No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORP.,
Petitioner,

v.

TROY LAMBERT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

JOHN C. HUESTON
Counsel of Record
STEVEN N. FELDMAN
JOSEPH A. REITER
HUESTON HENNIGAN LLP
523 West 6th Street
Suite 400
Los Angeles, CA 90014
(213) 788-4340
jhueston@hueston.com

Counsel for Petitioner

RONALD ALBERT MARRON
Counsel of Record
MICHAEL HOUCHIN
LAW OFFICES OF RONALD A. MARRON
651 Arroyo Drive
San Diego, CA 92103
(619) 696-9006
ron@consumersadvocates.com

Counsel for Respondent

(*Counsel continued on inside cover*)

August 20, 2018

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Petition for Writ of Certiorari granted June 25, 2018

GREGORY S. WESTON
ANDREW HAMILTON
THE WESTON FIRM
1405 Morena Blvd.
Suite 201
San Diego, CA 92110
(619) 798-2006
greg@westonfirm.com
andrew@westonfirm.com

JONATHAN A. HERSTOFF
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
jherstoff@haugpartners.com

Counsel for Respondent

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The following parts of the record have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

RELEVANT DOCKET ENTRIES

United States District Court for the Central District of California (Western Division – Los Angeles) 2:13-cv-05942-AB-E

Frank Ortega, et al. v. Natural Balance, Inc., et al.

Date Filed	#	Docket Text
08/14/2013	1	CLASS ACTION COMPLAINT against Defendants Natural Balance Inc, Nutraceutical International Corporation. Case assigned to Judge Audrey B. Collins for all further proceedings. Discovery referred to Magistrate Judge Charles F. Eick. (Filing fee $400 PAID.) Jury Demanded., filed by Plaintiffs Frank Ortega, Troy Lambert. (et) (mg). (Entered: 08/16/2013)
* * *		
06/19/2014	80	ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION by Judge Audrey B. Collins granting 65 Motion to Certify Class Action: For the foregoing reasons, the Court GRANTS Plaintiffs' Motion for Class

		Certification. However, the Class Definition must be revised to exclude claims not within the ordinary statute of limitations. The Court also approves Plaintiffs' plan for giving notice, except that the Court DENIES Plaintiffs request for an order requiring Defendant to pay for notice and to include notice in the product's packaging. Within seven (7) days of the issuance of this Order, Plaintiffs are to submit a revised Proposed Order reflecting these changes. (see document for further details) (bm) (Entered: 06/19/2014)
	* * *	
08/12/2014	86	ORDER OF THE CHIEF JUDGE (#14-035) approved by Chief Judge George H. King. Pursuant to the recommended procedure adopted by the Court for the CREATION OF CALENDAR of Judge Andre Birotte Jr., this case is transferred from Judge Audrey B. Collins to the calendar of Judge Andre Birotte, Jr for all further proceedings. The case number will now reflect the initials of the transferee Judge

		CV 13-05942 AB (Ex). (mg) (Entered: 08/12/2014)
* * *		
11/17/2014	111	NOTICE OF MOTION AND MOTION to Certify Class MOTION FOR CLASS DECERTIFICATION filed by defendant Nutraceutical Corp.. Motion set for hearing on 12/22/2014 at 10:00 AM before Judge Andre Birotte Jr. (Attachments: # 1 Garvin Decl iso Motion to Decertify Class, # 2 Greene Decl iso Motion to Decertify Class, # 3 Greene Decl Ex A, # 4 Greene Decl Ex B, # 5 Greene Decl Ex C, # 6 Greene Decl Ex D, # 7 Greene Decl Ex E, # 8 Greene Decl Ex F)(Greene, Andra) (Entered: 11/17/2014)
* * *		
12/01/2014	141	MEMORANDUM in Opposition to MOTION to Certify Class MOTION FOR CLASS DECERTIFICATION 112 , MOTION to Certify Class MOTION FOR CLASS DECERTIFICATION 111 filed by Plaintiff Troy Lambert. (Attachments: # 1 Declaration of Ronald A. Marron)(Marron, Ronald) (Entered: 12/01/2014)

	* * *	
12/22/2014	147	MINUTES OF MOTION FOR CLASS DECERTIFICATION 111 taking under advisement 111 Motion to Certify Class Action Hearing held before Judge Andre Birotte, Jr: The Court having carefully considered the papers and the evidence submitted by the parties, and having heard the oral argument of counsel, hereby takes the motion under submission. Court Reporter: Chia Mei Jui. (bm) (Entered: 12/22/2014)
	* * *	
02/20/2015	175	ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION by Judge Andre Birotte, Jr.: Defendant Nutraceutical Corporation's Motion for Class Decertification 111 is GRANTED. (gk) (Entered: 02/20/2015)
	* * *	

03/02/2015	178	AMENDED MINUTES Of Status Conference 177 held before Judge Andre Birotte, Jr.: Court and counsel discuss dates and deadlines. Plaintiff's counsel informs the Court of Plaintiff's intention to file a Motion for Re-Consideration. For the reasons stated on the record, the Court defers the setting of pretrial and trial dates and vacates the hearing re Motions for Summary Judgment 125 and Motion to Exclude Expert Report and Testimony 128 until after ruling on the Motion for Re-Consideration. The Motion shall be filed on or before 3/12/2015. Court Reporter: Chia Mei Jui. (gk) (Entered: 03/03/2015)
		* * *
03/12/2015	183	NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion to Certify Class Action, Order on Motion for Order 175 filed by Plaintiff Troy Lambert. (Attachments: # 1 Declaration of Paul K. Joseph and Exs. A-B thereto, # 2 Proposed Order Granting Plaintiff's Motion for Reconsideration of the Court's

		Order Granting Defendant's Motion for Decertification, # 3 Certificate of Service)(Weston, Gregory) (Entered: 03/12/2015)
		* * *
03/30/2015	189	MEMORANDUM in Opposition to MOTION for Reconsideration re Order on Motion to Certify Class Action, Order on Motion for Order 175 183 filed by Defendant Nutraceutical Corp.. (Attachments: # 1 Declaration of Steven N. Feldman, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Declaration of Jeffrey A. Hinrichs)(Hueston, John) (Entered: 03/30/2015)
		* * *
04/13/2015	192	RESPONSE IN SUPPORT of MOTION for Reconsideration re Order on Motion to Certify Class Action, Order on Motion for Order 175 183 filed by Plaintiff Troy Lambert. (Attachments: # 1 Declaration of Paul K. Joseph and Ex.1 thereto)(Weston, Gregory) (Entered: 04/13/2015)
		* * *

04/23/2015	194	(IN CHAMBERS) ORDER TAKING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION (DKT. 183) UNDER SUBMISSION by Judge Andre Birotte Jr.: The Court has considered the matters raised with respect to the Motion(s) and has concluded that pursuant to Local Rule 7.15, the matter can be decided without oral argument. The Court advises counsel that the Motion(s), noticed for hearing on April 27,2015 has been taken under submission and off its motion calendar. No appearance by counsel is necessary. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (cb) TEXT ONLY ENTRY (Entered: 04/23/2015)

06/24/2015	195	ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION by Judge Andre Birotte, Jr.: The Court DENIES Plaintiff's Motion for Reconsideration 183 . The Court ORDERS Plaintiff to file a proposed notice with respect to class decertification no later than 21 days following the issuance of this Order. Plaintiff will bear the cost of class notice. Culver, 277 F.3d at 915. This case shall move forward with Summary Judgement and Trial. Because the Court previously vacated all dates 178 , a status conference is scheduled for 7/27/2015 at 10:00 AM to reset dates and discuss the possibility of supplemental Summary Judgment briefing considering this ruling. (gk) (Entered: 06/24/2015)
* * *		
07/30/2015	203	NOTICE Plaintiff's Notice of Filing 23(f) Motion for Permission to Appeal filed by Plaintiff Troy Lambert. (Weston, Gregory) (Entered: 07/30/2015)

	* * *	
08/03/2015	205	ORDER RE STAY OF ACTION AND ORDER REMOVING CASE FROM ACTIVE CASELOAD BY VIRTUE OF STAY by Judge Andre Birotte, Jr.: The Court, having received Plaintiff Troy Lambert's Notice of Filing a Federal Rule of Civil Procedure Rule 23(f) Petition for an Appeal 203 , IT IS HEREBY ORDERED that this action shall be STAYED until the Ninth Circuit rules on Plaintiff's Rule 23(f) Petition. IS HEREBY ORDERED that this action is removed from the Court's active caseload until further application by the parties or Order of this Court. In order to permit the Court to monitor this action, the Court orders the parties to file periodic status reports. The first such report is to be filed on 9/14/2015, unless the stay is lifted sooner. Successive reports shall be filed every 45 days thereafter. Each report must indicate on the face page the date on which the next report is due. All pending calendar dates are vacated by the Court. This Court retains

		jurisdiction over this action and this Order shall not prejudice any party to this action. (Made JS-6. Case Terminated.) (gk) (Entered: 08/03/2015)
	* * *	
09/21/2015	210	NOTICE OF APPEAL to the 9th CCA filed by Plaintiff Troy Lambert. Appeal of Order on Motion for Reconsideration,,, 195 (Appeal fee of $505 receipt number 0973-16481006 paid.) (Marron, Ronald) Modified on 9/21/2015 (mat). (Entered: 09/21/2015)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

15-80119

Troy Lambert v. Nutraceutical Corp.

07/08/2015	1	FILED ON 07/08/2015 PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f). SERVED ON 07/08/2015. [9604125] (OC) [Entered: 07/09/2015 11:02 AM]

* * *

07/20/2015	7	Filed (ECF) Respondent Nutraceutical Corp. answer to 23f petition. Date of service: 07/20/2015. [9616280] [15-80119] (Feldman, Steven) [Entered: 07/20/2015 04:38 PM]
09/16/2015	8	Filed order (STEPHEN R. REINHARDT and JOHNNIE B. RAWLINSON): The court, in its discretion, grants the petition for permission to appeal the district court's February 20, 2015 order granting the motion for class decertification and the June 24, 2015 order denying the motion for reconsideration of the February 20, 2015 order. See Fed. R. Civ. P. 23(f); Chamberlan v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005) (per curiam). Within 14 days after the date of this

order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d). In addition to all other issues the parties wish to raise in their briefs in the appeal, the parties shall address the timeliness of this petition No. 15-80119. Cf. Briggs v. Merck Sharp & Dohme, Nos. 15-55873, 15-55874, 15-55875, 15-55876, 15-55877, 2015 WL 4645605 *5-6 (9th Cir. August 6, 2015) (after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions). [9685721] (AF) [Entered: 09/16/2015 04:04 PM]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

15-56423

Troy Lambert v. Nutraceutical Corp.

09/17/2015	2	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Fee due from Appellant Troy Lambert on 09/16/2015. Mediation Questionnaire due on 09/24/2015. Transcript ordered by 10/16/2015. Transcript due 11/16/2015. Appellant Troy Lambert opening brief due 12/28/2015. Appellee Nutraceutical Corp. answering brief due 01/28/2016. Appellant's optional reply brief is due 14 days after service of the answering brief. [9687481] (RT) [Entered: 09/17/2015 04:25 PM]

* * *

01/27/2016	8	Submitted (ECF) Opening Brief for review. Submitted by Appellant Troy Lambert. Date of service: 01/27/2016. [9843013] [15-56423] (Weston, Gregory) [Entered: 01/27/2016 02:03 PM]

01/27/2016	9	Submitted (ECF) excerpts of record. Submitted by Appellant Troy Lambert. Date of service: 01/27/2016. [9843020] [15-56423] (Weston, Gregory) [Entered: 01/27/2016 02:05 PM]

* * *

02/25/2016	15	Submitted (ECF) Answering Brief for review. Submitted by Appellee Nutraceutical Corp.. Date of service: 02/25/2016. [9879094] [15-56423] (Hueston, John) [Entered: 02/25/2016 03:09 PM]
02/25/2016	16	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee Nutraceutical Corp.. Date of service: 02/25/2016. [9879102] [15-56423] (Hueston, John) [Entered: 02/25/2016 03:10 PM]

* * *

03/01/2016	21	Filed Appellee Nutraceutical Corp. paper copies of supplemental excerpts of record [16] in 1 volume. [9886032] (SML) [Entered: 03/02/2016 10:23 AM]
04/08/2016	22	Submitted (ECF) Reply Brief for review. Submitted by Appellant Troy Lambert. Date of service: 04/08/2016. [9933782] [15-56423] (Weston, Gregory) [Entered: 04/08/2016 05:20 PM]

* * *

03/09/2017	33	ARGUED AND SUBMITTED TO RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN. [10350860] (DJW) [Entered: 03/09/2017 04:13 PM]

* * *

09/15/2017	37	FILED OPINION (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN) REVERSED AND REMANDED. Judge: RAP Authoring. FILED AND ENTERED JUDGMENT. [10582263] (MM) [Entered: 09/15/2017 08:31 AM]

* * *

11/03/2017	40	Filed order (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN): The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [10642477] (AF) [Entered: 11/03/2017 09:33 AM]

11/07/2017	41	Filed (ECF) Appellee Nutraceutical Corp. Motion to stay the mandate. Date of service: 11/07/2017. [10645863] [15-56423] (Hueston, John) [Entered: 11/07/2017 10:37 AM]
11/07/2017	42	Filed order (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN): Appellee's motion to stay the issuance of the mandate pending the filing and disposition of a petition for certiorari is GRANTED. [10646260] (AF) [Entered: 11/07/2017 12:45 PM]

JA 17

No. 15- _____ — Filed July 8, 2015

***In the* United States Court of Appeals**
***for the* Ninth Circuit**

TROY LAMBERT,
on behalf of himself and all others similarly situated,
Plaintiff-Petitioner
v.
NUTRACEUTICAL CORPORATION,
Defendant-Respondent.

Appeal from an Order of the United States District Court for the Central District of California,
Case No. 2:13-cv-5942-AB-(Ex)

TROY LAMBERT'S CORRECTED RULE 23(F) PETITION TO APPEAL ORDERS DECERTIFYING CLASS AND DENYING RECONSIDERATION OF SAME

Gregory S. Weston
THE WESTON FIRM
1405 Morena Blvd.,
Suite 201
San Diego, CA 92110
Telephone: (619) 798-2006
Facsimile: (480) 247-4553

Ronald A. Marron
Beatrice Skye Resendes
THE LAW OFFICES OF RONALD A. MARRON, APLC
651 Arroyo Dr.
San Diego, CA 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665

Attorneys for Plaintiff-Petitioner Troy Lambert

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

Plaintiff-Petitioner Troy Lambert respectfully requests permission to appeal the order of the United States District Court, Central District of California, granting Defendant-Respondent Nutraceutical Corporation's motion to decertify the previously certified class and denying his motion to reconsider that order.

INTRODUCTION

Defendant packages and sells "Cobra Sexual Energy," an ineffective and dangerous "aphrodisiac" herbal witches' brew. This precise conduct is prohibited by the FDA's Aphrodisiac Drug Rule, 21 C.F.R. § 310.528.

On June 19, 2014, the Honorable Audrey B. Collins certified the class finding that common issues predominated because "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading." Doc. 80 at 10:15-17. Following her appointment to Associate Justice of the California Court of Appeal and reassignment, Defendant moved to decertify the class. On February 20, 2015, the motion was granted, solely on the basis that, ". . . although Plaintiff's full refund model is consistent with his theories of liability," Doc. 175 at 4, ":. . . . because Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages, the Court cannot find that common issues predominate under Rule 23(b)(3)." Doc. 175 at 11.

This was manifest error for at least three reasons. First, this Court has instructed the lower courts

repeatedly that "damages is invariably an individual question [that] does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (citations omitted); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010).

Second, far from lacking evidence, Plaintiff already has obtained sufficient price information under their proposed model to allow a factfinder to calculate a restitutionary award under California law. Indeed, Plaintiff provided evidence for two separate damage models, a wholesale price model directly from Defendant's records, and a retail price model supported by multiple sources of evidence, including the price Defendant sold Cobra for online, and its suggested retail price.

Third, even if the District Court had correctly supposed that a gap existed in the evidence necessary to calculate damages *at this time*, that evidence supporting an approved model can easily be supplemented through additional pre-trial investigation or through cooperating or adverse-witness testimony adduced at trial. The Court should therefore approve Lambert's Petition for Review and vacate the orders decertifying the Class.

STATEMENT OF JURISDICTION

Defendant is a Delaware corporation that owns stores and conducts business in California. *See* Doc. 56, SAC ¶¶ 8, 12. The district court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). This Court has jurisdiction to review the order denying class certification under Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(e). The Petition is timely because it was

filed on July 8, 2015, within 14 days after the order denying Plaintiff's motion for reconsideration was entered on June 24, 2015. Doc. 195. *See* Fed. R. Civ. P. 6(a)(1) & 23(f).[1]

QUESTIONS PRESENTED

1. Where the District Court found that the Plaintiff's damages model matches his theories of liability, but hypothesized that the retail price data Plaintiff had obtained up until that time might be insufficient to calculate precise class-wide damages, and where the court incorrectly assumed that Plaintiff could not obtain any additional price information through investigation or at trial, and further refused to consider a fully-briefed and supported alternative model in the summary judgment motion, was the court's order decertifying a false-advertising consumer class action a sound exercise of the court's discretion?

2. Was the District Court's order refusing to recertify the class, and thus sounding the death knell of a class action where Plaintiff's individual claim is

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[1] This Circuit has not addressed if orders denying reconsideration of decertification orders are subject to 23(f) petitions, though the rule's language of "an order granting or denying class certification" certainly applies here, because Plaintiff's motion for reconsideration sought certification, and the Court's order is thus an "order [] denying class certification. *See also Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008) ("join[ing] the other circuits in holding" Rule 23(f) petitions are timely where a party files a "timely and proper motion to reconsider the grant or denial of class certification.") Here, Plaintiff, following decertification, promptly sought leave to file a motion for reconsideration, which the Court granted and set a schedule for at its post-decertification scheduling conference. Doc. 177.

under $200, questionable and appropriate for Rule 23(f) review?

STATEMENT OF FACTS

This action seeks relief under California state law for Defendant's deceptive marketing and sale of a product called "Cobra Sexual Energy." (hereinafter "Cobra" or the "Product"). *See* SAC ¶¶ 1; 5-6, 8. Defendant manufactures, advertises, and sells Cobra claiming among other things that it will allow users to "Take Virility to the Max!" and contains "aphrodisiac plants to enhance . . . sexual energy." SAC ¶¶ 44-89. Defendant also makes efficacy claims about the Product's ingredients, including yohimbe, "Horny Goat Weed" and muira puama, which it calls "Potency Wood." *See id*.; *see also* ¶¶ 64-89; These aphrodisiac claims are false. *See* SAC ¶¶ 26-30; 55-57; 90-94. Thus, Cobra is an unapproved and illegal new drug product. One of the ingredients, yohimbe, is also dangerous, and its use has caused acute cardiac arrest and multiple deaths. *Id. ¶¶* 31-43. The National Institutes of Health warns that yohimbe "may interfere with insulin and other medications used for diabetes," SAC ¶ 33, 67-68, may "bring out manic-like symptoms in people with bipolar disorder, or suicidal tendencies in individuals with depression," SAC ¶ 32, and may cause stroke, arrhythmia, hypertensive crisis, cardiac arrest, and death if ingested with many foods, such as cured meats and aged cheeses, that contain tyramine. SAC ¶¶ 34, 36-37. Defendant failed to warn consumers about any of these serious health risks. SAC ¶ 31.

Defendant did not apply for or obtain an FDA new drug approval for Cobra before it began marketing and selling it to the public as an "aphrodisiac." SAC ¶ 93.

Though Defendant's conduct is clearly illegal under general FDA new drug regulations, so great is the problem of companies like Defendant selling fake "herbal aphrodisiacs" that the FDA promulgated a specific regulation prohibiting such conduct.[2] Consumers are unaware that "Cobra Sexual Energy" is illegal to sell as advertised, that Defendant's marketing of the Product is prohibited by the FDA, and that the Product is dangerous to consume.[3] Plaintiff purchased Cobra based on its false and misleading labeling, and would not have purchased Cobra absent these claims and advertisements, or if he had known the product was illegally marketed and sold. SAC ¶¶ 25, 100.

REASONS FOR GRANTING THE PETITION

Interlocutory review under Rule 23(f) allows the Court to "restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958-59 (9th Cir. 2005). Interlocutory review of a certification decision is most appropriate when:

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[2] The Aphrodisiac Drug Rule, 21 C.F.R. § 310.528(a), states "[a]ny product that bears labeling claim[ing] that it will arouse or increase sexual desire, or that it will improve sexual performance, is an aphrodisiac drug product" i.e., an illegal unapproved new drug. "Labeling claims for aphrodisiacs for OTC use are either false, misleading, or unsupported by scientific data[.]" *Id.*

[3] The FDCA requires every new drug to have its application and label approved by the United States Food and Drug Administration ("FDA") before the drug can be marketed or sold to the public. *See generally* 21 U.S.C. §§ 355(a)-(b).

> (1) there is a death-knell situation . . . that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important to both the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. at 959.

Chamberlan holds an appeal under Rule 23(f) is appropriate when a plaintiff denied certification could only appeal after judgment on the merits of an individual claim that is worth less than the cost of litigation. Denial of certification in such a case "sounds the death knell of the litigation." *Id*. Here, all three of the *Chamberlan* factors are present: manifest error, fundamental issue of law, and a "death-knell" situation.

I. THE DISTRICT COURT COMMITTED MANIFEST ERRORS OF BOTH LAW AND FACT.

A decision to certify or de-certify a class action is at the District Court's sound discretion, as long as that decision follows sound legal principles and is not based on clearly erroneous or irrelevant findings of fact. *Leyva v. Medline Indus*., 716 F.3d 510, 513 (9th Cir. 2013). The District Court, however, both failed to follow Ninth Circuit authority and made dispositive factual findings that were without support in the record, thereby abusing its discretion.

A. Nothing in the Order Calls Into Question the District Court's Correct Prior Holding That Plaintiff Demonstrated Predominance.

The District Court, before reassignment, ruled correctly that the proposed Class satisfies predominance. Doc. 80 at 9-14. In the decertification order, however new, legally-improper predominance criteria were introduced based on supposed gaps in Plaintiff's data regarding retail sales prices.

1. Common Questions Predominate.

"The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1022 (9th Cir. 1998) (citing *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2249 (1997)). If "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then those issues predominate over individual questions. *Id*.

The District Court previously found that "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading[,]" and that "[t]he evidence relevant to this inquiry is also common to all claims: it is the packaging itself." Doc. 80 at 10. Neither of these factors has changed and the court makes no finding that they have. The court's previous holding that "Defendant's arguments that individual questions predominate are unavailing," *id*. at 11, still holds true. The class, as before, satisfies the Ninth Circuit's criteria for predominance.

2. The Order Contradicts Ninth Circuit Authority Regarding Damages and Predominance.

Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages. *Leyva,* 716 F.3d at 514, applying *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1435 (2013). In *Leyva*, a wage-and-hour class action, this Court held that the predominance requirement is satisfied if the plaintiff is "able to show that [class] damages stemmed from the defendant's actions that created the legal liability." 716 F.3d at 513.[4]

The District Court here, however, de-certified the Class on the sole basis that there was as yet, according to the court, incomplete evidence in the record regarding retail prices paid by class members. Doc. 175 at 7-11. This both gets the record wrong and is wholly inconsistent with Ninth Circuit authority that uncertainty in damages calculations does not call into question predominance for class certification purposes. *See Leyva*, 716 F.3d at 514.

At the class certification stage, a plaintiff only needs to show that the proposed method for calculating damages is plausible. *See, e.g., Menagerie Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, *62 (C.D.

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[4] The District Court attempted to distinguish *Leyva* on the basis that the plaintiffs in that action "had a workable damages model that matched their theory of liability." Doc. 175 at 10:22-24. But that is exactly what the District Court also found in *this* action - that the Plaintiff had provided an appropriate damages model that matched the theory of liability. Doc. 175 at 7:4-5.

Cal. Nov. 9, 2009) (certifying the class over defendants' objection that the method of calculating damages was imprecise.) The District Court's observation that Plaintiff's retail price data was not complete was therefore insufficient justification to decertify the class. *See Johns v. Bayer Corp.*, 280 F.R.D. 551, 557 (S.D. Cal. 2012) (applying *Yokoyama* to certify a similar class challenging vitamin advertising). In the instant case, as in *Leyva*, "the district court applied the wrong legal standard by concluding that individual questions predominate over common questions." *Leyva,* 716 F.3d at 513.

Courts have correctly applied the guidance in *Leyva* in the consumer goods context, specifically in false advertising cases. *See, e.g. In re ConAgra Foods, Inc*., 2015 U.S. Dist. LEXIS 24971 (C.D. Cal. Feb. 23, 2015). In *ConAgra* the court certified the class even though defendants asserted that plaintiffs were "unable to determine the price [premiums] they paid for [products advertised as 100% Natural] and have no means of acquiring this information. . . ." 2015 U.S. Dist. LEXIS 24971 at *85. The court in *ConAgra* found defendant's arguments "unconvincing" and certified the class over its objections that plaintiffs could not ascertain retail purchase prices or calculate damages precisely. *Id.* at *92 (citing *Forcellatti v. Highland's, Inc.*, 2014 U.S. Dist. LEXIS 50600, at *5 (C.D. Cal. Apr. 9, 2014); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)*; McCrary v. Elations Co., LLC,* 2014 U.S. Dist. LEXIS 8443, *8 (C.D. Cal. Jan. 13, 2014)). *See also Spann v. J.C. Penney Corp.,* 2015 U.S. Dist. LEXIS 73541, *63 (C.D. Cal. May 18, 2015) (finding that common issues predominated even in the presence of significant uncertainties as to damages.)

None of the cases the District Court cited in support provide binding or persuasive authority for decertifying the class. The court cites, for example, to *Freeland v. AT&T Corp*., 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006); Doc. 175 at 11. *Freeland* was an antitrust action unsuitable for class treatment because, *inter alia*, the class representative did not have standing, the plaintiff had no method of determining which class members suffered injury, and, likely influential in the court's decision, the *Freeland* court anticipated it would have to hold approximately 100 million individual hearings before it could rule on injunctive relief. *Freeland*, 238 F.R.D. at 143 n.6

Caldera v. J.M. Smucker Co., 2014 U.S. Dist. LEXIS 53912 (C.D. Cal. Apr. 15, 2014) is also easily distinguishable because the plaintiff's damages model in that false labeling snack food case required a "true market value" of the product – not required here – so the defendant's sales data alone were not sufficient. *Id*. at *11, 12. Even if Smucker's health claims were overstated, the *Caldera* court found the products still had *some* value, and a premium between the mislabeled product and the value received needed to be calculated, which the plaintiff in *Caldera* failed to do.

Plaintiff here, by contrast, alleges and provides evidence that (1) the product is wholly ineffective (2) the product is dangerous (3) the product is illegal. For these reasons, no "true value" calculation is needed: the entire amount was fraudulently obtained with no off-setting value, unlike a food product with overstated health claims that can still be consumed and enjoyed. *Caldera* is therefore inapplicable. *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12-

13 (N.D. Cal. Jan. 7, 2014), also cited by the court, is similar. Doc 175 at 8. The damages calculation in *Astiana* hinged on comparing the products at issue with competing ice cream in the same markets, for which the plaintiffs had provided no data whatsoever. Because the full-refund damages calculation here does not depend on comparison with any other products, *Astiana* is also inapposite.

In *Marlo v. U.P.S.*, similarly, the court was primarily concerned "about the class-wide applicability of the evidence regarding employee misclassification." 639 F.3d 942, 945-47 (9th Cir. 2011). Plaintiff here has already obtained sufficient price information to enable the jury to estimate damages, *see* Section I. C, below. But even if the damages calculation is uncertain, Ninth Circuit authority as applied to consumer products flatly prohibits the decertification decision on such basis. *Leyva,* 716 F. 3d at 514.

B. The Order Also Contravenes Applicable California State Law.

Class certification decisions are procedural rather than substantive, so federal, not state, procedural law governs. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Nevertheless, "[b]ecause the class action is a procedural vehicle for the vindication of underlying rights, the damages that each class member is entitled to is ultimately a function of other substantive law." *Vaccarino v. Midland Nat'l Life Ins. Co*., 2014 U.S. Dist. LEXIS 18601, *35 (C.D. Cal. Feb. 3, 2014), citing 28 U.S.C. § 2072 (providing that federal rules of procedure "shall not abridge, enlarge or modify any substantive right"). In other words, while the certification decision is governed by Rule 23, the

calculation of damages and restitution under California statutes, including the aggregated claims of a class, is a matter of California law.

The Court may therefore wish to note that California's highest court also holds that questions regarding determination of damages do not prevent class certification. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (2012). Under California law, "damages may be computed even if the result reached is an approximation." *GHK Assocs. v. Mayer Group, Inc*., 224 Cal. App. 3d 856, 873 (1990). Federal courts have accordingly found that "under California law, plaintiffs are required to, at most, provide ***a reasonable estimate*** of their damages . . .." *Vaccarino, supra*, at 35-36. (holding that "the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision.")

In *Brinker*, Justice Werdegar set forth California's black-letter approach to the issue of damages calculations and class certification:

> We have long settled that individual damages questions will rarely if ever stand as a bar to certification. In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution.

Brinker, 54 Cal. 4th at 1054 (Werdegar, J., concurring) (internal quotations, alterations, and citations omitted). Moreover, "to decertify a class on the issue of

damages or restitution may well be effectively to sound the death-knell of the class action device." *Id*.

C. The Order Rests on Illogical Factual Findings and Inferences.

In addition to manifest errors of law, the court made several critical factual errors, including:

1) misstating the required inputs to Plaintiff's proposed damages model;

2) incorrectly concluding that Plaintiff did not have sufficient record evidence for a jury to estimate classwide damages; and

3) incorrectly assuming that Plaintiff would be unable to obtain any additional price information prior to or at trial if such evidence were needed.

1. The District Court incorrectly assumed that Plaintiff's damages model required actual retail price to calculate class damages

The District Court in its Order incorrectly cited Plaintiff's proposed damages model as if it depended *exclusively* on an average retail price ("ARP") for the Products. This was not correct. Plaintiff had proposed in his motion for class certification a damages model based principally on the average suggested retail price ("ASRP"), not solely on the ARP as the court presumed. Doc. 65-1 at 20. Plaintiff proposed using ARP only as an alternative measure of damages. *Id*. at 21. Plaintiff already has obtained ASRP evidence in discovery, so the court's finding that Plaintiff has "no data" for his model is simply incorrect. *See* Weston Decl. in Support

of Motion for Reconsideration ¶¶3-8, Exs. 1-6 (filed under seal).

In the decertification order, the court cited Plaintiff's proposed damages model correctly but then analyzed it incorrectly. First it correctly described Plaintiff's model,

> Thus, using the average suggested retail sales price for [Cobra], which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class."

Doc. 175 at 7 (citing Doc. 65-1 at 20-21 (emphasis added)).

This was accurate. The model is based on suggested retail prices, not actual. Plaintiff proposed in his successful Motion for Class Certification that,

> [t]he amount spent on Cobra by the class can be established by Defendants' own sales data and suggested retail sales prices produced in discovery.
>
> . . . .
>
> Thus, using the average suggested retail sales price for the Product ("MSRP"), which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class. *See id*. In the alternative, the out-of-pocket dollars spent by the class on the Product can be acquired by Plaintiffs from companies that collect point-of-sale information, such as Spins.

Doc. 65-1 at 28 (emphases added.).

Unfortunately, the District Court then proceeded to analyze the damages model as if it was based instead only on the ARP, not the ASRP as Plaintiff proposed and as the court initially approved. The court failed to note that Plaintiff already had obtained in discovery sufficient data on suggested retail prices to calculate damages using the proposed model.

The court therefore erroneously concluded, referring to ARP, that, "In the instant case, there simply is no evidence to calculate damages under Plaintiff's damages model is what stops the analysis." [sic] Doc. 175 at 10.

This was a manifest error of fact, per the court's own recitation of Plaintiff's model which uses ASRP, not ARP data.[5] All that Plaintiff needs to calculate damages under this model is Defendant's ASRP and unit sales, both of which he already has. *See* Weston Decl. in Support of Motion for Reconsideration ¶¶3-8, Exs. 1-6 (filed under seal). Thus, Plaintiff already has a validated model and sufficient data to calculate proposed class damages using that model. The District Court erred when it found otherwise.

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[5] Plaintiff had proposed using principally the ASRP, with ARP only as a backup method of calculating class damages. The court's 2014 Order certifying the Class used the phrase, "average retail price" without clarifying whether the court meant the "average suggested retail price" (ASRP), the "average actual retail price" (ARP), or both. Plaintiff consistently proposed the average suggested retail price (ASRP) as the primary measure of damages, *see* Doc. 65-1 at 20, Doc. 65-2 ¶¶ 26-27, and that is the formula the court recited in the February 20, 2015 Order. Doc. 175.

2. Plaintiff presented sufficient retail pricing data.

The District Court found as a matter of law that "without the average retail price, class wide damages cannot be calculated." Doc. 175 at 9. This is a misstatement of California law governing damages for consumer fraud. It is further wrong because Plaintiff did have such data.

A. Contrary to the court's finding, Plaintiff has retail price data.

Plaintiff already has some retail price data from deposition testimony and from Defendant's direct website sales to consumers. *See* Weston Decl. in Support of Motion for Reconsideration ¶¶3-8, Exs. 1-6 (filed under seal). He further has Defendant's suggested retail prices. *See, e.g., Brinker,* 54 Cal. 4th at 1054. While Defendant should be free to attack these sources of evidence of damages as overstating the true amount, for example by showing that some retailers sold the product for less than MSRP, that is an issue to be reached only after a finding of liability, and should be decided by a jury at trial, not by the Court on a decertification motion. *See McCrary*, 2014 U.S. Dist. LEXIS 8443, at *50 (holding that even if damages need to be recalculated at trial, such a "reduction in allowable damages . . . is not fatal to class certification.").

B. Plaintiff can adduce additional retail price information at trial.

Plaintiff can also develop additional proof of damages at trial, through testimony of class members, adverse witnesses, or representative retailers. Justice

Werdegar has specifically recommended representative testimony at trial "to [facilitate] determinations of the extent of liability" when damages may be uncertain. *Brinker, supra* at 1054. For the District Court to assume that no additional price data could possibly be admitted into evidence at trial was plain error.

C. The District Court's Refusal to Permit the Introduction of Wholesale Price Data For Damages is Nonsensical and Contrary to California Law

Plaintiff, in moving for summary judgment while the Class was still certified, provided another model for class calculation of damages, one that, unlike retail prices for which perfect records do not exist, is beyond dispute: the actual wholesale revenue received by Defendant from the sale of Cobra during the class period. *See* Doc. 129 at 23-24. Even assuming, *arguendo*, that aggregated damages have to be calculated perfectly under California consumer law, and Plaintiff lacked evidence to do so, the revenue data was obtained directly from Defendant and is perfectly precise. Indeed, Plaintiff's motion for summary judgment provided a figure down to the very penny: $176,999.28 in restitution and $34,951.16 in prejudgment interest. *See* Doc. 129-2.

The District Court rejected the use of the lower but perfectly precise wholesale data as an alternative to the higher, but less precise retail data:

> Using the sales data alone, Plaintiff seeks to disgorge Defendant of what Defendant received from its wholesale sales, but as previously

> mentioned, Plaintiff and his class members do not have an ownership interest in those sales.

How, if a Plaintiff can prove he was defrauded by being sold a worthless and dangerous unapproved drug, can he have an "ownership interest" in the full retail price he paid for the product, but not the lessor amount representing the wholesale price is never explained by the District Court. It certainly fails as a matter of logic: if Plaintiff was defrauded of $20 from the sale of Cobra at a store, and the $20 is an appropriate measure of restitution, how could the lessor wholesale price of $10 not also be funds in which he enjoys "an ownership interest?"

The District Court also erred in disregarding long-standing precedent in favor of effecting restitutionary damages. California law authorizes a trial court to order a defendant simply to disgorge the money defendant gained by defrauding a class. *See Guido v. L'Oreal, USA, Inc*., 2013 WL 3353857, at *14 (C.D. Cal. July 1, 2013). A court of equity may exercise its powers to effect justice, *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979), and

> with respect to the restitution permitted under the CLRA and UCL, the Court has 'very broad' discretion to determine an appropriate remedy award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff ***the amount that the defendant wrongfully acquired.***

Wiener v. Dannon Co., 255 F.R.D. 658, 670 (C.D. Cal. 2009)(emphasis added). *See also* Restatement (Third) of Restitution and Unjust Enrichment § 44 cmt. a

(2011) ("Restitution by this rule will sometimes yield a recovery where a claimant could not prove damages . . . .")

II. THE ORDER IS QUESTIONABLE AND SOUNDS THE DEATH-KNELL OF THE CASE

Plaintiff's individual monetary claim is small, far outweighed by the cost of litigation. *See Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009) ("where the high costs of litigation grossly exceed an individual plaintiff's potential damages, the denial of class certification sounds the death knell of that plaintiff's claims"). "Rule 23(f)'s text and purpose counsel a broad reading of 'death-knell situation.'" *Dalton v. Lee Publ'ns, Inc.*, 625 F.3d 1220, 1222 (9th Cir. 2010) (O'Scannlain, J., dissenting) (citing *Chamberlan*, 402 F.3d at 960). Here, Plaintiff alleges he purchased Cobra about ten times and paid $16-17, and alleges no other individual damages than the purchase price of the product. *See* SAC at ¶18. His claim is thus for under $200.

III. THE ORDER PRESENTS A FUNDAMENTAL AND UNSETTLED QUESTION REGARDING CLASS CERTIFICATION

Although the Ninth Circuit has been clear in its guidance regarding damages calculations and class adjudication, *see Leyva, supra*; *and see*, *e.g., ConAgra*, *supra*, the District Court struggled with the question and its decision is contrary to both the order granting class certification prior to the case being reassigned, as well as the many other cases where retail-product

consumer class actions are certified. Either the issue is settled law and the District Court's ruling is manifestly in error, or the issue is unsettled in the lower courts. In either case, in this "death-knell" situation, the Court should grant Lambert's Petition.

CONCLUSION

The District Court's decertification is manifestly in error, as to both facts and law. It further sounded the death knell of this action, just as much as an appealable judgment against him would have. *Chamberlan*, 402 F.3d at 957, 959. For these reasons, petitioner Troy Lambert respectfully requests review the Order.

Dated: July 8, 2015

Respectfully Submitted,

/s/ Gregory S. Weston

GREGORY S. WESTON (239944)
THE WESTON FIRM
1405 Morena Blvd., Suite 201
San Diego, California 92110
Telephone: (619) 798-2006
Facsimile: (480) 247-4553

RONALD A. MARRON (175650)
THE LAW OFFICES OF RONALD A. MARRON, APLC
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9066
Facsimile: (619) 564-6665

Attorneys for Plaintiff-Petitioner Troy Lambert

[*Proof of Service Omitted in Printing of this Appendix.*]

JA 39

Appellate Case No.: 15-80119 — Filed July 20, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Troy Lambert, *Plaintiff-Petitioner*,
vs.
Nutraceutical Corp., *Defendant-Respondent*.

Petition for Leave to Appeal from the United States District Court for the Central District of California, Court Case No. 2:13-cv-5942-AB-(Ex)
The Honorable André Birotte, Jr., Presiding

DEFENDANT-RESPONDENT'S OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER FED. R. CIV. P. 23(f)

HUESTON HENNIGAN LLP
John C. Hueston (CA Bar No. 164921)
Steven N. Feldman (CA Bar No. 281405)
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340

MONROY, AVERBUCK & GYSLER
Jon F. Monroy (CA Bar No. 51175)
Jennifer E. Gysler (CA Bar No. 143449)
32123 Lindero Canyon Rd., Suite 301
West Lake Village, CA 92660
Telephone: (818) 889-0661

Attorneys for Defendant-Respondent
NUTRACEUTICAL CORP.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Defendant-Respondent Nutraceutical Corp. states that the parent company of Nutraceutical Corp. is Nutraceutical International Corp. Nutraceutical International Corp. owns 100 percent of Nutraceutical Corp.'s stock.

Dated: July 20, 2015 By: /s/ John C. Hueston
John C. Hueston

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

I. INTRODUCTION

The petition at issue here is time-barred and should be denied for that reason alone. Federal Rule of Civil Procedure Rule 23(f), which governs interlocutory appeals from "order[s] granting or denying class-action certification," provides 14 days to file a petition for permission to appeal such an order. The Rule's time limit is strict and unyielding; indeed, this Court has stated it can consider a petition "***only if***" it was filed within the prescribed 14-day window. *Plata v. Davis*, 329 F.3d 1101, 1107 (9th Cir. 2003) (emphasis added); *see also Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (the "fourteen day filing requirement is a rigid and inflexible restriction") (citation omitted); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (characterizing the time limit as "clearly strict and mandatory"); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (timeliness requirement is "mandatory"). Here, Petitioner did not file his Rule 23(f) petition until ***139 days*** after the district court entered its decertification order—*i.e.* 125 days too late. His petition is therefore untimely, and should be denied.

Remarkably, Petitioner fails to even acknowledge this fatal deficiency. Instead, he suggests—in a footnote—that the petition should be considered timely because it was filed within 14 days of the district court's order denying his motion for reconsideration of the decertification order. But this is not the law.

First, an order denying a motion for reconsideration does not itself qualify as an "order granting or denying class-action certification" under Rule 23(f) because it does nothing more than preserve the status quo. Thus,

the order denying Petitioner's motion for reconsideration did not open a new 14-day window for filing his petition. The operative date for calculating timeliness is thus February 20, 2015, when the district court entered its decertification order. Tellingly, Petitioner advances no argument that his petition is timely in reference to this date, nor could he given that he filed the petition on July 8, 2015—more than ***four months after*** that order was entered.

Second, to the extent Plaintiff seeks to take advantage of a narrow exception this Court has never recognized, which tolls Rule 23(f)'s time limit where a motion for reconsideration was filed within the Rule's 14-day window, his petition still fails. Even if this Court were to follow other Circuits and recognize this narrow exception, it would not help Petitioner because he did not move for reconsideration until ***20 days*** after the decertification order was entered, rendering his petition ineligible for tolling. Thus, under any analysis, the petition is untimely, and should be rejected on this basis alone.

Nevertheless, even if the petition were not time-barred under Rule 23(f)—and it is—it should still be denied because Petitioner has fallen far short of meeting the exacting burden necessary to justify interlocutory review—a form of relief this Court has held should be "granted sparingly." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). While Petitioner argues the district court issued a "questionable" decertification order, containing manifest errors of both law and fact, he does so only by mischaracterizing the district court's reasoning, misstating the factual record, and failing to

substantively engage in the relevant case law. Prior to discovery, the district court certified the class in this case based upon representations Petitioner and his former co-lead plaintiff—who was dismissed with prejudice after he was caught lying under oath in his deposition—made about evidence they would obtain during discovery. Following the close of discovery, the district court correctly found that Petitioner had "failed to produce the evidence needed" to support his sole class-wide damages model, and therefore decertified the class. Exhibit A at 11 (Decert. Order) [Dkt. 175]. Far from containing the type of errors required to obtain "rare" relief under Rule 23(f), the district court's order, as described in detail below, was supported by ample case law and a clear understanding of the record.

For these reasons, the petition should be denied.

II. QUESTIONS PRESENTED

Should this Court grant "rare" interlocutory review under Rule 23(f) where:

1) Petitioner failed to file a timely petition, as required by the Federal Rules; and

2) Where Petitioner failed to show that the decertification order contained manifest errors of fact or law, or that it presented a fundamental and unsettled question of class-action law.

III. BACKGROUND

On August 14, 2013, Petitioner, along with his former co-lead plaintiff Frank Ortega, filed the underlying suit against Respondent Nutraceutical

Corp. ("Nutraceutical"), alleging violations of California's false advertising and unfair competition laws related to his purchases of Cobra Sexual Energy ("Cobra"), a dietary supplement comprised of herbs, extracts, and other plant-based materials. Ex. B (Compl.) [Dkt. 1]; Ex. C (Order Dismiss. Ortega With Prejudice) [Dkt. 121]. Petitioner sought to represent a class of all persons who had previously purchased Cobra in California.

Relying on a number of Petitioner's representations that have since been proven false, the district court certified the class on July 14, 2014. *See* Ex. D (Mot. for Cert.) [Dkt. 65-1]; Ex. E (Order Grant. Cert.) [Dkt. 80]. For example, Petitioner promised to "use expert testimony, such as a consumer survey expert" to establish class commonality. Ex. D at 16. Yet he never retained a single expert. *See* Ex. F at 3 (Def's Mot. to Decert. Class) [Dkt. No. 111]. Petitioner also promised he would prove his sole damages theory by using "an average retail price." Ex. E at 13. Yet after months of opportunity during discovery, he failed to obtain any evidence of Cobra's average retail price. Ex. A at 11. When it became clear Petitioner could no longer satisfy his burden of showing certification was warranted, Nutraceutical moved to decertify the class. Ex. F. The district court agreed with Nutraceutical and, on February 20, 2015, granted decertification on the grounds that Petitioner could not demonstrate a class-wide calculation of damages. Ex. A at 4. Because this issue was dispositive, the court declined to reach the other issues raised in the decertification motion, which likewise compelled decertification.

Subsequently, at a March 2, 2015, status conference, Petitioner requested permission from the district court to file a "renewed motion for class certification." Ex. G at 4 (Stat. Conf. Tr.). The court denied his request. *Id.* at 7. Petitioner then moved for reconsideration on March 12, 2015—20 days after the class was decertified. Ex. H (Mot. for Recon.) [Dkt. 183]. The district court denied his motion for reconsideration on June 24, 2015, finding that he had failed to identify "any new evidence or law" that could not have been previously presented to the court, or any clear or manifest error. Ex. I (Order Den. Mot. for Recon.) [Dkt. 195]. Petitioner then filed this Rule 23(f) petition on July 8, 2015—more than four months after entry of the decertification order.

IV. ARGUMENT

A. The Petition is Untimely and Thus Barred by Rule 23(f).

Rule 23(f) allows a court of appeals to "permit an appeal from an order granting or denying class-action certification…if a petition for permission to appeal is filed within 14 days after the order is entered." Fed. R. Civ. P. 23(f). The 14-day filing window is "deliberately small," to limit the petition's likely disruptive effect on the ongoing case. *See Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). And every Circuit to consider the issue has strictly construed Rule 23(f)'s timing requirement. *See Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (the "fourteen day filing requirement is a rigid and inflexible restriction") (citation omitted); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (characterizing time limit as "clearly strict and mandatory"); *Carpenter v. Boeing*

Co., 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (timeliness requirement is "mandatory").

Here, the district court entered its order decertifying the class on February 20, 2015. Ex. A. Thus, to comply with Rule 23(f), Petitioner was required to file his petition by March 6, 2015—*i.e.* 14 days after the order's entry. Instead, he filed it on July 8, 2015—***four months*** after the filing window closed.

While Petitioner argues that his petition is nonetheless timely because he filed it within 14 days of the district court's order denying his motion for reconsideration of the earlier decertification order, Pet. 3 n.1, he is mistaken. Under well-established law, the only relevant date is February 20, 2015, the date the district court decertified the class. *See, e.g.*, *Gutierrez*, 523 F.3d at 193; *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014). Petitioner does not (because he cannot) dispute he missed that deadline.

1. An Order Denying a Motion for Reconsideration Does Not Open a New Window for Filing a Rule 23(f) Petition.

Petitioner asserts that, because his motion for reconsideration sought recertification of the class, the district court's denial of that motion is an "order [] denying class certification" under Rule 23(f) and should open a new 14-day window for filing his petition. Pet. 3 n.1. Yet ***every Circuit to consider this issue*** has rejected Petitioner's argument, holding that, regardless of how it is styled, "an order that leaves class-action status unchanged from what was determined by a prior order is not an order granting or denying class action

certification," and thus does not trigger a new time period for filing under Rule 23(f). *See Gutierrez*, 523 F.3d at 193; *Nucor Corp.*, 760 F.3d at 343 (same); *In re DC Water and Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009) (same); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (same); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006) (same); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir. 2007) ("[W]hat counts is the original order denying or granting class certification, not a later order that maintains the status quo.").

Remarkably, the single case Petitioner cites in support of his timeliness argument, *Gutierrez*, ***directly refutes*** his assertion and mandates his petition's denial. *See Gutierrez*, 523 F.3d at 194. As in this case, the petitioner in *Gutierrez* did not argue that his Rule 23(f) petition was timely in relation to the court's original order denying certification; rather, he claimed that the court's denial of his motion for reconsideration counted as another denial of class certification, and therefore triggered a new time period for filing under Rule 23(f). The Third Circuit rejected this argument, holding that because the district court's denial of the motion for reconsideration "did not change the status quo," but "merely affirmed [the] decision not to certify the class," it did "not qualify as an order 'granting or denying class action certification' within the meaning of Rule 23(f)," and thus did not create a new opportunity for filing a Rule 23(f) petition. *Id.* (quoting Fed. R. Civ. P. 23(f)).

Here, Petitioner employs the same faulty reasoning as the *Gutierrez* petitioner, arguing that because his motion for reconsideration sought recertification of the

class, its denial should be subject to a 23(f) petition. Pet. 3 n.1. But—just as in *Gutierrez*—the district court's denial of Petitioner's motion for reconsideration "did not change the status quo." It simply affirmed the court's earlier order decertifying the class. Thus, *Gutierrez*'s holding should apply just as forcefully in this case.

The logic of the Third Circuit's *Gutierrez* holding is unassailable. As the Seventh Circuit correctly recognized, if a petitioner were allowed to "styl[e] [his] motion to reconsider as a motion to [re]certify the class," he would be able effectively to "defeat the function of the [14-day] line drawn in Rule 23(f)." *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). That function is to "promote judicial economy," by providing only a "single window of opportunity to seek interlocutory review." *Jenkins*, 491. F.3d at 1290. Courts are rightly wary of parties who seek to subvert the framework established by the Rule. *See Carpenter*, 456 F.3d at 1190 ("Accepting an appeal from such a decision [leaving] the class definition in place would abandon the time limit for all practical purposes. That step would be both unauthorized and imprudent.") (internal brackets, quotation marks, and citation omitted).[1] Litigants cannot be allowed to undermine the Rules' legitimate concerns regarding judicial economy and the disruptive nature of interlocutory

[1] Petitioner attempted just such a subversion here: At a status conference following the district court's order decertifying the class, the district court expressly denied Petitioner's request to treat his then-forthcoming motion for reconsideration as a "renewed motion for class certification under Rule 23." Ex. I at 4 n.1.

appeals by continually seeking recertification of the class, waiting for the court to deny their motion, and then filing a Rule 23(f) petition in this Court. The Rule is clear: *It* sets the time for filing a petition, not Petitioner.

This Court should now join the Third, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits in explicitly holding that where a district court's order does not change the status quo and merely affirms the court's prior order, it does not create a new time period for filing a Rule 23(f) petition. The fact that Petitioner here filed a Rule 23(f) petition within 14 days of the district court's order denying his motion for reconsideration is immaterial, because the reconsideration order left the "class-action status unchanged from what was determined" by the district court's prior decertification order. *See Gutierrez*, 523 F.3d at 193**.**

2. Petitioner's Motion for Reconsideration Did Not Toll Rule 23(f)'s 14-Day Time Limit.

While other courts of appeal have held that filing a "timely and proper motion for reconsideration" tolls the time limit imposed by Rule 23(f), this "narrow exception" is inapplicable here. *See Gutierrez*, 523 F.3d at 193. Petitioner vaguely alludes to this exception, stating that, following decertification, he "promptly sought leave to file a motion for reconsideration," which he later filed in compliance with the schedule set by the district court. Pet. 3 n.1. But even if this Court were to join other Circuits in adopting this exception, it would not in any way change the outcome here, because for a reconsideration motion to be "timely" for purposes of tolling the Rule 23(f) time limit, it must be filed ***within***

14 days of the order granting or denying certification—a critical and dispositive distinction Petitioner fails to mention. *See Gutierrez*, 523 F.3d at 193 ("We stress that, for the purpose of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [14-day] period set forth in Rule 23(f)."); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is filed more than [14 days] after the order 'granting or denying class action certification under [Rule 23(f)],' then appeal must wait until the final judgment.") (quoting Fed. R. Civ. P. 23(f)). Here, Petitioner filed his motion for reconsideration on March 12, 2015—***20 days*** after the district court entered its order decertifying the class. Thus, the motion failed to toll the time limit prescribed by Rule 23(f), and the window for filing this petition closed on March 6, 2015—*i.e.* 125 days before it was actually filed.

As the Third Circuit has explained, "the fact that the [reconsideration] motion was timely for the purposes of the District Court's schedule does not necessarily make it timely for an appeal to this [Circuit] Court." *Gutierrez*, 523 F.3d at 194. Rather, "[i]t is the [14-day] period in Rule 23(f), ***and not any other schedule or time period***, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period . . . ." *Id.* (emphasis added). In other words, whether or not Petitioner filed his motion for reconsideration by the date set by the district court is irrelevant under Rule 23(f). All that matters is whether the motion was filed within 14 days of the order decertifying the class. It was not, and Petitioner does not—and cannot—dispute this.

In short, the petition should be rejected as untimely under Rule 23(f). Because the petition is untimely, it is not "authorized by a statute or rule" as required by the Federal Rules of Appellate Procedure, and must therefore be denied. *See* Fed. R. App. P. 5(b)(1)(D).

B. Even if the Petition Were Timely, Petitioner Still Fails to Meet the Standards Required for Rule 23(f) Review

This Court has held that "petitions for Rule 23(f) should be granted sparingly." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). To justify such relief, a petitioner must show that:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. Despite his assertions to the contrary, Petitioner cannot meet any of these standards.

1. The District Court's Order Decertifying the Class Was Not Manifestly Erroneous.

Petitioner first argues that the "district court committed manifest errors of both law and fact." Pet. 6. To warrant Rule 23(f) review under this standard,

"[t]he error in the district court's decision must be significant; bare assertions of error will not suffice. Any error must be truly 'manifest,' meaning easily ascertainable from the petition itself." *Chamberlan*, 402 F.3d at 959. Here, the district court's analysis was consistent with applicable law and properly applied the law to the facts of this case. In doing so, the district court reached the inescapable conclusion that Petitioner had failed to produce the evidence necessary to demonstrate class-wide damages and thus could no longer meet his burden of showing that class certification remained warranted. *See Marlo v. United Parcel Serv.*, 639 F.3d 942, 947 (9th Cir. 2011) (burden of proof on a motion for decertification remains with the party advocating for class certification).

(a) The District Court's Order Correctly Applied Applicable Law.

Following the close of discovery, the district court decertified the class, holding that Petitioner had "failed to provide the key evidence necessary to apply his classwide model for damages…." Ex. A at 11. At issue in the decertification order was Petitioner's full-refund theory of damages—the sole damages theory Petitioner advanced at the certification and decertification stages.[2] *Id*. In order to work, Petitioner's model

[2] In his motion for reconsideration, Petitioner improperly introduced for the first time an alternative "restitutionary-disgorgement model" for damages. Ex. H at 12. The district court held that this argument had been waived because Petitioner had failed to brief it in his opposition to the decertification motion or to mention it at oral argument. Ex. I at 8. Nonetheless, the district addressed Petitioner's newly offered damages model and found that it failed for the same reasons as the full-refund model. *Id.*

required evidence of the average retail price class members actually paid for Cobra from third-party retailers, because the damages sought "serve[d] to provide what the class members *lost*, not what the Defendant gained." Ex. A at 8 (emphasis added). At the certification stage, Petitioner promised he would obtain such evidence during discovery via "expert accountant testimony" and "independent, third parties that gather point-of-sale data." Ex. J at 20 (Reply in Supp. Mot. to Cert.) [Dkt. 75]. Yet, following months of discovery, Petitioner failed to obtain any such information, rendering his damages model unworkable on a class-wide basis. As the district court correctly held, citing numerous on-point authorities, "Missing this calculation is a defect in Plaintiff's evidence that is fatal to his class claims because restitution serves to provide what the class members lost, not what the Defendant gained." Ex. A at 7-8 (citing *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097 at *12-13 (N.D. Cal. Jan. 7, 2014) ("Restitutionary relief is an equitable remedy, and its purpose is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.") (internal quotation marks omitted)).

Having failed to provide the necessary average retail price, Petitioner attempted to rely on Nutraceutical's own sales data. *Id.* at 9. Citing additional relevant authority and properly applying Rule 23(b)(3), the district court rejected Petitioner's argument, finding that Nutraceutical's own sales data was insufficient to calculate class-wide damages because Nutraceutical does not (except in rare instances) sell Cobra directly to consumers. Rather, Cobra is sold via third-party retailers who—the

evidence showed—set widely different prices. Ex. A at 9 (citing *Caldera v. J.M. Smucker Co.*, CV 12-4936-GHK VBKX, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) ("[C]lasswide damages cannot accurately be measured based on Defendant's sales data alone."); *Astiana*, 2014 WL 60097 at *12-13 (denying class certification because the plaintiff failed to provide evidence regarding damages)). Thus, the district court held, Petitioner's model was deficient under *Comcast* and required decertification.[3] *See Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013).

Petitioner now argues the district court erroneously decertified the class because "uncertainty in damages calculations does not call into question predominance for class certification purposes." Pet. 8. All Petitioner needed to show, he argues, is that "the proposed method for calculating damages [was] plausible." *Id.* Petitioner's argument, however, reflects a fundamental lack of understanding of the district court's decision. The district court did *not* find that the damages model had to produce precise calculations; to the contrary, it clearly stated, "The Court recognizes that calculating damages need not be exact or 'mathematically precise' at this stage, but the Court will not ignore Plaintiff's

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[3] Petitioner improperly introduced a second new argument in his motion for reconsideration, suggesting that the jury could calculate the average retail price by relying on (i) Defendant's suggested retail price; (ii) the Plaintiff's own recollection of what he paid for Cobra; and (iii) the price of Cobra on Defendant's web site, from which it sold a de minimis amount of product directly to consumers. But even if this newly offered "evidence" had been properly presented (it was not), Petitioner failed to show how a jury could rely on such information to calculate an average retail price. *Id.* 10-16.

speculative approach in relying [in part] on price suggestions within a product guide as a basis to determine an average retail price." Ex. I at 14 n.8 (citing *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only that damages be capable of measurement based upon reliable factors without *undue speculation*") (emphasis in original)). Moreover, the district court never disputed that, "[u]nder California law, damages may be computed even if the result reached is an approximation," or that "plaintiffs are required to, at most, provide a reasonable estimate of their damages." Pet. 12-13 (internal quotation marks and citations omitted). Rather, the district court determined that, ***in order to provide a reasonable estimate at all***, Petitioner's model required evidence of "the average retail price used in selling" Cobra, which Petitioner had failed to gather despite months of opportunity during discovery. *Id.* at 13 n.7.

Petitioner's continued reliance on *Leyva v. Medline Indus.*, 716 F.3d 510 (9th Cir. 2013) is similarly misguided. Petitioner cites *Leyva* for the proposition that "[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages." Pet. 8 (citing *Leyva*, 716 F.3d at 514). But *Leyva* simply held that "the presence of individualized damages cannot, ***by itself***, defeat class certification under Rule 23(b)(3)." *Leyva*, 716 F.3d at 514 (emphasis added). In *Leyva*, a class of employees implicated individualized damages because not every member of the class earned the same wage or worked the same number of hours. The court held that, even though the damages may not be uniform, class decertification was

not required. *Id.* Critically, though, in *Leyva* "the plaintiffs ***had a workable damages model*** that matched their theory of liability." Ex. A at 10 (emphasis added). Here, on the other hand, Petitioner failed to provide "any evidence to calculate damages." Ex. I at 10 ("The absence of an average retail price makes it impossible to calculate damages either classwide *or* on an individual basis.") *Id.* (emphasis added). *Leyva* is therefore inapposite.

(b) The District Court's Order Correctly Applied Applicable Law to the Facts of this Case.

Petitioner's argument that the district court made "several critical factual errors," simply repackages his earlier arguments regarding the court's application of law. *See* Pet. 13. For instance, Petitioner claims that that the district court erred in finding that he had "no data" for his model because he had, in fact, obtained an "average *suggested* retail price." Pet. 14 (emphasis added). But the district court clearly stated that Petitioner's damages model could not rely on a suggested retail price because it "fail[ed] to take into account the retailer's discretion [in pricing Cobra,] which is why the Court expected Plaintiff to collect data and present an average retail price." Ex. I at 12. As such, the fact that Petitioner obtained an average suggested retail price is irrelevant.

Similarly, Petitioner claims that the district court erred in finding there was no evidence of an average retail price, because—in addition to the average *suggested* retail price he had obtained—Petitioner also had "some retail price data" from his own deposition testimony and Nutraceutical's web site. Pet. 16. As the

district court thoroughly laid out in both its order decertifying the class and its order denying Petitioner's motion for reconsideration, "Even assuming *arguendo* that such [suggested] retail prices are appropriate in measuring restitution, Plaintiff leaps to the conclusion that a jury could somehow determine an average retail price using these set[s] of numbers. . . . But Plaintiff ignores the question of how picking one suggested retail price . . . automatically configures an *average*.") (emphasis in original). Ex. I at 14. While Petitioner may disagree with the district court's reasoning, disagreement over the outcome of a decertification order does not warrant interlocutory review.

As the Seventh Circuit has articulated, a "manifest error is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co*, 224 F.3d 601, 606 (7th Cir. 2000). Here, Petitioner offers nothing more than his disappointment that the district court decertified the class. Far from demonstrating the district court's "wholesale disregard" or "misapplication" of the law or factual record, Petitioner can only make the same unavailing arguments he has relied on at every stage of this litigation. In sum, Petitioner has failed to show manifest error.

2. Regardless of Whether the Decertification Order Sounded the "Death-Knell" For Petitioner's Case, Interlocutory Review is Not Warranted Because Petitioner Failed to Show Error in the Decertification Order.

Petitioner next argues that, because his individual monetary claim is small, decertification created a death-knell scenario in the case, making it ripe for interlocutory review. Pet. 19. Yet even if that were true, under well-established precedent, review is only appropriate if—in addition to the death-knell—there is "error in the certification order." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005); *see also Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). ("However dramatic the effect of the grant or denial of class status in undercutting the plaintiff's claim or inducing the defendant to capitulate, if the ruling is impervious to revision there's no point to an interlocutory appeal."). As demonstrated above, Petitioner fails to show any error—manifest or otherwise—in the district court's order. Therefore, regardless of the decertification order's effect on the case, the order does not warrant interlocutory review.

3. The Decertification Order Does Not Present any Fundamental and Unsettled Question of Law Regarding Class Certification.

Taking a kitchen-sink approach, Petitioner concludes his petition with a confusing, three-sentence section entitled, "The Order Presents a Fundamental and Unsettled Question Regarding Class Certification."

Pet. 20. Yet Petitioner fails to cite ***a single such question***, nor does he even attempt to cite or discuss any purportedly conflicting case law. What is more, Petitioner even admits that "the Ninth Circuit ***has been clear*** in its guidance regarding damages calculations and class adjudication…" *Id.* (emphasis added). Under these circumstances, "immediate review" under Rule 23(f) is both unnecessary and inappropriate. *See Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 26 F.3d 134, 140 (2d Cir. 2001).

V. CONCLUSION

In sum, the Rule 23(f) petition at issue here is time-barred and should be denied for that reason alone. This Court should join every other Circuit to consider the issue and hold that an order which preserves the status quo and leaves class status unchanged does not open another window for filing a Rule 23(f) petition. And even if the petition were not time-barred, it falls far short of meeting the exacting standards required for Rule 23(f) review. The petition should therefore be denied.

Dated: July 20, 2015

HUESTON HENNIGAN LLP
John C. Hueston
Steven N. Feldman
523 West 6th St., Suite 400
Los Angeles, CA 90014

By: /s/ John C. Hueston
Attorneys for Defendant-Respondent
NUTRACEUTICAL CORP.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-80119
D.C. No. 2:13-cv-05942-AB-E
Central District of California, Los Angeles

Filed September 16, 2015

TROY LAMBERT, on behalf of himself and all others similarly situated, Plaintiff - Petitioner,	)
v.	)
NUTRACEUTICAL CORP., Defendant - Respondent.	)

ORDER

Before: REINHARDT and RAWLINSON, Circuit Judges.

The court, in its discretion, grants the petition for permission to appeal the district court's February 20, 2015 order granting the motion for class decertification and the June 24, 2015 order denying the motion for reconsideration of the February 20, 2015 order. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam). Within 14 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

In addition to all other issues the parties wish to raise in their briefs in the appeal, the parties shall

address the timeliness of this petition No. 15-80119. *Cf. Briggs v. Merck Sharp & Dohme*, Nos. 15-55873, 15-55874, 15-55875, 15-55876, 15-55877, 2015 WL 4645605 *5-6 (9th Cir. August 6, 2015) (after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions).

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No. 15-56423 — Filed January 27, 2016

***In the* United States Court of Appeals**
***for the* Ninth Circuit**

TROY LAMBERT,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant
v.
NUTRACEUTICAL CORPORATION,
Defendant-Appellee.

Appeal from an Order of the United States District Court for the Central District of California,
Case No. 2:13-cv-5942-AB-(Ex)

OPENING BRIEF FOR PLAINTIFF-APPELLANT

Gregory S. Weston
David Elliot
THE WESTON FIRM
1405 Morena Blvd.,
Suite 201
San Diego, CA 92110
Telephone: (619) 798-2006
Facsimile: (313) 293-7071

Ronald A. Marron
Beatrice Skye Resendes
THE LAW OFFICES OF RONALD A. MARRON, APLC
651 Arroyo Dr.
San Diego, CA 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665

Attorneys for Plaintiff-Appellant Troy Lambert

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

STATEMENT OF JURISDICTION

The district court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). Diversity of citizenship is satisfied because Plaintiff-Appellant Troy Lambert is a California resident, while Defendant-Appellee Nutraceutical Corporation ("Nutraceutical") is a Delaware corporation. Plaintiff-Appellant alleged that the aggregate claims of the class exceed the sum or value of $5,000,000, exclusive of interest and costs. Moreover, less than one-third of the members of the putative class are citizens of the state where the action was originally filed and the factors in § 1332(d)(3) weigh in favor of retaining jurisdiction.

On June 19, 2014, the district court granted Plaintiff's Motion for Class Certification. ER243-259. On November 17, 2014, Nutraceutical filed a Motion for Class Decertification, ER215-242, and Plaintiff opposed, ER132-158. The district court held a hearing on December 22, 2014, ER30-73, and Defendant's motion was granted on February 2, 2015. ER19-29. Plaintiff then moved for reconsideration of this order, ER103-130. Nutraceutical opposed the motion, and Plaintiff filed his reply brief on March 13, 2015. ER80-102. On June 24, 2015, the district court denied Plaintiff's motion. ER1-18. On June 8, 2015, Plaintiff filed a Petition to Appeal Pursuant to Fed. R. Civ. P. 23(f), ER78-79, and the district court stayed proceedings pending appeal. ER76-77. Plaintiff's petition was accepted on September 16, 2015, and Plaintiff timely filed his Notice of Appeal on September 21, 2015. ER74-75.

The Motions Panel properly granted the 26(f) petition as all three of the factors in *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) are present, even though only one factor would be sufficient. First, the district court's decision to decertify the class sounded the "death-knell" to the case as Plaintiff's individual monetary claim of less than $100 is far outweighed by the cost of litigation. Second, the district court's decision to decertify the class based on supposed inadequate evidence to calculate damages is a manifest error of both fact and law. Finally, if the decision were to stand it would act to unsettle the important legal issue of whether a district court may deny certification based on supposed difficulties of calculating damages or restitution.

QUESTIONS PRESENTED

1. QUESTION 1

Where Appellant's class action was previously certified and Appellant's retail-price-based damages model found satisfactory, where Appellant introduced evidence of the retail prices charged to Class members purchasing the Product on the Defendant's internet retail store and comparable prices paid by Appellant at brick-and-mortar retail stores, and where the district court after reassignment found that Appellant had not presented sufficient evidence of class member's individual damages, where discovery was closed but where additional evidence of retail prices, class members' individual damages, and average class-wide damages was available for introduction at trial through percipient witness testimony, was the district court's ruling de-certifying the Class on the basis of

individualized or class-wide damages calculation consistent with Ninth Circuit jurisprudence?

2. QUESTION 2

Did the district court err in holding that the product's average retail price was the only measure of restitution available under California law, rejecting other measures of restitution including Defendant's wholesale revenue, and further err in decertifying the class on that basis?

STATEMENT OF THE CASE

Plaintiff appeals the district court's decertification of a previously-certified class of consumers who were induced to buy an unapproved, unlawful, and fraudulent aphrodisiac drug.

Nutraceutical packages and sells "Cobra Sexual Energy," an ineffective, dangerous, and unapproved purported aphrodisiac. This precise conduct is prohibited by the FDA's Aphrodisiac Drug Rule, 21 C.F.R. § 310.528.

The fraudulent sale of fake, snake oil, "herbal" aphrodisiacs is an ancient problem. The FDA, charged with protecting the public from such fraud, promulgated 21 C.F.R. § 310.528 (the "Aphrodisiac Drug Rule"), to prohibit "aphrodisiac drug product[] claim[s]" by "nutritional supplement" manufacturers. 54 Fed. Reg. 28780, 28780 (July 7, 1989). The Aphrodisiac Drug Rule was promulgated and published in the Federal Register after public notice and opportunity to comment and carries the force of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979)

("properly promulgated, substantive agency regulations have the 'force and effect of law'").

The Rule states categorically that "[a]ny product that bears labeling claims that it will arouse or increase sexual desire, or that it will improve sexual performance, is an aphrodisiac drug product" and may not be offered for sale without first undergoing clinical testing and FDA approval. 21 C.F.R. § 310.528(a). The FDA provides several examples of prohibited aphrodisiac claims, including:"arouses or increases sexual desire and improves sexual performance"; "helps restore sexual vigor, potency, and performance"; "improves performance, staying power, and sexual potency"; and "builds virility and sexual potency." *Id.* These are all claims that Defendant makes for "Cobra Sexual Energy" using nearly identical language.

The FDA expressly found unsupportable any claims of effectiveness for any OTC ingredients, including specific ingredients in Cobra, for use as an aphrodisiac. 21 C.F.R. § 310.528(a). The FDA expressly determined that "all products that bear labeling claims that they will arouse or increase sexual desire or that they will improve performance are aphrodisiac drug products," 54 Fed. Reg. 28780, 28786 (July 7, 1989), and that ***"labeling claims for aphrodisiacs for OTC use are either false, misleading, or unsupported by scientific data***." 21 C.F.R. § 310.528(a) (emphasis added).

Defendant never obtained New Drug Approval from the FDA—or even attempted to do so, ER204-214 at ¶ 2, Exs. 1-2—before it began selling Cobra Sexual Energy to the public with a label advertising "aphrodisiac" ingredients and making explicit

aphrodisiac claims. As such, Cobra is a misbranded new drug offered for sale in violation of federal law.

In addition to these clear and direct violations of the Aphrodisiac Drug Rule, Cobra also violates FDA's general drug and dietary supplement laws. 21 U.S.C. § 343(r)(6) requires that a manufacturer of a dietary supplement making a nutritional deficiency, structure/function, or general well-being claim have substantiation that the claim is (1) truthful (2) not misleading, and (3) bears the disclaimer, "prominently displayed and in boldface type" that "[t]his statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease." Not only does Defendant lack substantiation, but it has never provided such prominent and boldface disclaimer.

On June 19, 2014, the Honorable Audrey B. Collins certified the class of consumers who had purchased Cobra Sexual Energy. Judge Collins found that common issues predominated because "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading." ER252. Three months after Judge Collins's appointment to the California Court of Appeal and the reassignment of this action, Nutraceutical moved to decertify the class. ER215-242. On February 20, 2015, Nutraceutical's motion was granted, solely on the basis that, "although Plaintiff's full refund model is consistent with his theories of liability," ER22, ". . . because Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages, the Court cannot find that common issues predominate under Rule 23(b)(3)." ER29.

This was clear error. This Court instructs "damages is invariably an individual question [that] does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (citations omitted); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010).

The district court was also incorrect that Plaintiff did not present a valid damages model supported by evidence. In fact, he presented three separate models, all supported by evidence. He first presented expert evidence that the product was worthless and had a value of $0.00 because it was an unlawful and dangerous unapproved new drug and was completely ineffective. *See* ER159-72. As to the amount that the class should be awarded based on their purchases of a worthless product, he presented evidence allowing a restitutionary award to be calculated under three methods, all supported by California law: (1) the sales of product multiplied by average retail price; (2) the sales of product multiplied by the manufacturer's suggested retail price ("MSRP"); and (3) the revenue from the sale of the product during the Class period that Defendant disclosed in discovery.

Lambert inarguably had already obtained adequate competent evidence to apply at least two of the three models. Even if the district court had been correct that a gap existed in the evidence necessary to calculate damages at the time of the decertification motion for one of those models, the Average Retail Price model, it erred in assuming such information could not have been easily and properly obtained subsequently through further investigation or adduced at trial through witness testimony. The district court thus

erred in decertifying the class and refusing to reconsider its ruling or allow a subsequent motion to certify.

SUMMARY OF ARGUMENT

The district court's original order certifying the class and approving the full-refund damages model was correct. After the case's reassignment, however, the court ignored Ninth Circuit authority regarding damages calculations in cases such as *Leyva v. Medline Indus.*, 716 F.3d 510 (9th Cir. 2013) and concluded that "Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages," decertifying the class based on this erroneous assumption. It did so in the face of competent evidence showing: (1) the retail price paid for multiple purchases of the Product by Plaintiff-Appellant; (2) the retail price actually charged by Defendant to customers purchasing the product from Defendant's internet retail store; (3) Defendant's revenue from the sale of the product; and (4) expert testimony that the value of the product was zero because it was illegal, dangerous, and completely ineffective—as well as the fact that additional price evidence could properly be adduced at trial.

The original certification order correctly found that common questions predominated. *See, e.g., Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1022 (9th Cir. 1998) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). If "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then those issues predominate over individual questions. *Id*.

A proposed damages calculation model need only be plausible, *Menagerie Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, at *62-66 (C.D. Cal. Nov. 9, 2009); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 494 (C.D. Cal. 2006); a criterion that one, two, or all three of Plaintiff-Appellant's proposed models easily meet. *See*, *also, McCrary v. Elations Co., LLC*, 2014 U.S. Dist. LEXIS, at *50 (C.D. Cal. Jan. 13, 2014).

The district court, however, in ruling for decertification, cited to inapposite authorities including those in which, for example, a district court found that approximately 100 million individual hearings would be needed to resolve class claims for injunctive relief. *Freeland v. AT&T Corp*., 238 F.R.D. 130, 157 (S.D.N.Y. 2006). The district court also cited two cases in which expert testimony was required to determine a "true value" or price premium for the product at issue, complications not necessary here under Plaintiff-Appellant's model. ER26-27 (citing *Caldera v. J.M. Smucker Co*., 2014 U.S. Dist. LEXIS 53912, at *11-12 (C.D. Cal. Apr. 15, 2014); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014)). In addition to being inapposite, these cases are also wrongly decided by misapplying California's law of restitution.

Further, even if no retail price data were available or able to be adduced at trial, under California law, Lambert could still calculate restitution based solely on Defendant's revenues from the sale of the product, figures which are already known. "California law 'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an

approximation . . . [T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery.'" *Pulaski & Middleman, LLC v. Google, Inc*., 802 F.3d 979, 989 (9th Cir. 2015) (internal citation omitted).

California law provides that "a defendant, who carefully exploited an unfair trade practice so that the individual victims suffered only minor losses, to disgorge the resulting large and illicit sum of money." *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979) (internal citations omitted). And "a court of equity may exercise its full range of powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo* ante as nearly as may be achieved." *Id*. The court has "'very broad' discretion to determine [a restitution] award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the amount that the defendant wrongfully acquired." *Wiener v. Dannon Co.*, 255 F.R.D. 658, 670-71 (C.D. Cal. 2009) (emphasis added) (quoting *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 695 (2006)). In addition to the retail price data, the wholesale price and revenue evidence that Plaintiff-Appellant had already presented was adequate for a jury to carry out this calculation. The district court therefore also erred when it rejected any alternate damages calculation model based on Defendant's known wholesale price and markup or on Defendant's revenues.

ARGUMENT

I. THE PETITION TO APPEAL IS TIMELY AND WAS CORRECTLY GRANTED

A. Standard of Review for 23(f) Petitions

"A court of appeals may permit an appeal from an order granting or denying class-action certification under" Fed. R. Civ. P. 23(f). "[T]he court of appeals [enjoys] 'unfettered discretion' to grant or deny permission to appeal based on 'any consideration that the court of appeals finds persuasive.'" *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 957 (9th Cir. 2005) (quoting Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f)). Acceptance of an appeal under Rule 23(f) is appropriate where the class certification decision "sounds the death knell of the litigation." *Chamberlan*, 402 F.3d at 957 (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)).

B. The Court Correctly Granted Plaintiff-Appellant's 23(f) Petition

This Court has jurisdiction to review an order denying class certification under Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(e). Plaintiff's 23(f) petition was timely because it was filed on July 8, 2015, within 14 days after the order denying Plaintiff's motion for reconsideration was entered on June 24, 2015. ER1-18, 78-79. *See* Fed. R. Civ. P. 23(f).[1]

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[1] This Circuit has not addressed whether orders denying reconsideration of decertification orders are subject to 23(f) petitions, though the rule's language of "an order granting or

Interlocutory review under Rule 23(f) allows the Court to "restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." *Chamberlan*, 402 F.3d at 957-58. Interlocutory review of a certification decision is most appropriate when:

> (1) there is a death-knell situation . . . that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. at 959.

Chamberlan holds an appeal under Rule 23(f) is appropriate when a plaintiff denied certification could only appeal after judgment on the merits of an individual claim that is worth less than the cost of

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denying class certification" certainly applies here, because Plaintiff's motion for reconsideration sought certification of a decertified class, and the Court's order is thus an "order [] denying class certification." *See Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008) ("join[ing] the other circuits in holding" Rule 23(f) petitions are timely where a party files a "timely and proper motion to reconsider the grant or denial of class certification.") Here, the district court explicitly granted leave to file and set a schedule for a motion to reconsider at its post-decertification scheduling conference. ER131.

litigation. Denial of certification in such a case "sounds the death knell of the litigation." *Id*. Here, all three of the *Chamberlan* factors were present: manifest error, fundamental issue of law, and a "death-knell" situation.

First, the district court committed manifest errors of both law and fact. The district court failed to follow Ninth Circuit authority and made dispositive factual findings that were without support in the record, thereby abusing its discretion. Although the Ninth Circuit has been clear in its guidance regarding damages calculations and class adjudication, the district court's decision is contrary to both the prior judge's order granting class certification and to the many other cases in this Circuit where retail-product consumer class actions have been certified in the presence of some degree of uncertainty as to class members' damages. Either the issue is settled law and the district court's ruling is manifestly in error, or the issue is unsettled in the lower courts and it becomes a fundamental issue of law satisfying the second *Chamberlan* factor. Finally, Plaintiff's individual monetary claim is small, far outweighed by the cost of litigation. *See Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009) ("where the high costs of litigation grossly exceed an individual plaintiff's potential damages, the denial of class certification sounds the death knell of that plaintiff's claims"). "Rule 23(f)'s text and purpose counsel a broad reading of 'death-knell situation.'" *Dalton v. Lee Publ'ns, Inc.*, 625 F.3d 1220, 1222 (9th Cir. 2010) (O'Scannlain, J., dissenting) (citing *Chamberlan*, 402 F.3d at 960).

II. STANDARD OF REVIEW FOR CLASS CERTIFICATION ORDERS

The Court reviews a district court's class-certification decision for an abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co*., 594 F.3d 1087, 1090-91 (9th Cir. 2010). "While "review of discretionary class certification decisions is deferential, it is also true that [the Court] accord[s] the decisions of district courts no deference when reviewing their determinations of questions of law." *Id*. at 1091.

III. THIS CASE SATISFIES RULE 23, AND THE DECERTIFICATION ORDER CORRECTLY REJECTED MOST OF DEFENDANT'S ARGUMENTS FOR DECERTIFICATION

The district court, before reassignment, ruled correctly that the class satisfies Rule 23's predominance requirement. ER251-56. The decertification order was based an incorrect legal holdings on measures of damages and the type of restitution available under California law.

A. Common Questions Predominate

"The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1022 (9th Cir. 1998) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). If "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then those issues predominate over individual questions. *Id*.

The district court previously found that "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading," and that the "evidence relevant to this inquiry is also common to all claims: it is the packaging itself." ER252. Neither of these factors has changed, and the district court, in decertifying the class, made no finding that these factors have changed. The court's initial holding that "Defendant's arguments that individual questions predominate are unavailing," ER253, still holds true. The class, as before, satisfies the Ninth Circuit's criteria for predominance.

B. The District Court's Order Decertifying the Class Disregarded Ninth Circuit Authority Regarding Damages and Predominance

Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages. *Leyva v. Medline Indus.,* 716 F.3d 510, 514 (9th Cir. 2013) (applying *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1435 (2013)); *see also Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Yokoyama*, 594 F.3d at 1094; *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986-88 (9th Cir. 2015). In *Leyva*, a wage-and-hour class action, this Court held that the predominance requirement is satisfied if the plaintiff is "able to show that [class] damages stemmed from the defendant's actions that created the legal liability." 716 F.3d at 514. This is exactly the case here. Defendant sold the same bogus and illegal "aphrodisiac" to every class member, each of whom is

entitled to damages and restitution under California's consumer protection laws.

The district court attempted to distinguish *Leyva* on the basis that the plaintiffs in that action "had a workable damages model that matched their theory of liability." ER28. But that is exactly what the district court also found in *this* action—that the Plaintiff had provided an appropriate damages model that matched the theory of liability. ER25 ("The Court finds that Plaintiff's full refund damages model matches his theories of liability.")

The district court here, however, de-certified the Class on the sole basis that there was as yet, according to the court, incomplete evidence in the record regarding retail prices paid by class members. ER25-29. This both gets the record wrong and is wholly inconsistent with Ninth Circuit authority, that uncertainty in damages calculations does not call into question predominance for class certification purposes. *See Leyva*, 716 F.3d at 514.

At the class certification stage, a plaintiff need only show that the proposed method for calculating damages is plausible. *See, e.g., Menagerie Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, *62-66 (C.D. Cal. Nov. 9, 2009) (certifying the class over defendants' objection that the method of calculating damages was imprecise); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 494 (C.D. Cal. 2006) ("Moreover, 'in assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods for computing damages are so insubstantial as to amount to no method at all . . . . Plaintiffs need only come forward with plausible [method]'" (quoting *Klay v.*

Humana, Inc., 382 F.3d 1241, 1259 (11th Cir. 2004); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 554 (N.D. Cal. 2005))). The district court's observation that Plaintiff's retail price data was not complete was therefore insufficient justification to decertify the class. *See Johns v. Bayer Corp.*, 280 F.R.D. 551, 557-58 (S.D. Cal. 2012) (applying *Yokoyama* to certify a similar class challenging vitamin advertising). In the instant case, as in *Leyva*, the "district court applied the wrong legal standard by concluding that individual questions predominate over common questions." *Leyva,* 716 F.3d at 513.

None of the cases the district court cited in support of decertification provide binding or persuasive authority for decertification. Despite ample and binding authority from this Court, the district court relied on, for example, *Freeland v. AT&T Corp*., 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006); ER29. *Freeland* was an antitrust action unsuitable for class treatment because, *inter alia*, the class representative did not have standing, the plaintiff had no method of determining which class members suffered injury, and, likely influential in the court's decision, the *Freeland* court found it would have to hold 100 million individual hearings, one for each AT&T customer, before it could rule on injunctive relief. *Freeland*, 238 F.R.D. at 157.

Caldera v. J.M. Smucker Co., 2014 U.S. Dist. LEXIS 53912 (C.D. Cal. Apr. 15, 2014), cited at ER27, is also easily distinguishable because the plaintiff's damages model in that false-labeling snack food case required a "true value" of the product—not required here—so the defendant's sales data alone were not sufficient. *Caldera*, 2014 U.S. Dist. LEXIS 53912 at *11-12. Thus,

even though the health claims on defendant's frozen peanut butter and jelly sandwiches were false, the *Caldera* court found the products still had *some* value to consumers. A premium between the mislabeled product and the value received therefore needed to be calculated and the plaintiff failed to present a model for doing so. *Id*.

Plaintiff here, by contrast, alleges and provides evidence that (1) the product is wholly ineffective, (2) the product is dangerous, and (3) the product is illegal. For these reasons, no "true value" calculation is needed: all the revenue Nutraceutical received from the sale of Cobra was fraudulently obtained with no off-setting value, unlike a food product with overstated health claims, which can still be consumed and enjoyed. *Caldera* is therefore inapplicable.

Astiana v. Ben & Jerry's Homemade, Inc., 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014), also cited by the court, is similar. ER26. In that case, the district court found that the plaintiff needed to provide pricing information for competing ice creams that did not have deceptive labels in order to calculate "price premium" damages, but the plaintiff there had not and could not supply such data. Here, the plaintiff is not proposing a comparison method of damages between Cobra and other fraudulent aphrodisiacs, but proposing and providing evidence that the value of Cobra is nothing, and the Class should receive full restitution. Thus, *Astiana* is also inapposite.

Moreover, while fully distinguishable, *Caldera* and *Astiana* were also wrongly decided because they misapplied the law of restitution. Restitution starts with the restoration to a plaintiff of the funds the

defendant wrongfully acquired. As an equitable remedy, it is subject to equitable defenses, including the partial defense of offset. Thus, a sushi chef who innocently sells albacore as more expensive blue fin tuna may show that it was an innocent error stemming from a mistake by his supplier, and that he promptly corrected his error upon discovering it, and therefore the restitution award of the funds he acquired in selling fish mislabeled as "blue fin" should be reduced by the value of the albacore he provided. This Court explained these concepts with another analogy:

> we return to the hypothetical dishonest rhinestone merchant. Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back. We would not limit their recovery to the difference between what they paid and a fair price for rhinestones. The seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought rhinestones at all or only some. The district court implied this notion of a tainted purchasing decision with its qualification 'given the misrepresentations recommended by [defendant] and made by distributors to consumers.' The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds.

FTC v. Figgie Int'l, 994 F.2d 595, 606 (9th Cir. 1993). In other words, while an innocent mistake might mean a defendant should pay only the difference between what he promised and what he delivered, a "dishonest

merchant" must pay "full refunds," not offset by "a fair price for rhinestones." If they proved a long-standing fraud by a large and sophisticated food manufacturer, as the plaintiffs in *Caldera* and *Astiana* proposed, they foreclosed the equitable defense of offset by showing such defendants lack the clean hands required to assert off-set, no different than the "hypothetical dishonest rhinestone merchant" discussed by this Court. *Compare Caldera*, 2014 U.S. Dist. LEXIS 53912 at *10-12.

Nor is *Marlo v. U.P.S*. on point here, as the Court was primarily concerned there "about the class-wide applicability of the evidence regarding employee misclassification." 639 F.3d 942, 945-47 (9th Cir. 2011).

Plaintiff here has already obtained sufficient price information to enable the jury to estimate damages. *See* Section VI-VIII, below. But even if the damages calculation were uncertain, this is no basis for decertification. *Leyva,* 716 F. 3d at 514. The district court's determination that the "absence of an average retail price makes it impossible to calculate damages either classwide or on an individual basis," was thus a manifest error of law. Moreover, to calculate damages "California law 'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation . . . [T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery.'" *Pulaski & Middleman, LLC v. Google, Inc*., 802 F.3d 979, 989 (9th Cir. 2015) (internal citation omitted).

The district court's decision to decertify the class was premised on the legal error that class members' damages must be amenable to precise calculation. The district court erroneously ruled damages could not be approximated by the jury using MSRP or testimony on prices from Plaintiff and retailers, nor could it be deduced from the uncontroverted evidence of wholesale prices Nutraceutical provided. It therefore committed "a per se abuse of discretion" and should be reversed. *Yokoyama*, 594 F.3d at 1091. "So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed did not defeat class certification." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014).

C. Other Circuits Are In Accord That Uncertainties in Damages Calculations Does Not Defeat Class Certification

Other circuits agree that individualized damages issues do not defeat predominance or class certification. In the antitrust case *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) the First Circuit held:

> it is well-established that "[t]he individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3). Where . . . common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." *Smilow*, 323 F.3d at 40; Newberg, supra, § 4:54 (It is a "black letter rule . . . that individual damage calculations generally do not defeat a finding that common issues predominate . . . .")."

In an order vacating the denial of a class certification motion, the Second Circuit affirmed that *Comcast* does not overrule the presumption that "class certification pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure cannot be denied merely because damages have to be ascertained on an individual basis." *Roach v. T.L. Cannon Corp*., 778 F.3d 401, 402 (2d Cir. 2015). After a detailed discussion of *Comcast*, the Second Circuit concluded "it was well-established . . . that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification under Rule 23(b)(3)." *Id*. at 405 (internal quotations omitted).

The Seventh Circuit likewise states:

> the district court misread Rule 23(b)(3) to require a greater showing of common evidence than is contemplated by that rule. Under the district court's approach, Rule 23(b)(3) would require not only common evidence and methodology, but also common results for members of the class. That approach would come very close to requiring common proof of damages for class members, which is not required. To put it another way, the district court asked not for a showing of common questions, but for a showing of common answers to those questions. Rule 23(b)(3) does not impose such a heavy burden.

Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 819 (7th Cir. 2012).

IV. THE ORDER COMMITS ERRORS OF SUBSTANTIVE CALIFORNIA LAW

"Because the class action is a procedural vehicle for the vindication of underlying rights, the damages that each class member is entitled to is ultimately a function of other substantive law." *Vaccarino v. Midland Nat'l Life Ins. Co*., 2014 U.S. Dist. LEXIS 18601, at *35 (C.D. Cal. Feb. 3, 2014) (citing 28 U.S.C. § 2072 (federal rules of procedure "shall not abridge, enlarge or modify any substantive right")). Thus, calculation of damages and restitution under California statutes, including the aggregated claims of a class, is a matter of California law.

As an initial matter the California Supreme Court is in accord with federal authority that questions regarding determination of damages do not prevent class certification. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (2012). Thus "damages may be computed even if the result reached is an approximation." *GHK Assocs. v. Mayer Group, Inc*., 224 Cal. App. 3d 856, 873 (1990). Under "California law, plaintiffs are required to, at most, provide ***a reasonable estimate*** of their damages." *Vaccarino*, 2014 U.S. Dist. LEXIS 18601 at *35-36 (emphasis added). The "defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." *Id*. (quoting *Dallman Co. v. S. Heater Co*., 262 Cal. App. 2d 582, 594 (1968)).

Brinker further describes California law on this issue:

> We have long settled that individual damages questions will rarely if ever stand as a bar to certification. In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution.

Brinker, 53 Cal. 4th at 1054 (Werdegar, J., concurring) (internal quotations, alterations, and citations omitted). Moreover, "to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device." *Id*. Any such holding is therefore contrary to California law, whose policy strongly favors the class action device. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004) (California "has a public policy which encourages the use of the class action device." (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 473 (1981)). Sound the death-knell of retail-product class actions is exactly what the district court would do, as a plaintiff will almost never have exact evidence of the prices charged at retail locations given the reality of constant price changes, sales, and promotions. Plaintiff's presentation of MSRP, the actual prices charged online, examples of actual retail prices, and wholesale prices is sufficient to allow a jury to make a reasonable approximation.

V. CALIFORNIA ALLOWS MULTIPLE METHODS OF RESTITUTION CALCULATION IN CONSUMER CLASS ACTIONS TO FACILITATE ITS PUBLIC POLICY OF FAIR AND HONEST COMPETITION

California law provides that a trial court sitting in equity may order "a defendant, who carefully exploited an unfair trade practice so that the individual victims suffered only minor losses, to disgorge the resulting large and illicit sum of money." *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979) (internal citations omitted). And "a court of equity may exercise its full range of powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved." *Id*. This binding "full range of powers to accomplish complete justice" language means the district court's narrow view rejecting the use of other measures such as MSRP or defendant's wholesale revenue from the sales of Cobra to calculate restitution was in error. On the contrary, the district court had "'very broad' discretion to determine [a restitution] award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the amount that the defendant wrongfully acquired." *Wiener v. Dannon Co.*, 255 F.R.D. 658, 670-71 (C.D. Cal. 2009) (quoting *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 695 (2006)).

While relying on out-of-circuit cases and those involving dissimilar products, the district court ignored ample local precedent involving "health and nutrition" fraud. In *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582 (C.D.

Cal. 2011), involving an ineffective "natural" cold remedy, the Honorable Josephine S. Tucker explained that under the CLRA, plaintiffs could recover the "[a]mounts actually and reasonably expended in reliance upon the fraud," *id.* at 592 (quoting Cal. Civ. Code § 3343(a)(1)), and that in a false advertising case, "the amount of restitution under the UCL and actual damages under the CLRA is the same," and equivalent to "the amount [plaintiff] spent purchasing packages of" the challenged product. *Id.* Similarly, in *Krueger v. Wyeth, Inc.*, 2011 U.S. Dist. LEXIS 154472 (S.D. Cal. Mar. 29, 2011), the Honorable John A. Houston explained that:

> plaintiff does not seek the difference in price between [defendant's] drugs and a drug issues by another manufacturer. Rather, plaintiff seeks a refund of the entire purchase price . . . . Defendant's argument that nonrestitutionary disgorgement is not an available remedy under the UCL is correct. However, restitutionary disgorgement is allowed under the UCL and that is the remedy sought by plaintiff here.

Id. at *17, *40 n.10. As another example, in *Johns v. Bayer Corp.* restitution was measured by the defendant's profits in selling a vitamin mix with allegedly false claims. 280 F.R.D. 551, 560 (S.D. Cal. 2012).

VI. THE ORDER RESTS ON ERRONEOUS FACTUAL FINDINGS AND INFERENCES

In addition to errors of law, the district court made several critical factual errors, including: (1) misstating the required inputs to Plaintiff's proposed damages

model; (2) incorrectly concluding that Plaintiff did not have sufficient record evidence for a jury to estimate classwide damages; and (3) incorrectly assuming that Plaintiff would be unable to obtain additional price information prior to or at trial, if such evidence were needed.

A. The District Court Incorrectly Assumed that Plaintiff's Damages Model Required Actual Retail Price to Calculate Class Damages

The district court incorrectly cited Plaintiff's proposed damages model as if it depended *exclusively* on an average retail price ("ARP") for the Products. This was not correct. Plaintiff had proposed in his motion for class certification a damages model based principally on the average suggested retail price ("ASRP" or "MSRP"), not solely on the ARP as the district court presumed. ER307-08. Plaintiff proposed using ARP only as an alternative measure of damages. ER308. Plaintiff already has obtained ASRP/MSRP evidence in discovery, so the court's finding that Plaintiff has "no data" for his model is simply incorrect. ER352-53, 357-370 at ¶¶3-8, Exs. 1-6 (filed under seal).

In the decertification order, the court cited Lambert's proposed damages model correctly, but then analyzed it incorrectly. First, it correctly described Plaintiff's model,

> Thus, using the average suggested retail sales price for [Cobra], which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class.

ER25 (citing ER307-08 (emphasis added)). This phrasing was accurate. The model is based on suggested retail prices, not actual. Plaintiff proposed in his successful Motion for Class Certification that,

> [t]he amount spent on Cobra by the class can be established by Defendants' own sales data and **suggested** retail sales prices produced in discovery.
> . . . .
> Thus, using the average **suggested** retail sales price for the Product ("**MSRP**"), which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class. *See id*. **In the alternative**, the out-of-pocket dollars spent by the class on the Product can be acquired by Plaintiffs from companies that collect point-of-sale information, such as Spins.

ER307-08 (emphases added.).

Unfortunately, the district court then proceeded to analyze the damages model as if it was based instead only on the ARP, not the ASRP/MSRP as Plaintiff proposed and as the court initially approved. The district court failed to note that Lambert already had obtained in discovery sufficient data on suggested retail prices to calculate damages using the proposed model.

The court, therefore, erroneously concluded, referring to ARP, that: "In the instant case, there simply is no evidence to calculate damages under Plaintiff's damages model is what stops the analysis." [sic] ER28.

This was a manifest error of fact, per the district court's own recitation of Lambert's model which uses ASRP/MSRP, not ARP data.[2] All that Lambert needs to calculate damages under this model is Nutraceutical's ASRP/MSRP and unit sales, both of which he already has. *See* ER352-53, 357-370 at ¶¶3-8, Exs. 1-6 (filed under seal). Thus, Plaintiff already has a validated model and sufficient data to calculate proposed class damages using that model. The district court erred when it found otherwise.

Further, any suggestion that Plaintiff promised to supply pricing data through "expert accountant testimony" or "independent, third parties that gather point-of-sale data" is incorrect. Plaintiff merely offered these as possible examples of calculating damages. However the district court, even when presented with (1) evidence of actual retail prices, (2) the suggested retail price, and (3) the defendant's aggregate revenue, found that none of these methods could be used as a measure of damages or restitution and that the class must be de-certified as a result.

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[2] Plaintiff had proposed using principally the ASRP/MSRP, with ARP only as a backup method of calculating class damages. The court's 2014 Order certifying the Class used the phrase, "average retail price" without clarifying whether the court meant the "average suggested retail price" (ASRP/MSRP), the "average actual retail price" (ARP), or both. Plaintiff consistently proposed the average suggested retail price (ASRP/MSRP) as the primary measure of damages, *see* ER307; ER261 ¶¶ 27-28, and that is the formula the court recited in the February 20, 2015 Order. ER19-29.

B. Plaintiff Presented Sufficient Retail Pricing Data

The district court found as a matter of law that "without the average retail price, class wide damages cannot be calculated." ER27. This is a misstatement of California law governing damages for consumer fraud. It is further wrong because Plaintiff did have representative data even if it did not cover every sale.

VII. CONTRARY TO THE DISTRICT COURT'S FINDING, PLAINTIFF HAS RETAIL PRICE DATA

Plaintiff already has some retail price data from deposition testimony and from Defendant's direct website sales to consumers. *See* ER352-53, 357-370 at ¶¶3-8, Exs. 1-6 (filed under seal). He further has Nutraceutical's suggested retail prices. *See, e.g., Brinker,* 53 Cal. 4th at 1054. (Courts must "use [ ] a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts.") While Nutraceutical should be free to attack these sources of evidence of damages at trial, for example by showing that some retailers sold the product for less than MSRP, this is a purely factual issue for a jury to decide at trial, not by the Court on a decertification motion. *See McCrary*, 2014 U.S. Dist. LEXIS 8443, at *50 (holding that even if damages need to be recalculated at trial, such a "reduction in allowable damages . . . is not fatal to class certification.").

VIII. PLAINTIFF CAN ADDUCE ADDITIONAL RETAIL PRICE INFORMATION AT TRIAL

Plaintiff can also develop additional proof of damages at trial, through testimony of class members, adverse witnesses, or representative retailers. Justice Werdegar has specifically recommended representative testimony at trial "to [facilitate] determinations of the extent of liability" when damages may be uncertain. *Brinker*, 53 Cal. 4th at 1054. For the district court to assume that no additional price data could possibly be admitted into evidence at trial was error.

Through the data already available, as well as through sales testimony admissible at trial, Plaintiff can present satisfactory information for a jury to reliably estimate damages without "undue speculation." *Cf.* Order Denying Plaintiff's Motion for Reconsideration, ER 14-15 n.8; *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only that damages be capable of measurement based upon reliable factors without undue speculation.") It was therefore error for the district court to take this factual decision away from the jury prematurely by decertifying the Class.

IX. THE DISTRICT COURT'S REFUSAL TO PERMIT THE INTRODUCTION OF WHOLESALE PRICE DATA FOR DAMAGES IS CONTRARY TO CALIFORNIA LAW

Plaintiff, in moving for summary judgment while the Class was still certified, provided a model for class calculation of damages, that, unlike retail prices for which perfect records do not exist, is beyond dispute:

the actual wholesale revenue received by Defendant from the sale of Cobra during the class period. *See* ER201-02. Even assuming, *arguendo*, that aggregated damages have to be calculated perfectly under California consumer law, and Lambert lacked evidence to do so, the revenue data was obtained directly from Defendant and is perfectly precise. Indeed, Plaintiff's motion for summary judgment, never decided by the district court, provided a restitution calculation down to the penny: $176,999.28 in restitution and $34,951.16 in prejudgment interest. *See* ER173-74.

The district court rejected the use of the lower but perfectly precise wholesale data as an alternative to the higher, but less precise retail data:

> Using the sales data alone, Plaintiff seeks to disgorge Defendant of what Defendant received from its wholesale sales, but as previously mentioned, Plaintiff and his class members do not have an ownership interest in those sales.

ER15. But if a Plaintiff can prove he was defrauded by being sold a worthless and dangerous unapproved drug, and inarguably has an ownership interest in the full retail price he paid for the product, he must also have an ownership interest in at a minimum the lessor amount represented by the wholesale price. The wholesale price of the product, known here, provides at a minimum a valid starting point for the calculation of restitution under California law. The decertification order is thus based on a misstatement of California law, which grants a court wide discretion to decide the appropriate method of the calculation of restitution. The order further fails as a matter of logic: if Plaintiff was defrauded of $20 from the sale of "Cobra Sexual

Energy" at a store, and the $20 represents funds in which the Plaintiff has an ownership interest, how could the amount the Defendant acquired from Plaintiff, as evidenced by the wholesale price of $10, not also be funds in which the plaintiff enjoys an "ownership interest?"

The district court also erred in disregarding long-standing precedent in favor of effecting restitutionary damages. California law authorizes a trial court to order a defendant simply to disgorge the money defendant gained by defrauding a class. *See Guido v. L'Oreal, USA, Inc*., 2013 U.S. Dist. LEXIS 94031, at *37 (C.D. Cal. July 1, 2013). A court of equity may exercise its powers to effect justice, *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979), and

> with respect to the restitution permitted under the CLRA and UCL, the Court has 'very broad' discretion to determine an appropriate remedy award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff ***the amount that the defendant wrongfully acquired.***

Wiener v. Dannon Co., 255 F.R.D. 658, 670 (C.D. Cal. 2009) (emphasis added). *See also* Restatement (Third) of Restitution and Unjust Enrichment § 44 cmt. a (2011) ("Restitution by this rule will sometimes yield a recovery where a claimant could not prove damages . . . .")

The Sixth Circuit is in accord and also affirmed this principle in *Rikos v. P&G*, 799 F.3d 497 (6th Cir. 2015). *Rikos* involved a probiotic supplement that plaintiffs contended, like here, did not work and was thus

valueless. Applying California law, it affirmed "Plaintiffs' damages model—a full refund of the purchase price for each class member—satisfies *Comcast*," and upheld the lower court's order granting class certification finding "the district court did not abuse its discretion in determining that common issues will predominate over individual issues in resolving the key merits issue of this case—whether [the product works]." *Id*. at 523-24. The lower court, in finding plaintiffs' damages model sufficient for class certification noted "Defendant's liability amount, based either on total retail sales ***or a conservative wholesale sales measure*** . . . can be readily determined." *Rikos v. P&G*, 2014 U.S. Dist. LEXIS 109302, at *46 (S.D. Ohio June 19, 2014) (emphasis added). The court noted that as "a general matter, a wrongdoer cannot escape liability by stating that its records do not permit calculating damages or restitution with exact precision" and concluded that with wholesale sales "the jury may make a just and reasonable estimate of the damage based on relevant data and act upon probable and inferential, as well as direct and positive proof. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Id*. at *46-47 (internal citations and alterations omitted).

CONCLUSION

For the foregoing reasons, order of the district court decertifying the class should, respectfully, be vacated.

Dated: January 27, 2016

Respectfully Submitted,

/s/ Gregory S. Weston

GREGORY S. WESTON (239944)
THE WESTON FIRM
1405 Morena Blvd., Suite 201
San Diego, California 92110
Telephone: (619) 798-2006
Facsimile: (480) 247-4553

RONALD A. MARRON (175650)
THE LAW OFFICES OF RONALD A. MARRON, APLC
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9066
Facsimile: (619) 564-6665

Attorneys for Plaintiff-Appellant Troy Lambert

STATEMENT OF RELATED CASES PURSUANT TO LOCAL APPELLATE RULE 28-2.6

Pursuant to Ninth Circuit Court of Appeal Local Rule 28-2.6, I hereby state there are no cases known to be pending before this Court that are deemed to be related to this action.

DATED: January 27, 2016

THE WESTON FIRM

/s/ Gregory S. Weston
Gregory S. Weston

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

JA 98

Appellate Case No.: 15-56423
Filed February 25, 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Troy Lambert, *Plaintiff-Appellant*,
vs.
Nutraceutical Corp., *Defendant-Appellee*.

Appeal from an Order of the United States District Court for the Central District of California, Court Case No. 2:13-cv-5942-AB-(Ex)

ANSWERING BRIEF OF DEFENDANT-APPELLEE

HUESTON HENNIGAN LLP
John C. Hueston (CA Bar No. 164921)
Steven N. Feldman (CA Bar No. 281405)
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340

MONROY, AVERBUCK & GYSLER
Jon F. Monroy (CA Bar No. 51175)
32123 Lindero Canyon Rd., Suite 301
West Lake Village, CA 92660
Telephone: (818) 889-0661

Attorneys for Defendant-Appellee
NUTRACEUTICAL CORP.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Defendant-Appellee Nutraceutical Corp. states that the parent company of Nutraceutical Corp. is Nutraceutical International Corp. Nutraceutical International Corp. owns 100 percent of Nutraceutical Corp.'s stock.

Dated: February 25, 2016 By: */s/ John C. Hueston*
John C. Hueston

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

I. STATEMENT OF JURISDICTION

The district court has jurisdiction over this case under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). There is diversity of citizenship because Plaintiff-Appellant Troy Lambert is a citizen of California, while Defendant-Appellee Nutraceutical Corp. ("Nutraceutical") is incorporated in Delaware. Lambert alleges that aggregate claims of the class exceed $5,000,000.00, exclusive of interest or costs.

The district court decertified the class on February 20, 2015. ER19-29. Lambert filed a motion for reconsideration on March 12, 2015. ER103-29. The district court denied Lambert's motion on June 24, 2015. ER 1-18. Lambert filed a petition for permission to appeal the decertification order to this Court on July 8, 2015. Supplemental Excerpts of Record ("SER") 003-07.

Rule 23(f) of the Federal Rules of Civil Procedure governs interlocutory appeals of "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f). The Rule requires that a petition for permission to appeal be filed "within 14 days after the order is entered." *Id.* Lambert does not deny that he failed to file his petition within 14 days of the court's decertification order. Rather, he claims his petition is timely because it was filed within 14 days of the court's denial of his motion for reconsideration.

On September 16, 2015, this Court granted Lambert's petition for permission to appeal the district court's February 20, 2015 decertification order and the June 24, 2015 order denying his motion for reconsideration of the decertification order. SER001-02.

In its order, this Court ***specifically ordered*** the parties to "address the timeliness" of Lambert's Rule 23(f) petition, and cited *Briggs v. Merck Sharp & Dohme*, Nos. 15-55873, 15-55874, 15-55876, 15-55877, 2015 WL 4645605, *5-6 (9th Cir. August 6, 2015), for the proposition that "after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions." *Id.*

II. QUESTION PRESENTED

Under Rule 23(f) of the Federal Rules of Civil Procedure, a party must file a petition seeking permission to appeal an order granting or denying class-action status within 14 days of that order's entry. Plaintiff-Appellant Troy Lambert filed his Rule 23(f) petition *more than four months* after the district court entered its decertification order. Was Lambert's Rule 23(f) petition time-barred by the Federal Rules of Civil Procedure, and should his appeal be denied on that ground?

III. STATEMENT OF THE CASE

On August 14, 2013, Plaintiff-Appellant Troy Lambert, along with his former co-lead plaintiff Frank Ortega (who was previously dismissed with prejudice after he was caught lying under oath), filed the underlying suit against Nutraceutical, alleging violations of California's false advertising and unfair competition laws related to his purchases of Cobra Sexual Energy ("Cobra"), a dietary supplement comprised of herbs, extracts, and other plant-based materials. Lambert sought to represent a class of all persons who had previously purchased Cobra in California.

Relying on a number of Lambert's representations about what he would be able to prove in discovery, the district court certified the class on July 14, 2014. ER243-259. For example, in his motion for class certification, Lambert promised to "use expert testimony, such as a consumer survey expert" to establish class commonality. SER023 (Def.'s Mot. to Decert. Class). Yet he never retained a single expert. Similarly, Lambert promised he would prove his sole damages theory by using "an average retail price." ER255. Yet after months of opportunity during discovery, he failed to obtain any evidence whatsoever of Cobra's average retail price. ER029.

Following the close of discovery, and in light of Lambert's continued failures to establish class commonality and provide an average retail price, Nutraceutical moved to decertify the class. The district court granted class decertification on February 20, 2015, on the grounds that Lambert could not demonstrate a class-wide calculation of damages. ER019-29.

Following decertification of the class, at a March 2, 2015 status conference, Lambert requested permission from the district court to file a "renewed motion for class certification." SER011-12 (Stat. Conf. Tr.). The court denied his request. SER014. Lambert then moved for reconsideration on March 12, 2015—20 days after the class was decertified. ER103-30. The district court denied his motion for reconsideration on June 24, 2015, finding that he had failed to identify "any new evidence or law" that could not have been previously presented to the court, or any clear or manifest error. ER017. Lambert then filed a Rule 23(f) petition seeking

permission to file an interlocutory appeal of the district court's decertification order on July 8, 2015—*more than four months* after entry of the decertification order. SER003-07.

On September 16, 2015, this Court granted Lambert's Rule 23(f) petition, specifically ordering the parties to "address the timeliness" of Lambert's Rule 23(f) petition. In doing so, this Court cited *Briggs v. Merck Sharp & Dohme*, Nos. 15- 55873, 15-55874, 15-55876, 15-55877, 2015 WL 4645605, *5-6 (9th Cir. August 6, 2015), for the proposition that "after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions." SER001-02.

IV. SUMMARY OF ARGUMENT

The Rule 23(f) petition underlying this appeal is time-barred by the Federal Rules of Civil Procedure, and the appeal should be denied for that reason alone. Rule 23(f) of the Federal Rules of Civil Procedure, which governs interlocutory appeals from "order[s] granting or denying class-action certification," provides 14 days after the order is entered to file a petition to this Court for permission to appeal, and there is no doubt that Lambert missed this deadline.

Every circuit to consider the issue agrees that this time limit is strict and unyielding, and bars any 23(f) petition not filed within the prescribed time period. Tellingly, despite the fact that this Court's order granting the 23(f) petition specifically directed the parties to "address the timeliness" of the petition, Lambert's opening brief virtually ignores this

dispositive issue. Indeed, Lambert fails to even name it as a question presented. *See* App. Br. 2-3.

Instead, Lambert makes two perfunctory arguments for timeliness, each of which should be rejected: (1) that the district court's denial of his motion for reconsideration opened a new window for filing a Rule 23(f) petition; and (2) that his motion for reconsideration tolled the time period in which to file a Rule 23(f) petition. While Lambert correctly notes that this Court has not yet addressed either issue: whether denial of a motion for reconsideration opens a new window for filing a Rule 23(f) petition, and whether filing a motion for reconsideration tolls the Rule's time limit, he fails to mention that ***six other U.S. Courts of Appeals*** have, and that ***every single one*** would deny his petition as untimely. Moreover, Lambert is unable to cite a single case that supports his misguided arguments.

First, as every circuit to consider the question has held, an order that leaves class-action status unchanged from a prior court order is not an order granting or denying class certification under Rule 23(f), and cannot open a new window for filing a Rule 23(f) petition. The logic behind these holdings is clear and compelling: If a petitioner were able to style his motion for reconsideration as a motion for certification under the Rules, then the 14-day time limit prescribed by Rule 23(f) would have no effect. In the interest of judicial economy—and recognizing the disruption an interlocutory appeal brings to the underlying case—the Rules grant just one chance to file a Rule 23(f) petition: within 14-days of an order granting or denying certification.

Second, though some circuits have held that a properly filed and timely motion for reconsideration will toll the time for filing a petition under Rule 23(f), this narrow exception does not apply here because Lambert's petition ***was not timely filed***. The other circuits are clear and correct: What matters for timeliness is the 14-day window opened by entry of an order granting or denying certification. Here, Lambert did not file his motion for reconsideration until *20 days* after entry of the decertification order. Whether his motion was timely for purposes of the district court's own schedule is irrelevant; rather, "[i]t is the [14-day] period in Rule 23(f), ***and not any other schedule or time period***, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period . . . ." *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 194 (3d Cir. 2008) (emphasis added).

In short, Lambert had until March 6, 2015 to file his Rule 23(f) petition under the Federal Rules of Civil Procedure, but chose not to. The fact that he finally filed his petition after the court denied his motion for reconsideration—an order that merely reaffirmed the court's earlier decertification of the class—is immaterial. The fact that he filed his motion for reconsideration 20 days after entry of the decertification order is also immaterial. His motion was filed too late to have any effect on the closing of his window of opportunity. That window closed on March 6, 2015 and has not reopened since. Lambert's Rule 23(f) petition is time-barred and his appeal should be denied.

Furthermore, even if his petition were timely—and it is not—Lambert cannot show that the district court

abused its discretion in decertifying the class. Lambert's arguments that the court made legal and factual errors rest on a fundamental misapprehension of the district court's orders and omit crucial information. For instance, the district court held that Lambert had waived argument concerning a second damages model, which he failed to brief in his opposition to the decertification motion and failed to raise during oral argument. Lambert conspicuously fails to mention the district court's holding regarding this waiver in his opening brief. Nor does he offer any argument or cite any caselaw demonstrating why the district court's holding should be overturned.

Likewise, Lambert argues that the district court made factual errors by failing to consider certain evidence he presented to support his damages theory. But the court held that this evidence was waived for the same reason as Lambert's second damages theory: He failed to present the evidence in his briefing papers or during argument. What's worse, Lambert attempts to use this waived evidence to support the damages theory that the court *also deemed waived*. Again, Lambert fails to mention any of this crucial information in his brief.

With regard to the single damages theory that is permissibly raised, Lambert continually misapprehends or misrepresents the district court's holding. While he claims the court erred by requiring precise damages calculations for class individuals, the district court held no such thing. In fact, the court recognized that damages calculations do *not* need to be "exact or 'mathematically precise.'" ER014 n.8. A damages theory *does* have to be workable, however,

and Lambert failed to present any evidence "to calculate damages under [his] damages model" either class-wide or individually. ER028. The district court decertified the class because Lambert failed to propose a damages theory that could work at all, not because it was less than perfectly precise.

In sum, Lambert's appeal should be denied because the Rule 23(f) petition underlying it is time-barred by the Federal Rules of Civil Procedure. This Court should join the holdings of the Third, Fourth, Fifth, Tenth, Eleventh and District of Columbia circuits, and bar Lambert's Rule 23(f) petition as untimely. But even if the petition were timely filed, the appeal should still be denied because Lambert failed to show that the district court abused its discretion in decertifying the class.

V. ARGUMENT

A. Lambert's Untimely Rule 23(f) Petition is Fatal to His Appeal

Lambert's Rule 23(f) petition is time-barred, and this Court should deny his appeal for that reason alone. The Federal Rules of Civil Procedure grant parties 14 days to file a Rule 23(f) petition after entry of an order granting or denying class-action certification. Fed. R. Civ. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."). The Rule's time limit is strict and unyielding. Indeed, this Court has stated it can consider a petition "only if" it was filed within the prescribed 14-day window. *Plata v. Davis*, 329 F.3d 1101, 1107 (9th Cir. 2003); *see also Fleischman v.*

Albany Med. Ctr., 639 F.3d 28, 31 (2d Cir. 2011) (the "fourteen day filing requirement is a rigid and inflexible restriction") (citation omitted); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (characterizing the time limit as "clearly strict and mandatory"); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (timeliness requirement is "mandatory").

Here, the district court entered its decertification order on February 20, 2015. Under the Rule, Lambert had until March 6, 2015 to file his petition. Instead, he did not file until July 8, 2015—more than four months after the window for filing had closed. The untimeliness of Lambert's Rule 23(f) petition is dispositive: His appeal fails because his petition for interlocutory relief is time-barred by Rule 23(f).

In his opening brief, Lambert relegates his timeliness argument to just one sentence and one footnote, even though this Court specifically directed the parties to brief this crucial issue. *See* App. Br. 11 n.1. Lambert's perfunctory argument for timeliness is (1) that the district court's order denying his motion for reconsideration opened a new 14-day window for filing the petition, and (2) that by filing his motion for reconsideration he tolled the 14-day time period until the district court entered its order denying reconsideration. Both arguments fail.

First, as every circuit to address the issue has agreed, an order that leaves class-action status unchanged from what was determined by a prior order is *not* an order granting or denying class-action certification under Rule 23(f), and its entry does *not* open a new 14-day window for filing a Rule 23(f)

petition. *See, e.g.*, *Gutierrez*, 523 F.3d at 193. Thus, the district court's entry of its order denying Lambert's motion for reconsideration—which only reaffirmed the court's earlier decertification order—did not create a new opportunity for filing the petition.

Second, Lambert's motion for reconsideration did not toll the time for filing a Rule 23(f) petition because he filed the motion more than 14 days after the court entered its decertification order. While other courts of appeal have held that filing a "timely and proper motion for reconsideration" may toll the time limit imposed by Rule 23(f), this "narrow exception" only applies to motions filed "within the [14-day] period set forth in Rule 23(f)." *Gutierrez*, 523 F.3d at 193. Lambert filed his motion 20 days after the court decertified the class.

Thus, the only meaningful date by which to measure timeliness is February 20, 2015, the date the district court entered its decertification order. That order opened a 14-day window during which time Lambert had opportunity but chose not to file a Rule 23(f) petition. That window closed on March 6, 2015, and nothing Lambert has done since can reopen it.

1. The District Court's Order Denying Lambert's Motion for Reconsideration Did Not Open a New Window for Filing a Rule 23(f) Petition.

The district court's order denying Lambert's motion for reconsideration did not open a new 14-day window for filing a Rule 23(f) petition because the order merely reaffirmed the status quo. As every circuit to consider

the question has agreed, "[A]n order that leaves class-action status unchanged from what was determined by a prior order is not an 'order granting or denying class action certification,'" and thus does not trigger a new time period for filing under Rule 23(f). *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006) (quoting Fed. R. Civ. P. 23(f)); *see also Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (same); *in re DC Water and Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009) (same); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008) (same); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11 Cir. 2007) ("[W]hat counts is the original order denying or granting class decertification, not a later order that maintains the status quo."); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (same).

Lambert argues that Rule 23(f)'s "language of 'an order granting or denying class certification'" should apply to the court's order denying reconsideration because his motion "sought certification of a decertified class . . . ." App. Br. 11 n.1 (quoting *Gutierrez*, 523 F.3d at 193). Incredibly, *Gutierrez*, the one case Lambert cites in support of his argument, directly and unequivocally refutes his position.

As in this case, the petitioner in *Gutierrez* did not argue that his Rule 23(f) petition was timely in relation to the court's original order denying certification; rather, he claimed that the court's denial of his motion for reconsideration opened a new 14-day window for filing under Rule 23(f). The Third Circuit rejected this argument and held that, because the district court's denial of the motion for reconsideration "did not change the status quo," but "merely affirmed [the] decision not

to certify the class," it did "not qualify as an order 'granting or denying class action certification' within the meaning of Rule 23(f)," and thus did not create a new opportunity for filing a Rule 23(f) petition. *Id.* at 194 (quoting Fed. R. Civ. P. 23(f)).

Here, Lambert relies on the same faulty reasoning as the *Gutierrez* petitioner and argues that, because his motion for reconsideration sought recertification of the class, its denial should be subject to a Rule 23(f) petition. App. Br. 11 n.1. But—just as in *Gutierrez*—the district court's denial of Lambert's motion for reconsideration "did not change the status quo." It simply affirmed the court's earlier order decertifying the class. Thus, *Gutierrez*'s holding should apply just as forcefully in this case.

The logic behind *Gutierrez*'s reasoning is compelling. As the Seventh Circuit correctly recognized, if a petitioner were allowed to "styl[e] [his] motion to reconsider as a motion to [re]certify the class," he would be able effectively to "defeat the function of the [14-day] line drawn in Rule 23(f)." *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). That function "promote[s] judicial economy," by providing only a single window of opportunity to seek interlocutory review." *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290 (11 Cir. 2007). Courts are right to be wary of parties that seek to subvert the Rule's framework. *See Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 (10th Cir. 2006) ("Accepting an appeal from such a decision [leaving] the class definition is place would abandon the time limit for all practical purposes. That step would be both unauthorized and imprudent.") (brackets, quotation marks, and citation omitted).

Indeed, Lambert attempted such a subversion here: At a status conference following class decertification, the district court expressly denied Lambert's request to treat his then-forthcoming motion for reconsideration as a "renewed motion for class certification under Rule 23." ER004 n.1.

Litigants cannot be allowed to undermine the Rule's legitimate concerns regarding judicial economy and the disruptive nature of interlocutory appeals by continually seeking recertification of the class, waiting for the court to deny their motion, and then filing a Rule 23(f) petition in this Court. The Rule is clear: *It* sets the time for filing a petition, not litigants.

This Court should join the Third, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits in explicitly holding that where a district court's order does not change the status quo and merely affirms the court's prior order, it does not create a new opportunity for filing a Rule 23(f) petition. The fact that Lambert filed his petition within 14 days of the district court's order denying his motion for reconsideration is immaterial because that order left the "class-action status unchanged from what was determined" by the court's earlier decertification order. *See Gutierrez*, 523 F.3d. at 193.

2. Lambert's Motion for Reconsideration Did Not Toll the Time for Filing a Rule 23(f) Petition.

Lambert's motion for reconsideration did ***not*** toll the time period for filing a Rule 23(f) petition. While other courts of appeal have held that filing a "*timely* and proper motion for reconsideration" tolls the time limit imposed by Rule 23(f), this "narrow exception" is

inapplicable here. *See Gutierrez*, 523 F.3d at 193 (emphasis added). For a motion to be "timely" for purposes of tolling the Rule 23(f) time limit, it must be filed within 14 days of the order granting or denying certification. *Id.* ("We stress that, for purposes of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [14-day] period set forth in Rule 23(f)."); *see also Gary v. Sheahan*, 188 F.3d 891, 892 ("[I]f the request for reconsideration is filed more than [14 days] after the order 'granting or denying class action certification under [Rule 23(f)],' then appeal must wait until the final judgment.") (quoting Fed. R. Civ. P. 23(f)). Here, Lambert filed his motion for reconsideration on March 12, 2015—*20 days* after the district court entered its order decertifying the class. Thus, the motion failed to toll the time limit prescribed by Rule 23(f), and the window for filing this petition closed on March 6, 2015—125 days before the petition was actually filed.

Remarkably, Lambert relies on *Gutierrez* to argue that his motion for reconsideration tolled the time period for filing. *See* App. Br. 11 n.1. But *Gutierrez* clearly held (1) that only a *timely* motion for reconsideration could toll the time period for filing a Rule 23(f) petition, and (2) that, for purposes of tolling, a motion is only timely if it was filed within the 14-day period set forth in the Rule. *Gutierrez*, 523 F.3d at 193. Lambert neglects to mention this critical and dispositive distinction. Instead, he indirectly argues that his motion was timely because the "district court explicitly granted leave to file and set a schedule for a motion to reconsider at its post-decertification scheduling conference." App. Br. 11 n.1 (citing ER131). But *Gutierrez*—again, the only case Lambert relies

on—***unequivocally forecloses this argument***. "[T]he fact that the [reconsideration] motion was timely for the purposes of the District Court's schedule does not necessarily make it timely for an appeal to this [Circuit] Court." *Gutierrez*, 523 F.3d at 194. Rather, "[i]t is the [14-day] period in Rule 23(f), *and not any other schedule or time period*, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period . . . ." *Id.* (emphasis added). In other words, whether or not Lambert filed his motion for reconsideration by the date set by the district court is irrelevant under Rule 23(f). All that matters is whether the motion was filed within 14 days of the order decertifying the class. It was not, and Lambert does not—and cannot—dispute this.

In short, Lambert's window for filing a Rule 23(f) petition closed on March 6, 2015—20 days after the district court entered its order decertifying the class. His petition, filed more than four months late, is time-barred by the Federal Rules of Civil Procedure, and his appeal should be denied for that reason alone. Lambert *cannot cite one case* in support of his two arguments for timeliness. Indeed, the one case he does cite unequivocally refutes Lambert and supports Nutraceutical's arguments for *un*timeliness. This Court should join the other circuits in holding that the Federal Rules of Civil Procedure alone determine whether a motion for reconsideration is "timely" for Rule 23(f) purposes.

B. Even If Lambert's Rule 23(f) Petition Were Timely, He Cannot Show that the District Court Abused Its Discretion in Decertifying the Class

The district court decertified the class in this action because Lambert failed to "demonstrate that damages [were] measureable on a classwide basis through use of a 'common methodology'" as required by Supreme Court precedent. ER022-23 (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1526, 1430 (2013)). The court held that Lambert's proposed application of his full-refund theory of damages—the sole damages theory he advanced at the certification and decertification stages—was too speculative to support Rule 23 predominance. *See Comcast*, 133 S. Ct. at 1433.

Lambert argues that the court erred both in its application of law and in its factual findings. Both arguments rely on a fundamental misunderstanding of the court's holdings and omit critical facts.

First, Lambert argues that the district court erred by demanding that "class members' damages must be amenable to precise calculation." App. Br. 20. The court held no such thing. In fact, the court recognized that damages calculations do *not* need to be "exact or 'mathematically precise.'" ER014 n.8. A damages theory *does* have to be workable, however. ER028. Here, Lambert failed to present any evidence "to calculate damages under [his] damages model," which, the district court correctly determined, "stop[ped] the analysis." *Id.*

***Second*,** Lambert argues that the district court erred by failing to consider his restitutionary-

disgorgement model for damages. App. Br. 24-25. The district court held that Lambert had waived this argument by failing to brief it in his opposition to the decertification order or to raise it at oral argument. *See* ER008. Lambert does not mention this holding in his opening brief. Nor does Lambert offer any argument—let alone cite any supportive caselaw—that the district court was wrong to consider the argument waived. Additionally, in its order denying reconsideration, the district court correctly held that the same lack of evidence that doomed Lambert's full-refund model likewise doomed his improperly proposed restitutionary-disgorgement model. ER009-016.

Third, Lambert argues that the district court made a factual error by refusing to consider evidence Lambert allegedly offered to support his damages theory. App. Br. 26. Much like his restitutionary-disgorgement model, Lambert failed to present this evidence in his opposition to the motion for decertification, and raised it with the court for the first time in his motion for reconsideration. *See* ER011 ("Plaintiff does not claim that this evidence is newly discovered. Therefore, such evidence should have been presented to the Court in those previous opposition papers, not a motion for reconsideration.") (citing C.D. Cal. L.R. 7-9, 7-18). Moreover, the court correctly determined that this "*newly* presented evidence [was] unreliable" and rendered Lambert's damages model "nonrestitutionary in nature." ER011 (emphasis in original).

1. Standard of Review

"A district court's class certification ruling is reviewed for abuse of discretion." *Pulaski &*

Middleman, LLC v. Google, Inc., 802 F.3d 979, 984 (9th Cir. 2015) (citing *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008)). A district court abuses its discretion "if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013). This Court "review[s] the district court's findings of fact under the clearly erroneous standard, meaning [it] will reverse them only if they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record." *Id.* (internal quotation marks and citation omitted). An error of law is a "per se abuse of discretion." *Id*.

2. The District Court Correctly Held that Lambert Failed to Offer Sufficient Evidence to Support His Full-Refund Damages Model.

At issue in the court's decertification order was Lambert's full-refund theory of damages—the sole damages theory Lambert advanced at the certification and decertification stages. In order to work, Lambert's model required evidence of the average retail price class members actually paid for Cobra from third-party retailers, because the damages sought "serve[d] to provide what the class members *lost*, not what the Defendant gained." ER026. Though the court recognized that "calculating damages need not be exact or 'mathematically precise,'" it could not consent to Lambert's "speculative approach." ER014 n.8 (citing *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only

that damages be capable of measurement based upon reliable factors without *undue speculation*") (emphasis in original)). Lambert's failure to provide an average retail price was a failure to produce the evidence necessary to demonstrate class-wide damages. Thus, he could no longer meet his burden of showing that class certification was warranted. *See Marlo v. United Parcel Serv.*, 639 F.3d 942, 947 (9th Cir. 2011) (burden of proof on a motion for decertification remains with the party advocating for class certification).

Throughout his opening brief, Lambert claims the district court improperly demanded precise figures for class members' individual damages amounts. This mischaracterizes the district court's holding. The Court determined that Lambert's approach to calculating full-refund damages based on Cobra's sales to wholesalers—sales that had no relation to the price customers actually paid for the product—was too speculative to survive *Comcast*:

> In this context, the price Defendant sold Cobra to its wholesalers does not reflect the price class members actually paid. It is the average retail price that reflects the price class members actually paid. . . . Although the average retail price does not have to be exact, it is nevertheless critical at this stage of the litigation. Missing this calculation is a defect in Plaintiff's evidence that is fatal to his class claims because restitution serves to provide what the class members lost, not what the Defendant gained.

ER026.

As the district court made clear, "individualized damage calculations" may not defeat certification so long as the plaintiff has a "*workable* damages model that matche[s] [his] theory of liability." ER028 (distinguishing this case from *Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013)) (emphasis added). In *Leyva*, a class of employees implicated individualized damages because not every member of the class earned the same wage or worked the same number of hours. The court held that, though the damages may not be uniform, class decertification was not required. *Leyva*, 716 F.3d at 514. Critically, though, the *Leyva* plaintiffs had presented a *workable* model that matched their theory of liability. ER028. Here, Lambert's failure to produce an average retail price "ma[de] it impossible to calculate damages either classwide *or* on an individual basis" *Id.* (emphasis added).

Lambert misses the point by arguing that the district court had found that his full-refund model matched his theory of liability. App. Br. 15. The district court did not decertify the class because Lambert failed to provide a damages model that matched his theory of liability. Nor did the district court decertify the class because it incorrectly demanded more precise individual damages calculations. The district court decertified the class because Lambert failed to provide "any evidence to calculate damages" either on a "classwide *or* on an individual basis." ER028. (emphasis added). Lambert's inability "to put forth a damages model that *could calculate damages attributable* to [his] liability theory" doomed class certification. *Werdebaugh v. Blue Diamond Growers*, No. 12-cv-02724, 2015 WL 397751, at *3 (N.D. Cal. Jan. 29, 2015) (decertifying a class based on plaintiffs'

inability to "put forth a damages model that measured the damages attributable to Defendant's wrongful conduct") (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)) (emphasis added); *see also Forrand v. Fed. Express. Corp*., 2013 WL 1793951, at *3 (C.D. Cal. Apr. 25, 2013) ("As the Supreme Court reemphasized in *Comcast*, in order for Rule 23(b)(3)'s predominance requirement to be satisfied, a plaintiff must bring forth a measurement method that can be applied classwide *and* that ties the plaintiff's legal theory to the impact of the defendant's allegedly illegal conduct.") (emphasis in original).

Lambert's superficial attempts to distinguish the other cases relied on by the district court are equally unavailing. As discussed above, Lambert continually asserts that the district court demanded precise damages calculations from him. It did not. The court merely required—as *Comcast* requires—a *workable* damages theory. Thus, Lambert's reliance on *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) for the proposition that "California law 'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation" is inapposite. The district court held *the very same thing*. By neglecting to provide an average retail price, Lambert failed to offer a "reasonable basis of computation of damages." *That* is why the district court decertified the class, and *Pulaski* does not contradict that holding.

The other cases Lambert cites are similarly inapposite because they only discuss *precision* of damages calculations, not whether the model itself is

workable at all as required by *Comcast*. *See* App. Br. 16 (citing cases for the propositions that certification is appropriate even where the "method of calculating damages was imprecise," and that plaintiffs need only to present a "plausible method" to the court). The district court did not err in applying *Comcast* to find that Lambert failed to present a workable damages theory. The court's holding was supported by voluminous caselaw, which Lambert failed to rebut. His inability to produce an average retail price was fatal to the class and should be fatal to his appeal.

3. The District Court Correctly Held that Lambert's Restitutionary-Disgorgement Damages Model Also Fails.

(a) Lambert waived any argument related to this model by raising the issue for the first time in his motion for reconsideration.

Lambert argues that the district court erred by failing to consider his restitutionary-disgorgement model of damages. App. Br. 24-26, 31-32. In fact, Lambert waived this argument by failing to raise it both in his opposition to Nutraceutical's decertification motion and during oral argument. *See* ER006 ("In reviewing Plaintiff's opposition to the motion to decertify class, it is abundantly clear that Plaintiff's newfound disgorgement model and arguments in support of that model were well outside the record before the Court."). He cannot now argue that the district court erred by not considering this untimely disclosed model.

In his opening brief, Lambert alludes that this restitutionary-disgorgement model was mentioned in his motion for summary judgment. App. Br. 31. Even if true, Lambert failed to cite his summary judgment papers in opposing Nutraceutical's motion for decertification. *See Fair Housing Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001) (noting that a district court is required to review evidence filed in support of another motion so long as that evidence is "specifically identified in [the] moving papers"). As the district court noted, if Lambert wished "to have the court consider evidence cited in a separate motion for summary judgment" he must "actually *cite* the evidence *in [his] opposition papers*." ER 006 (citing *Fair Housing*, 249 F.3d at 1135-36) (emphases in original). "It is unreasonable for Plaintiff to expect the Court to extrapolate this alternative damages model from his Summary Judgment briefing. In effect, Plaintiff seeks to transform the Court into 'lawyer for [Plaintiff], performing the lawyer's duty forth setting forth specific [arguments] . . . .'" ER006 (quoting *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)) (alterations in original).

Lambert offers no argument that the district court erred in finding this restitutionary-disgorgement model waived. Indeed, he fails to mention the fact at all. By contrast, the district court cited extensively in support of its holding that Lambert's "failure to explicitly raise this newly proposed alternative damages model argument[] in his opposition papers or oral argument amount[s] to a waiver of this argument." ER008 (citing *Moreno Roofing Co., Inc. v. Nagle*, 99 F.3d 340, 343 (9th Cir. 1996) (passing remarks on an issue in opposition

to summary judgment were insufficient to avoid waiver); *United States v. George*, 291 F. App'x 803, 805 (9th Cir. 2008) (holding party's "failure to adequately develop these arguments in his brief operates as a waiver"); *accord John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (the party "failed to develop any argument on this front, and thus has waived it"); *JustMed, Inc. v. Byce*, 580 F. App'x 566, 567 (9th Cir. 2014) ("Because [Defendant] did not properly raise this argument before the district court . . . the argument is waived."); *United States v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997) (where party fails to "coherently develop[]" an argument on appeal "we deem it to have been abandoned")).

The district court did not abuse its discretion in refusing to consider Lambert's newly presented damages model. *See Morales v. C.I.R.*, __ F. App'x __, 2015 WL 8734114, at *1 (9th Cir. Dec. 15, 2015) ("Indeed, we have held that 'abuse of discretion review precludes reversing the [trial] court for declining to address an issue raised for the first time in a motion for reconsideration.'") (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). This Court should likewise refuse to consider Lambert's arguments based on a restitutionary-disgorgement model.

(b) Even if Lambert had not waived this argument, his restitutionary-disgorgement model fails due to its reliance on waived and unreliable evidence.

Even if Lambert had not waived argument regarding his restitutionary-disgorgement model, it

would fail for the same reasons as his full-refund model. As the district court correctly noted, the object of restitution is "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." ER009 (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148, 131 Cal. Rptr. 2d 29 (Cal. 2003)). Restitutionary disgorgement of profits is available under California's Unfair Competition Law ("UCL"), but the disgorgement *must* be restitutionary in nature. *Korea Supply*, 131 Cal. Rptr. 2d at 40 (California Supreme Court stating that "[w]hile express authority to order restitution was added to the UCL, courts were not given similar authorization to order nonrestitutionary disgorgement"). Moreover, as noted by the district court, "Restitutionary disgorgement is limited to (1) money or property once in the plaintiff's possession and (2) money in which the plaintiff had a vested interest." ER010 (citing *Korea Supply*, 131 Cal. Rptr. 2d at 41-42). To the extent Lambert seeks to disgorge money that was not taken from the plaintiffs, "such monetar[y] relief is nonrestitutionary and unavailable under the UCL." *Id.*

Lambert's restitutionary-disgorgement model fails because he did not provide reliable evidence of an average retail price, which is necessary to ensure that the money being disgorged is restitutionary in nature. Instead, he presented *for the first time* in his motion for reconsideration purported evidence that could be used to calculate an average retail price derived from (1) Cobra's product guides that are distributed to retailers, (2) Lambert's deposition, and (3) Cobra's website from which it sells a negligible amount of product. ER010.

The district court correctly held that this newly presented—but *not* newly discovered—evidence was waived because Lambert failed to present it in his opposition to the decertification order or during oral argument. ER011 n.5 ("Again, this evidence Plaintiff relies on . . . is nowhere to be found in any of his opposition to decertify class. . . . Plaintiff does not claim that this evidence is newly discovered. Therefore, such evidence should have been presented to the Court in those previous opposition papers, not a motion for reconsideration.").

Even if Lambert had not waived this evidence, however, the district court correctly held that it was "unreliable in determining the average retail price." ER011. To start, the product guides are unreliable because "the prices wholesalers suggest to its retailers are not the prices at which retailers sell the product." *Id.* Lambert's reliance on the product guides fails to take into account the retailer's discretion in setting retail prices, "which is why the Court expected Plaintiff to collect data and present an average retail price." ER012. The district court found Lambert's reliance on his deposition testimony to provide an *average* retail price "illogical." *Id.* ("For Plaintiff to ask a juror to determine the average retail price based on one particular value a vendor (Rite-Aid) used in selling Cobra makes no sense."). Finally, Lambert's reliance on Cobra's website is "rife with problems." ER013. To start, the website only provides information about Cobra's direct sales to customers—a negligible amount. *Id.* Second, Lambert "does not seek to disgorge profits from [Cobra's] direct sales to consumers," so the information is irrelevant to his damages theory. *Id.*

Whether or not Lambert agrees with the district court's factual findings regarding this untimely disclosed evidence, he has not shown that such findings were "clearly erroneous." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (holding that this Circuit will reverse a lower court's findings of facts "only if they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record") (internal quotation marks and citation omitted).

In sum, Lambert relies on waived and unreliable evidence to support a waived argument for an alternate damages theory not properly before this Court. His appeal should be denied.

VI. CONCLUSION

This Court should deny Lambert's appeal and uphold the district court's decertification order because Lambert's Rule 23(f) petition was time-barred under the Federal Rules of Civil Procedure and because he failed to show that the district court abused its discretion in decertifying the class.

Dated: February 25, 2016

Respectfully Submitted,

HUESTON HENNIGAN LLP

/s/ John C. Hueston
John C. Hueston

Attorney for Defendant-Appellee
NUTRACEUTICAL CORP.

STATEMENT OF RELATED CASES PURSUANT TO LOCAL APPELLATE RULE 28-2.6

Pursuant to Ninth Circuit Court of Appeals Local Rule 28-2.6, I hereby state that there are no cases known to be pending before this Court that are deemed to be related to this action.

Dated: February 25, 2016

/s/ John C. Hueston
John C. Hueston

Attorney for Defendant-Appellee
NUTRACEUTICAL CORP.

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

JA 128

No. 15-56423 — Filed April 8, 2016

***In the* United States Court of Appeals**
***for the* Ninth Circuit**

TROY LAMBERT,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant
v.
NUTRACEUTICAL CORPORATION,
Defendant-Appellee.

Appeal from an Order of the United States District Court for the Central District of California,
Case No. 2:13-cv-5942-AB-(Ex)

PLAINTIFF-APPELLANT'S REPLY BRIEF

Gregory S. Weston
David Elliot
THE WESTON FIRM
1405 Morena Blvd.,
Suite 201
San Diego, CA 92110
Telephone: (619) 798-2006
Facsimile: (313) 293-7071

Ronald A. Marron
Beatrice Skye Resendes
THE LAW OFFICES OF RONALD A. MARRON, APLC
651 Arroyo Dr.
San Diego, CA 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665

Attorneys for Plaintiff-Appellant Troy Lambert

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

I. INTRODUCTION

The district court's decision on class certification and refusal to recertify the class on Mr. Lambert's motion itself is contrary to longstanding Ninth Circuit practice and is therefore nearly indefensible. Defendant, in fact, made little effort to attempt that task. Instead, Defendant's Answering Brief ("Ans. Br."), which used less than half the word limit, is mostly concerns itself not with the merits of this appeal but with arguing, notwithstanding the decision of the Motions Panel, that the appeal is untimely.

II. THE DISTRICT COURT EXTENDED PLAINTIFF'S TIME TO FILE A MOTION FOR RECONSIDERATION, WHICH TOLLED HIS TIME TO APPEAL

"It has long been accepted that the time period to file an appeal generally runs from the denial of a timely motion for reconsideration, rather than from the date of the initial order. We see no good reason to depart from this 'well-established rule' and the 'traditional and virtually unquestioned practice' of applying it." *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1046 (9th Cir. 2015) (internal citations omitted); *accord*, *Blair v. Equifax Check Servs.*, 181 F.3d 832, 837 (7th Cir. 1999).

Plaintiff informed the district court of his intention to file a motion for reconsideration well before the 14-day time period expired after the court decertified the class. *See* ER14 (at the Status Conference 10 days after the court decertified the class, the court stated "feel

free to file your motion for reconsideration, if that's what you desire.") At the conference, the district court set filing date of March 12, 2015 for Plaintiff's Motion for Reconsideration, and Plaintiff filed on this date. ("Plaintiff's counsel informs the Court of Plaintiff's intention to file a Motion for Re-Consideration. For the reasons stated on the record, the Court defers setting pretrial and trial dates until after the ruling on the Motion. The Motion shall be filed on or before March 12, 2015.") *See* ER131, 103. Given the district court's express willingness to consider a motion to recertify the class, and that it stayed other proceedings until it made a decision, it would have been procedurally inappropriate to file a Rule 23(f) petition, and likewise inappropriate as the practical death knell of Plaintiff's case had yet to toll.

III. THE MOTIONS PANEL WAS CORRECT TO GRANT THE PETITION TO REVIEW THE RECONSIDERATION ORDER UNDER 23(f)

In order to review the reconsideration order, an appellate court will necessarily also consider the order being reconsidered. *See Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (reviewing entire class certification record after appeal from order denying motion for reconsideration).

On top of the Order Granting Defendant's Motion for Certification (hereinafter "Decertification Order"), Plaintiff *specifically appeals* the Order on Motion for Reconsideration (hereinafter "Reconsideration Order"), and the Motions Panel accepted his appeal of this order under Rule 23(f). *See* Order Granting 23(f) Petition, Appeal Doc. 1 ("The court, in its discretion, grants the petition for permission to appeal the district court's . . .

June 24, 2015 order denying the motion for reconsideration of the February 20, 2015 Order." (citing Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam)).

In his Motion for Reconsideration, Plaintiff's single and entire objective was the certification of a class. Rule 23(f) expressly applies to any "order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered." Thus, because Plaintiff filed his Rule 23(f) petition within 14 days of the court entering its Reconsideration Order, and the petition was granted, this appeal is timely.

Further, Nutraceutical is wrong when it states the Reconsideration Order "merely reaffirmed the status quo." Ans. Br. at 11. In fact, the Reconsideration Order amended the previous Decertification Order by setting forth a plan for notice to the class regarding decertification. The ruling establishing this notice plan was previously absent from the Decertification Order. Part of Plaintiff's argument in his Motion for Reconsideration was that the Decertification Order was in error because it did not provide a plan for notice of class decertification. ER128-29. In the Court's Reconsideration Order it noted "Plaintiff is correct that class members must receive notice following class decertification" and ordered "Plaintiff to file a proposed notice with respect to class decertification." ER17-18. Thus, the Reconsideration Order augmented and amended the Decertification Order, in that it set forth a notice plan previously absent, and did not "merely reaffirm the status quo."

Nutraceutical's "merely reaffirmed the status quo" argument is further wrong because Rule 23(f) says nothing about "changing the status quo" as the test of which orders are subject to petitions. Rather, 23(f) governs not "orders that change the status quo" but "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f).

The Ninth Circuit has previously accepted appeals such as this one of class certification decisions after a motion for reconsideration has been filed outside of the time to appeal the original decision. In *Parra v. Bashas', Inc*., 536 F.3d 975 (9th Cir. 2008), the

> district court certified the proposed class as to [one] claim, but denied certification of the proposed class regarding [a separate] claim based upon a finding of lack of commonality within the class. Plaintiffs filed a motion for the district court to reconsider its motion and, in the alternative [redefine the denied class] . . . . Those motions were denied.

Id. at 976. In *Parra*, the district court's ruling on the original motion for class certification occurred on August 31, 2005. The plaintiffs in *Parra* filed a motion for reconsideration on September 15, 2005, fifteen days after the class certification order. In 2005, 23(f) provided ten rather than the current fourteen days to appeal. Either way, no petition was filed and it was fifteen days later the plaintiff sought reconsideration. When reconsideration was denied, this Court "granted Plaintiffs' request to file th[e] appeal pursuant to Fed. R. Civ. P. 23(f)," *Parra*, 536 F.3d at 977, and ultimately "reverse[d] the district court conclud[ing] that it abused its discretion in failing to find commonality in the

Plaintiffs' original class definition." *Id*. at 976. In other words, in a situation identical on all parts to this case, this Court accepted an appeal of a class certification order and motion to reconsider it under Fed. R. Civ. P. 23(f), and reversed the order denying class certification.

Finally, Defendant-Appellant's argument, in addition to running contrary to the actual text of Rule 23(f) and this Court's decision last year in *Briggs*, is illogical and suggests a deliberate waste of party and judicial resources should be required.

Here, the district court stated within the appeal window that it would reconsider its order. Mr. Lambert was fully ready and willing to file his 23(f) petition within the appeal window if the district court said it would not reconsider the order and sounded his case's death knell. The district court ultimately changed its initial decertification order in response to the motion for reconsideration, even while denying certification. Nutraceutical would have had Mr. Lambert, even after the district court stated it would reconsider its order, nonetheless file a petition to appeal. Then, if Lambert had been successful, he would have had to dismiss his petition, or his appeal had the petition been granted, and had he lost reconsideration, file a new or amended petition that incorporated the order denying reconsideration. Either way, Nutraceutical's position, if adopted, calls for the Motions Panel to regularly and needlessly consider 23(f) petitions that will inevitably either be amended or withdrawn. Here, there are only two relevant orders, but in other cases district courts deny certification without prejudice or deny certification pending additional evidence or briefing, often several times. Nutraceutical would have

plaintiffs, after receiving an unfavorable but not final decision on certification, nonetheless file a wave of petition after petition in order to preserve their right to appeal later if a final order denying certification is eventually issued later.

This simply makes no sense and is an illogical waste of court and party resources. Yet Rule 23(f), and Rule 23 generally is an intensely practical rule that has always been interpreted to avoid imposing needless costs on class action litigants. The Supreme Court has recognized that, first, the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's . . . labor." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

Here, the real "death knell" for Mr. Lambert's individually small consumer fraud claim was not when the class was decertified because the district court left open the possibility of recertification on motion to reconsider. The district court both ruled narrowly, stating it was a single issue of evidence not being in the record in response to Nutraceutical's broad motion, and within the appeal window it gave leave to seek reconsideration and set a schedule for doing so.

IV. PLAINTIFF PRESENTED WORKABLE DAMAGES MODELS

"In almost every class action, factual determinations of damages to individual class members

must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution. Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device." *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013) (quoting *Brinker Rest. Corp. v. Sup. Court*, 53 Cal. 4th 1004, 1054 (2012)). Nutraceutical claims the district court correctly decertified the class because Plaintiff failed to present a "workable" damages model. *See* Ans. Br. at 20-24. This is wrong. In fact, Plaintiff presented three separate models, all supported by evidence. Plaintiff first presented expert evidence that the product was worthless, and had a value of $0.00, because it was dangerous, ineffective, and an unlawful, unapproved new drug. *See* ER159-72. As to the amount that the class should be awarded based on their purchases of a worthless product, he presented evidence allowing a restitutionary award to be calculated under three methods, all supported by evidence and permitted by California law: (1) Nutraceutical's revenue from the sale of the product during the Class period, as disclosed in discovery; (2) the sales of product multiplied by the defendant's suggested retail price; and (3) the sales of product multiplied by the jury's estimate of the average retail price.

At the hearing on the Motion for Class Decertification, counsel for Plaintiff affirmed to the court that damages could be calculated by using the revenue from the sale of the product during the Class period that Defendant disclosed in discovery. *See* ER 33 ("And we know how much the defendant received from the sale of the product because they've turned that

information over to us. Thus, we have the damages right there."); *see also* ER37-38; ER64 ("Mr. Weston: It would—well it would be the full refund in the sense all money that the defendant received from the plaintiffs from their purchases . . . . It would be the revenue received by the defendant from the wholesaler."); ER66 ("But restitution [sometimes] involves not getting every penny back the consumer paid but getting the money back that the defendant received . . . And we have those exact figures.") At the same hearing, counsel also referred the district court to the summary judgment briefing which calculated a precise figure of restitution based on disclosed revenue. *See* ER37 ("Mr. Weston: I would refer the Court to our summary judgment motion. In our summary judgment motion, we went in and we requested a specific amount on behalf of the entire class."); *see also* ER201-02 (calculating precise restitution figures and explaining the calculations), ER123-24 (detailed discussion of these calculations), ER112, 119-26 (defending the viability of this model under California law). Plaintiff further provided these calculations in a declaration supporting his Motion for Reconsideration.

Second, in Plaintiff's original Motion for Class Certification, he proposed a damages model based on the unit sales of product multiplied by the manufacturer's suggested retail price ("MSRP") set by the defendant. ER307-08. In the Decertification Order, the district court even recognized Plaintiff's model based on "average suggested retail price," but inconsistently went on to analyze the model as if it were based only on average actual retail price. *See* Op. Br. at 27-28 (emphasis added); *see also id.* at 28 n.2. Plaintiff obtained in discovery all the evidence

necessary to demonstrate the MSRP model, as he had both MSRP and the sales numbers of the product. ER352-353, 357-70. Plaintiff further provided these calculations in a declaration supporting his Motion for Reconsideration. *See* ER353-54.

Finally, Plaintiff also presented evidence to calculate restitution based on the unit sales of product multiplied by a reasonable price estimate, the method the district court wrongly insisted was the only possible measure of restitution. For example, he submitted evidence of retail price data from deposition testimony and from Defendant's direct website sales to consumers. *See* ER115-16, 352-353, 357-70. Further, through the data already available, as well as through sales testimony admissible at trial, Plaintiff could present satisfactory information for a jury to reliably estimate damages. The district court was wrong that Plaintiff only submitted "one suggested retail price" which could not "configure[] an average," concluding that Plaintiff presented a "speculative approach." ER14-15 n.8. In fact, Plaintiff presented evidence of prices from multiple sources, and had the ability to derive more before and at trial, which would enable a jury to configure an average retail price without undue speculation. Accordingly, Plaintiff could present evidence to support all three of his viable damages models.

Thus, the district court's determination that "Plaintiff claims that damages can be calculated based solely on Defendant's sales data but does not explain how to do so without the average retail price," ER27, and Nutraceutical's statement that the "district court decertified the class because Lambert failed to provide

'any evidence to calculate damages' either on a 'classwide or on an individual basis,'" are both simply wrong. Ans. Br. at 22 (quoting ER028). Nutraceutical's nonsensical argument that while "the court recognized that 'calculating damages need not be exact or 'mathematically precise,'" it could not consent to Lambert's "speculative approach," holds no weight. Ans. Br. at 20 (quoting ER014 n.8)

Additionally, despite arguing throughout their brief that the district court decertified the class because Lambert failed to present a "workable" damages model, Nutraceutical does not even address Lambert's contention that California law provides a court a "very broad" "full range of powers to accomplish complete justice." Op. Br. at 24-26. Similarly, Nutraceutical did not address Lambert's argument that the district court's refusal to allow Plaintiff to calculate damages based on wholesale revenue data was contrary to California law. *See* Op. Br. at 31-34. Nutraceutical, thus, failed to rebut that the district court had broad discretion to find any or all of Lambert's proposed damages models viable and erred in not allowing Lambert to use the wholesale price evidence. On top of this, Nutraceutical also failed to address Lambert's argument that additional evidence of retail prices for Cobra Sexual Energy could be adduced at trial. *See* Op. Br. at 30. Nutraceutical waived all arguments against these. "[A]n appellee waives any argument it fails to raise in its answering brief." *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) (citation omitted).

V. AVERAGE RETAIL PRICE WAS NOT THE ONLY WAY TO CALCULATE DAMAGES

Nutraceutical is incorrect when it argues "Lambert's failure to provide an average retail price was a failure to produce the evidence necessary to demonstrate class-wide damages." Ans. Br. at 20. In fact, Plaintiff has retail price data from deposition testimony and Nutraceutical's direct website sales, both sufficient to calculate damages. Plaintiff further has evidence from the MSRP of Cobra and can provide additional evidence through testimony at trial. All of this evidence is sufficient to prevent "speculation" in calculating damages. The district court was incorrect in ruling that "there is simply no evidence to calculate damages under Plaintiff's damages model." ER28.

Nutraceutical's citation to *Werdebaugh v. Blue Diamond Growers*, 2015 U.S. Dist. LEXIS 10646 (N.D. Cal. Jan. 29, 2015) in support of its argument that Plaintiff failed to present evidence to make his damages model workable is completely inapposite. *Werdebaugh* involved health claims on an almond milk product. *See Werdebaugh v. Blue Diamond Growers*, 2014 U.S. Dist. LEXIS 173789, at *2-3 (N.D. Cal. Dec. 15, 2014). Much like *Caldera* and *Astiana*, discussed *infra* and in great detail Lambert's opening brief, the damages calculations in *Werdebaugh* required finding the "true value" of the product absent the alleged conduct, then the price premium of the product at issue over the "true value." *See* Op. Br. at 17-20. Plaintiffs in *Werdebaugh* had a damages model requiring more complex evidence as to the price premium. Thus, the *Werdebaugh* court ruled that the plaintiff "failed to put forth a damages model that measured the damages

attributable to Defendant's wrongful conduct." 2015 U.S. Dist. LEXIS 10646, at *10. Here, Plaintiff's full-refund model, which the court found "is consistent with [Plaintiff's] theories of liability," ER22, requires less evidence to calculate damages and Plaintiff provided three viable methods, with supporting evidence, to make these calculations. *See* Op. Br. at 7-8; *see also supra* Section IV.

While it cited a new and similar case, Nutraceutical did not even try to address Lambert's detailed discussion of why the district court erred by relying on inapplicable cases like *Caldera v. J.M. Smucker Co*., 2014 U.S. Dist. LEXIS 53912 (C.D. Cal. Apr. 15, 2014) and *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014), as well as its peculiar decision to rely on the inapplicable, aged, and out-of-circuit *Freeland v. AT&T Corp*., 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006), involving federal antitrust law, not California consumer fraud statutes, despite plentiful recent, relevant, in-circuit authority in cases arising under California consumer protection statutes. *See* Op. Br. 17-20. And again, while these cases, all involving false claims that alleged allowed food with some real value had been sold for more than that value, are not relevant to a case involving a dangerous, ineffective, illegal, and wholly valueless product, they are also all decided contrary to California restitution law and this Court's decision in *FTC v. Figgie*, 994 F.2d 595 (1993), as discussed in the opening brief.

VI. PLAINTIFF DID NOT WAIVE ANY ARGUMENT REGARDING ANY OF HIS MODELS

Nutraceutical claims Plaintiff waived his argument related to his restitutionary-disgorgement model "by failing to raise it both in his opposition to Nutraceutical's decertification motion and during oral argument." Ans. Br. at 24. More than "allud[ing] that this restitutionary-disgorgement model was mentioned in his motion for summary judgment," *id*., Lambert's counsel pointed the court directly to it during oral argument. *See* ER37 ("Mr. Weston: I would refer the Court to our summary judgment motion. In our summary judgment motion, we went in and requested a specific amount on behalf of the entire class.") He also described in detail these calculations. *See* ER37-38.

Thus, the restitutionary-disgorgement model was not "newfound," but rather already part of the record and described in great detail in Mr. Lambert's pending motion for summary judgment, which he referred to repeatedly in his motion papers and at oral argument. Both Nutraceutical and the district court are wrong when they claim Plaintiff "fail[ed] to explicitly raise this newly proposed alternative damages model argument[] in his opposition papers or oral argument." Ans. Br. at 25 (quoting ER8). In fact, Lambert explained how the summary judgment motion, then fully submitted before the district court, calculated a precise dollar amount of damages for the certified class and cited many supporting California authorities for that calculation. ER119-26.

VII. CALCULATION OF RESTITUTION AND DAMAGES DOES NOT REQUIRE AVERAGE RETAIL PRICE

Nutraceutical argues that "Lambert's restitutionary-disgorgement model fails because he did not provide reliable evidence of an average retail price, which is necessary to ensure that the money being disgorged is restitutionary in nature." Ans. Br. at 27. The district court likewise ruled that "Plaintiff needs both pieces of evidence using this model—Defendant's sales to its retailers and the average retail price used in selling Cobra—to bridge the gap between Defendant's gains and Plaintiff's ownership interest within those gains." ER13 n.7.

This argument is profoundly illogical. Both Nutraceutical and the district court concede that the damages model would be acceptable if Plaintiff had presented evidence of the actual retail prices paid by class members. If Plaintiff and class members have "an ownership interest" in the full retail price they paid for the product, they must also have an ownership interest in the lessor amount represented by the wholesale fraction of the retail price, and there is no dispute that Nutraceutical produced its wholesale revenue from Cobra Sexual Energy, which Plaintiff presented to the district court. The district court's holding that the only proper measure of damages for a worthless product sold at stores is total retail sales, simply has no support under California law, and cannot be used to decertify a class found to have met all of the requirements of Rule 23.

VIII. COBRA IS A DANGEROUS, ILLEGAL PRODUCT

In considering Plaintiff-Appellant's appeal, the Court should not be blind to the underlying facts of the case. The FDA promulgated 21 C.F.R. § 310.528 (the "Aphrodisiac Drug Rule") which states "[a]ny product that bears labeling claims that it will arouse or increase sexual desire, or that it will improve sexual performance, is an aphrodisiac drug product" and may not be offered for sale without first undergoing clinical testing and FDA approval. 21 C.F.R. § 310.528(a). The FDA provides several examples of prohibited aphrodisiac claims, including: "arouses or increases sexual desire and improves sexual performance"; "helps restore sexual vigor, potency, and performance"; "improves performance, staying power, and sexual potency"; and "builds virility and sexual potency." *Id.* These are all claims that Defendant makes for "Cobra Sexual Energy" using nearly identical language, as shown in the following chart:

Aphrodisiac Drug Rule (21 C.F.R. § 310.528)	Claims Made on the Label of Cobra
labeling claims that it will arouse or increase sexual desire, ***or that it will improve sexual performance***	• Cobra Sexual Energy • Powerful Men's Formula • **Perform Your Best with Animal Magnetism**

Korean ginseng . . . **yohimbine** . . . have been present as ingredients in such drug products . . . There is a lack of adequate data to establish general recognition of the safety and effectiveness of any of these ingredients, or any other ingredient, for OTC use as an aphrodisiac.	• **Yohimbe** & Horny Goat Weed • **Korean Ginseng**- Most famous of all performance enhancing herbs. Ginseng is prized in the Orient. • **Yohimbe** Bark Extract-Legendary herb from Africa that contains **Yohimbine**.
Labeling claims for **aphrodisiacs** for OTC use are either false, misleading, or **unsupported by scientific data**.	• For centuries, men have used various herbs, roots and '**aphrodisiac'** plants to enhance their sexuality and improve their performance • **Scientifically blending** select, high-quality herbs into proprietary formulas is our art.
The following claims are examples of some that have been made for aphrodisiac drug products for OTC use: … "**builds virility and sexual potency.**"	• **Take Virility to the Max!** • Muira Puama Stimulating Brazilian herb known as "**potency wood**".

any OTC drug product containing ingredients for use as an aphrodisiac **cannot be generally recognized as safe and effective**.	Saw Palmetto North American herb known for its reputed ability to **help promote prostate function**.

Nutraceutical believes it has cleverly found a path around the FDA's Aphrodisiac Drug Rule by calling Cobra a "supplement" and using slight variations on the label claims the FDA specifically found false and unlawful. However, the true identity of the product is clear. Further, Nutraceutical is endangering the public with its bogus product. The National Institute of Health's National Center for Complementary and Integrative Health states it "is not known whether yohimbe is effective for any health condition" and cautions yohimbe "can be dangerous if taken in large doses or for long periods of time."[1] The NIH also advises people not to take yohimbe if they have kidney problems or psychiatric conditions or use MAO inhibitors.[2] *Id*. The NIH further warns yohimbe "should be used with caution when taken with medicines for high blood pressure, tricyclic antidepressants, or phenothiazines." *Id*. A surveillance study of dietary supplement-related poison control center calls found that yohimbe products accounted for almost a fifth of all exposures to dietary supplements that led to

[1] https://nccih.nih.gov/health/yohimbe (last visited April 4, 2016)

[2] MAO inhibitors, which can have a dangerous interaction with the yohimbe in Cobra, are a widely prescribed class of drugs that include several anti-depressants.

negative symptoms, despite being a very small percentage of dietary supplement sales.[3] [4]

CONCLUSION

For the foregoing reasons, orders of the district court decertifying the class and denying recertification should, respectfully, be vacated.

Dated: January 27, 2016

Respectfully Submitted,

/s/ Gregory S. Weston

GREGORY S. WESTON (239944)
THE WESTON FIRM
1405 Morena Blvd., Suite 201
San Diego, California 92110
Telephone: (619) 798-2006
Facsimile: (480) 247-4553

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[3] C. Haller et al., *Dietary Supplement Adverse Events: Report of a One-Year Poison Center Surveillance Project*, 4 J. MED. TOXICOLOGY 84 (June 2008) (available at http://tinyurl.com/lambert101)

[4] In addition to consumer danger, use of yohimbe bark products also is a danger to our natural environment. *See* Alves, Biodiversity, traditional medicine and public health: where do they meet?, J. ETHNOBIOLOGY AND ETHNOMEDICINE, 2007, 3:14. ("Wild populations of . . . yohimbe (Pausinystalia yohimbe) are currently harvested in unsustainable and destructive ways in order to feed international markets.")

RONALD A. MARRON (175650)
THE LAW OFFICES OF
RONALD A. MARRON, APLC
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9066
Facsimile: (619) 564-6665

Attorneys for Plaintiff-
Appellant Troy Lambert

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

No. 15-56423 — Filed September 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY LAMBERT,
Plaintiff-Appellant,

v.

NUTRACEUTICAL CORP.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California,
No. 2:13-cv-5942-AB-(Ex)

PETITION FOR REHEARING EN BANC

HUESTON HENNIGAN LLP
John C. Hueston (CA Bar No. 164921)
Steven N. Feldman (CA Bar No. 281405)
Joe A. Reiter (SBN 294976)
521 West 6th Street, Suite 400
Los Angeles, CA 90039
213.788.4340
Attorneys for Defendant-Appellee

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

INTRODUCTION AND RULE 35 STATEMENT

This case presents a paradigm example of where en banc review is necessary. In a published opinion reversing the district court's decertification of a class action, the panel addressed an issue of first impression in the Ninth Circuit—whether equitable tolling excuses a party's failure to file its interlocutory appeal within the fourteen-day window set forth in Federal Rule of Civil Procedure 23(f)—and issued a legally erroneous and misguided decision that conflicts with all seven U.S. Courts of Appeal to have addressed the issue.

As every other U.S. Court of Appeal to consider this issue has correctly held, the sole way one can toll Rule 23(f)'s deadline is by filing a motion for reconsideration within fourteen days of the district court's order. *See, e.g.*, *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [fourteen] days if it is going to toll the [] period within which to seek permission to appeal."); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (Rule 23(f)'s deadline is "strict and mandatory.")

The panel here held the opposite, ruling that "equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline." (Op. at 21.) Applying this standard, the panel excused Plaintiff-Appellant Lambert's failure to file his motion for reconsideration until *twenty* days after the district court decertified the class. In doing so, the panel admitted "other circuits would likely not toll

the Rule 23(f) deadline in Lambert's case," and made clear the Ninth Circuit would "part ways with them." (Op. at 16.)

The panel's holding on the merits was also legally erroneous; as described below, it directly violates the Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), and California's prohibition against non-restitutionary damages in this context.

En banc review is warranted for several reasons:

First, the decision violates Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal. *See Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (rejecting Rule 23(f) petition because FRAP 26(b)(1) "clearly states that this Court cannot extend the time for filing a petition for permission to appeal."). The panel's opinion does not even discuss FRAP 26(b)(1).

Second, the decision contravenes the purpose behind Rule 23(f)'s deadline, which was "designed to reduce the risk that attempted appeals will disrupt continuing proceedings," and improperly places the Ninth Circuit at odds with every other circuit to consider this issue. Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment); *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290 (11th Cir. 2007) ("[T]he [] deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."); *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) (Rule 23(f)'s deadline is "deliberately small.").

Third, the panel's broad and vague holding that "equitable circumstances," such as filing "a letter" or making a "verbal representation conveying an intent to seek reconsideration," will toll Rule 23(f)'s deadline, creates an unworkable standard that will exacerbate the delay and disruption caused by interlocutory appeals and increase this Court's workload. Indeed, the decision requires that this Court, going forward, scour district court records to determine whether petitioners ever sent a letter, made verbal representations, or otherwise engaged in conduct that warrants equitable tolling. It also disincentivizes litigants from diligently filing interlocutory appeals and increases the number of petitions filed in this Court and the disruption of district court proceedings. Notably, the panel's reasoning is explicitly not limited to Rule 23(f) and could spread to other deadlines and contexts. (*See* Op. at 11.)

Fourth, the panel's holding on the merits, which improperly allows the class to obtain damages not permitted by California law, violates the Supreme Court's holding in *Comcast* that, to obtain class certification, plaintiffs must provide a damages model that "measure[s] ***only*** those damages attributable to th[eir] theory" of liability. 569 U.S. at 35 (emphasis added).

For these reasons, the decision raises "questions of exceptional importance" and should be reheard en banc to ensure uniformity with the other circuits and Supreme Court precedent, to ensure this Court's compliance with the Federal Rules of Appellate Procedure, and to prevent the negative consequences it

will have on class-action proceedings and other interlocutory appeals.

ARGUMENT

I. THE PANEL'S DECISION TO EXCUSE LATE RULE 23(f) PETITIONS WAS LEGALLY ERRONEOUS AND CREATED A CIRCUIT SPLIT

Rule 23(f) governs interlocutory appeals of "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f). This Court has recognized that Rule 23(f) petitions, like other interlocutory appeals, are "generally disfavored because they are disruptive, time-consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

Thus, Rule 23(f) establishes a "strict and mandatory" deadline. *Gutierrez*, 523 F.3d at 192. It states "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule *if* a petition for permission to appeal *is filed* with the circuit clerk *within 14 days* after the order is entered."[1] Fed. R. Civ. P. 23(f) (emphasis added); *see also Beck v. Boeing Co.*, 320 F.3d 1021, 1022 (9th Cir. 2003) ("We may exercise our discretion to review a district court's Rule 23 class action certification order ***only if*** an 'application is made to [us] within [fourteen] days after entry of the [district court's] order.'") (quoting Fed. R. Civ. P. 23(f) (emphasis added)).

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[1] Rule 23(f) was amended in 2009 to provide a fourteen-day deadline including weekends and holidays. The original rule imposed a ten-day deadline excluding weekends and holidays.

Here, the district court decertified the class on February 20, 2015. Lambert's deadline to file a Rule 23(f) petition was March 6. Lambert missed the deadline. He never even informed the district court of his intent to file a Rule 23(f) petition. Instead, at a March 2 status conference, Lambert requested permission to file a "renewed motion for class certification." (SER 11–12). The court denied that request, but acknowledged Lambert could file a motion for reconsideration and set a March 12 deadline. (*Id.* at 16–17). Lambert filed his motion for reconsideration, which the court denied on June 24, finding that Lambert failed to produce evidence necessary to calculate restitutionary damages (the only damages allowed by California law) and "Plaintiff's continued attempt to manipulate his evidence to satisfy a restitutionary measurement is obvious." (ER16:12–14.) Lambert subsequently filed his Rule 23(f) petition on July 8—more than four months late.

Despite this, the panel concluded that Lambert's petition was timely. Contrary to every circuit to consider the issue, the panel held that "equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline." (Op. at 21.) The panel held that Lambert tolled the Rule 23(f) deadline when he "conveyed his intention" to file a motion for reconsideration at the March 2 status conference. (*Id.* at 15–16.)

A. The Panel Violated FRAP 26(b)(1)'s Prohibition on Extensions to File a Petition for Permission to Appeal

By applying equitable tolling to extend the deadline to file a Rule 23(f) petition, the panel violated Federal

Rule of Appellate Procedure 26(b)(1), which plainly states that this Court "may not extend the time to file . . . a petition for permission to appeal."

Numerous U.S. Courts of Appeal have held that FRAP 26(b)(1) prohibits extending the time to file a Rule 23(f) petition. *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal."); *Eastman*, 736 F.3d at 677 (same); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (per curiam). Indeed, this Court has applied FRAP 26(b) to dismiss untimely appeals. *See, e.g.*, *U.S. ex rel. Haight v. Catholic Healthcare W.*, 602 F.3d 949, 955 (9th Cir. 2010) ("Rule 26 does not allow us to extend the time for Plaintiffs to file their notice of appeal.") Yet the panel here did not even address FRAP 26(b)(1).

B. The Panel Created a Conflict with Seven U.S. Courts of Appeal

The panel created a conflict with all seven U.S. Courts of Appeal (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh) that have addressed this issue. (Op. at 16 (admitting "other circuits would likely not toll the Rule 23(f) deadline in Lambert's case").) While those courts held that a motion for reconsideration filed *within* Rule 23(f)'s fourteen-day deadline may toll the time to file a Rule 23(f) petition, they uniformly rejected the panel's conclusion that other equitable tolling is available. *See McNamara*, 410 F.3d at 281 ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [fourteen] days if it is going to toll" Rule 23(f)'s deadline.); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is

filed more than [fourteen] days after the order . . . appeal must wait until the final judgment."); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) ("An out-of-time motion for reconsideration . . . cannot restart the clock for appellate review under Rule 23(f)."); *Fleischman*, 639 F.3d at 31 (a contrary holding "would eviscerate [Rule 23's] deliberate and tight restriction on interlocutory appeals"); *In re DC Water and Sewer Auth.*, 561 F.3d 494, 185–86 (D.C. Cir. 2009) (rejecting late Rule 23(f) petition); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1192 (10th Cir. 2006) (same).

In fact, other circuits rejected the panel's reasoning in ***identical circumstances***—*i.e.* where a litigant files a motion for reconsideration pursuant to the district court's order but after Rule 23(f)'s deadline. In *Gutierrez*, the Third Circuit rejected an untimely Rule 23(f) petition even though the plaintiffs requested an extension to file a motion for reconsideration within ten days of the order denying certification, the district court granted the request, and plaintiffs filed a Rule 23(f) petition within ten days of the order denying their motion for reconsideration. 523 F.3d at 190–91. The court held "it is the [fourteen]-day period in Rule 23(f), and not any other schedule or time period, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period." *Id.* at 194; *see also id.* at 198 ("Petitioners cannot use the District Court's approval of the extension of time to save their untimely petition.").

In *Jenkins*, the Eleventh Circuit held that a Rule 23(f) petition was untimely where the plaintiffs missed the deadline on the eve of Thanksgiving Day, even though the petition was only two days late, the

plaintiffs had instructed a courier to file the petition before the deadline, and the district court vacated and reentered its order to restart the deadline. 491 F.3d at 1289–92. The court held that the "single opportunity for seeking interlocutory review of the denial of class certification expired on November 22, 2006, and . . . the district court was without the authority to circumvent the [] deadline." *Id.* at 1292; *see also Delta Airlines*, 383 F.3d at 1145 (rejecting Rule 23(f) petition filed only two days late where counsel had mistakenly relied on the grace period in Rule 6(e) and FRAP 26(c) and the district court had granted an extension).

In an attempt to support its departure from other circuits, the panel cited *McNamara*, 410 F.3d at 279, and *Gary*, 188 F.3d at 893, for the unremarkable proposition that a district court may treat a filing as a motion for reconsideration, even if it is not formally designated as such. (Op. at 14–15.) Neither case, however, supports the panel's conclusion that Lambert tolled the Rule 23(f) deadline by stating during a status conference that he intended to file a motion for reconsideration. Rather, both cases squarely held that only a motion for reconsideration filed within fourteen days of the district court's order can toll the Rule 23(f) deadline. *McNamara*, 410 F.3d at 281; *Gary*, 188 F.3d at 892.

When the Seventh Circuit held in *Gary* that it does not "matter [] what caption the litigant places on the motion to reconsider," the court obviously meant that, after a district court certifies a class, it does not matter whether the defendant files a motion for reconsideration or motion to decertify. In either scenario, the motion must be filed within fourteen days

to toll the Rule 23(f) deadline. *Gary*, 188 F.3d at 892-93. Similarly, while the Fifth Circuit held in *McNamara* that the district court appropriately treated a "Trial and Case Management Plan" ("TCMP") as a motion for reconsideration, the TCMP was not even remotely similar to Lambert's perfunctory, *oral* representation. Rather, the TCMP was a 36-page filing that included extensive argument on class certification and was formally opposed in writing. *See McNamara v. Bre-X Minerals, Ltd.,* No. 5:97-CV-159 (E.D. Tex. 2003), Trial and Case Management Plan, ECF No. 896.

Thus, neither *Gary* nor *McNamara* support the panel's decision. All seven circuits discussed above would have rejected Lambert's petition.

Moreover, the Supreme Court decided in an analogous context that a district court's scheduling order cannot toll the deadline to file a notice of appeal. In 2016, the Court resolved a circuit split by amending FRAP 4(a)(4) to clarify that the time to file a notice of appeal may be tolled by the filing of certain post-judgment motions—but only if they are timely filed pursuant to deadlines in the Federal Rules of Civil Procedure. That rule "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules." Fed. R. App. P. 4 advisory committee's note (2016 Amendment). This suggests that the Court would reject the panel's reliance on the district court's scheduling order.

C. The Panel's Reasons for Creating a Circuit Split are Unfounded

The panel provided three justifications for placing the Ninth Circuit at odds with its sister circuits. None have any support in law, fact, or logic.

First, the panel claimed that "[l]itigants have no reason to know that their deadline for filing a motion for reconsideration is effectively fourteen days, rather than whatever the district court has ordered." (Op. at 17.) That is incorrect. Rule 23(f), which all litigants are on notice of, clearly requires a petition to be filed "within 14 days after the order is entered." Fed. R. Civ. P. 23(f).

While Rule 23(f) does not state whether a motion for reconsideration affects the deadline, there is ample case law from this Court and other circuits (as noted above) holding that a motion for reconsideration may toll an appeal ***provided*** it is filed within Rule 23(f)'s fourteen-day window. Indeed, this Court expressly adopted that rule in *Briggs v. Merck Sharp & Dohme* when it held that the deadline to appeal an order remanding a class action "runs from . . . the date of an order granting or denying reconsideration, *provided* the motion for reconsideration was *timely* filed." 796 F.3d 1038, 1046 (9th Cir. 2015) (emphasis added). Importantly, *Briggs* noted that its holding was "consistent with the rule applied in other circuits," and cited appellate cases from the Rule 23(f) context for the proposition that a "timely" motion for reconsideration is one filed *within fourteen days* of an order granting or denying class-action certification. *Id.* at 1047.

It is also well-established that ignorance of the law does not constitute grounds for equitable tolling. *Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) ("Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the doctrine of equitable tolling."). Rather, equitable tolling is only available if a litigant pursued his rights "diligently" and "some extraordinary circumstance stood in [his] way." *Rudin v. Myles*, 781 F.3d 1043, 1054 (9th Cir. 2015). There is no reason to stray from that rule in this case.[2] This Court should put the burden on litigants to apprise themselves of the relevant deadlines and diligently file a motion for reconsideration within fourteen days to prevent further disruption of district court proceedings.

Second, the panel based its holding on the false premise that Rule 23(f) petitions are not generally disruptive and slow. (Op. at 18.) The Supreme Court, however, found the opposite when it promulgated Rule 23(f), which is why, as the Advisory Committee notes explain, the Court adopted a narrow window for filing a petition. Fed. R. Civ. Proc. 23(f) advisory committee's note (1998 Amendment) (the deadline "is designed to reduce the risk that attempted appeals will disrupt continuing proceedings"); *see also Gary*, 188 F.3d at 893 (Rule 23(f)'s deadline is "deliberately small.").

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[2] This is especially true because: (i) there is no evidence that Lambert even considered the Rule 23(f) deadline before filing his motion for reconsideration; and (ii) the district court did not prevent Lambert from filing a timely Rule 23(f) petition or motion for reconsideration.

Critically, this Court previously reached the same conclusion. *Chamberlan*, 402 F.3d at 959 ("Although Rule 23(f) expands opportunities to appeal certification decisions, the drafters intended interlocutory appeal to be the exception rather than the rule" because they are "disruptive, time-consuming, and expensive."). The panel cannot rely on its subjective views to reject Rule 23(f)'s purpose and the Supreme Court's intent in promulgating it.

D. The Panel Adopted an Unworkable Standard That Will Waste Ninth Circuit Resources, Delay Cases, and Create Confusion

The panel's holding that "equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline," such as "a letter or verbal representation conveying an intent to seek reconsideration," is a vague and impractical standard that will exacerbate the problems with interlocutory appeals. (Op. at 21.) It will "add to the heavy workload of the appellate courts, require consideration of issues that may become moot, [] undermine the district court's ability to manage the class action," and create substantial delay and confusion. *See Chamberlan*, 402 F.3d at 959.

Under its decision, litigants have no incentive to diligently pursue motions for reconsideration or Rule 23(f) petitions within fourteen days of a district court's order. Instead, litigants can preserve their right to file Rule 23(f) petitions by simply writing a letter or orally informing the district court that they *intend* to file a motion for reconsideration. District courts will undoubtedly see an influx of such communications and,

at the least, this will add weeks or months to the already significant delays associated with Rule 23(f) petitions.

The decision will also lead to an increase in the number petitions that are filed in, and granted by, this Court. A screening panel can no longer rely on the Rule 23(f) deadline to deny petitions. Rather, this Court will need to scour the district court record, including transcripts, to determine whether the petitioner engaged in any conduct that would entitle him to equitable tolling. This type of review, and the resulting increase in Rule 23(f) petitions that are granted, will add even more work to this Court's heavy docket.

It will also create even more uncertainty in the law. As this Court is aware, equitable tolling issues are fact-dependent. This Court will be confronted with situations where it is debating whether a verbal representation at a status conference, a letter, or a call to the clerk's office was sufficient to toll the Rule 23(f) deadline. Courts should not "adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple." *Carpenter*, 456 F.3d at 1191.

Likewise, the panel's reliance on the district court's briefing schedule will require this Court to consider whether a petitioner has complied with a district court's schedule. This defeats the very purpose of having a uniform federal deadline. For example, local rules governing motions for reconsideration vary across district courts. The Central District of California has no deadline, while the Southern District of California requires motions for reconsideration to be filed within

28 days. C.D. Cal. L.R. 7–18; S.D. Cal. CivLR 7.1(i); *see also* N.D. Cal. Civil L.R. 7–9 (requiring leave of court); D. Ariz. LRCiv 7.2(g) (fourteen-day deadline). This Court now must take the local rules (and their differences) into account.

For similar reasons, the standard will inject uncertainty into, and prolong, district court proceedings. Although a district court need not enter a stay when a Rule 23(f) petition is pending, very few district courts will continue to litigate a case and potentially waste judicial resources while an appeal is pending. In this case, district court proceedings were stayed for over *two years*.

Finally, the panel's reasoning is not limited to Rule 23(f). The panel appears to believe that broad equitable tolling applies to any non-jurisdictional deadline. (*See* Op. at 11 ("Because the Rule 23(f) deadline is not jurisdictional, equitable exceptions, such as tolling, may apply.").) If so, the delay, confusion, and waste of judicial resources caused by the panel's decision may well spread to other areas.

II. THE PANEL'S DECISION ON THE MERITS IS CONTRARY TO SUPREME COURT PRECEDENT AND CONTROLLING CALIFORNIA LAW

In *Comcast*, the Supreme Court held that class certification is not appropriate unless plaintiffs offer a damages model that "measure[s] ***only*** those damages attributable to th[eir] theory" of liability. 569 U.S. at 35 (emphasis added). There is no dispute that the only damages attributable to Lambert's liability theory is a full refund of money that class members actually paid.

Indeed, under California law, non-restitutionary disgorgement—*i.e.* recovery of a defendant's gain, as opposed to plaintiff's loss—is strictly prohibited. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1147-49 (2003). That is, plaintiffs are limited to seeking damages they have an "ownership interest" in, and nothing more. *Id.* at 1147. As the district court held, to determine the plaintiffs' ownership interest, Lambert was required to provide evidence of the product's average retail price. (ER 14.)

Applying *Comcast* and *Korea Supply*, the district court correctly held that, with discovery closed, Lambert had failed to produce a damages model that satisfied *Comcast* because he had no evidence of what class members actually paid, *i.e.* the average retail price.[3] (ER 25-29.) While Lambert argued that he could use *suggested* retail price, the district court correctly recognized that this method would result in non-restitutionary damages because "the prices wholesalers suggest to its retailers are ***not*** the prices at which retailers sell the product." (ER 11) (emphasis added); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liability Litig.*, 2016 WL 6248426, at *18 n.5 (N.D. Cal. Oct. 25, 2016) (describing suggested retail price as "an unreliable measure of purchase price"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 513 F. Supp. 1100,

[3] This requirement, which was made clear to Lambert early in the litigation, was hardly insurmountable. Lambert could have easily obtained this data through various methods, including subpoenaing sales data from retail stores, consumer surveys, and expert witnesses. Lambert should not be rescued from his lack of diligence by dismantling Supreme Court precedent.

1301 (E.D. Pa. 1981) (concluding "there was no relationship between [suggested retail price] and the actual selling price").

Critically, the panel's decision ***did not even discuss*** California's limitation on non-restitutionary damages, which was the primary basis for the district court's decision. Nor did the panel explain (nor could it) how suggested retail price reflects plaintiffs' ownership interest. (Op. at 25.)[4] Instead, the panel mischaracterized the district court's decision and created a straw man by focusing solely on whether "uncertain damages calculations alone can[] defeat certification." (Op. at 22-23.) Yet the district court repeatedly made clear that it was *not* holding that Lambert needed to provide mathematically precise damages. (ER 24 ("For a damages model such as this, '[c]alculations need not be exact.'"); ER 26 ("Although the average retail price does not have to be exact, it is nevertheless critical at this stage of the litigation.").) The district court simply held that, under *Comcast*, Lambert was required to provide a damages model that "measure[s] ***only*** those damages attributable to [his] theory" of liability. 569 U.S. at 35 (emphasis added).

In short, the panel failed to engage in this required analysis and ignored controlling precedent. The consequences of the panel's decision will be significant. Under it, class plaintiffs have no obligation to produce a workable damages model that only measures those damages attributable to their theory of liability—*i.e.*

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[4] Relatedly, the panel failed to explain how the district court could have abused its discretion by making a *factual* determination that suggested retail price did not reflect plaintiffs' ownership interest.

district courts are required to essentially ignore *Comcast*. Put another way, class plaintiffs need not do anything other than offer a class-wide measure of damages—the very same low standard for certification that *Comcast* expressly rejected. 569 U.S. at 35–36 ("Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.") (emphasis in original).

CONCLUSION

For these reasons, rehearing en banc is necessary and appropriate.

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HUESTON HENNIGAN LLP

By: /s/ John Hueston
John C. Hueston
Attorneys for Defendant

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]