

RECORD NO. 14-1724

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE: GNC CORPORATION; TRIFLEX PRODUCTS MARKETING AND
SALES PRACTICES LITIGATION (NO. II),

YVONNE BROWN; SHAWN HOWARD, On Behalf of Themselves and All
Others Similarly Situated; MICHAEL LERMA, On Behalf of Themselves and All
Others Similarly Situated; JEREMY GAATZ, On Behalf of Themselves and All
Others Similarly Situated; ROBERT TOBACK; ROBERT CALVERT;
THOMAS FLOWERS; JOHN J. GROSS; JUSTIN M. GEORGE; LOUIS
LASTRES, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

GNC CORPORATION, a Delaware Corporation; GNC HOLDINGS, INC.; RITE
AID CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND AT BALTIMORE

**PLAINTIFFS'-APPELLANTS' PETITION FOR REHEARING AND FOR
REHEARING *EN BANC*, AND IN THE ALTERNATIVE, FOR
MODIFICATION OF OPINION AND JUDGMENT**

Robert J. Berg
DENLEA & CARTON LLP
2 Westchester Park Drive, Suite 410
White Plains, New York 10604
(914) 920-7400

Counsel for Appellants

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INTRODUCTION

Plaintiffs-Appellants hereby respectfully petition the Court for rehearing and for rehearing *en banc*, or in the alternative, for modification of the opinion and judgment because, in counsel's judgment, (a) the panel opinion in this case directly conflicts with prior opinions of this Court and of several other circuit courts of appeals, and the conflict was not addressed in the opinion, and (b) the proceeding involves one or more questions of exceptional importance. Fed. R. App. P. 35 and 40; Loc. R. 40(b)(iii) and (iv).

I. REASONS FOR REHEARING

The issue before the panel was whether Plaintiffs' Consolidated Amended Complaint ("CAC") meets the pleading standards set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), where Plaintiffs failed to allege that *all reasonable experts* would agree that the representations at issue are false. On appeal, the panel looked to federal court rulings under the federal Lanham Trademark Act 15 U.S.C. §1051, *et seq.*, as "instructive in construing the state laws at issue here" – to wit, whether a representation is false under the state consumer protection statutes of California, Florida, Illinois, New York, New Jersey, and Pennsylvania, and under Ohio's UCC for breach of warranty. JA48-70. The panel found that if Plaintiffs concede at the pleading stage "that some reasonable and duly qualified scientific experts" would

agree that the representation is true then plaintiffs cannot allege that the representation is false.

Plaintiffs seek rehearing and rehearing en banc and/or modification on three separate grounds. First, Plaintiffs seek rehearing on the panel's holding that a plaintiff cannot allege a state law consumer protection statute violation based on a false representation if the plaintiff does not allege that all reasonable and duly qualified experts would agree that the representation is false. This holding conflicts with a prior opinion of this Court, *C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 433 (4th Cir. 1997)), and with the opinions of other circuits, which the Court did not address, and this holding deals with an issue of exceptional importance – that is, the federal court standard for pleading state law-based false advertising claims.

Whether an expert is duly qualified and his or her opinion is reasonable merely goes to the admissibility of the opinion under the *Daubert* standard and does not address the ultimate question of whether that evidence proves or disproves the claim at issue. A battle of the experts can occur on whether a representation is false, even when all the experts are duly qualified, yet the panel ruled otherwise, contrary to the Fourth Circuit's holding in *C.B. Fleet*.

Second, rehearing (or modification) also is required because of the Court's misplaced reliance upon federal Lanham Act case law in interpreting state consumer protection statutes. The panel's reliance on the Lanham Act conflicts

with the express text of some of the state consumer protection statutes at issue and relevant state court opinions, including opinions from those states' highest courts. These statutes and decisions hold that case law and agency interpretations of the Federal Trade Commission Act ("FTC Act"), not the Lanham Act, are relevant in construing unanswered issues under the state consumer protection statutes.

Finally, the panel found the CAC to be defective because it fails to allege that all of the ingredients contained in the products are incapable of providing the represented benefits, and this "defect" provides an alternate ground for affirming the district court. The panel's alternative ground for dismissal fails to address case law of other courts which have upheld virtually identical complaints against other manufacturers of joint health dietary supplements, and fails to afford Plaintiffs the opportunity to "cure" by amending the CAC in the interests of justice.

ARGUMENT

A. Rehearing And Rehearing En Banc Should Be Granted On The Panel's Holding That In Order To Plead A State Law Consumer Protection Statute Violation Based On A False Representation, A Plaintiff Must Allege That All Reasonable And Duly Qualified Experts Would Agree That The Representation Is False

The panel held that "in order to state a false advertising claim on a theory that representations have been proven to be false, plaintiffs must allege that all reasonable experts in the field agree that the representations are false." Opinion at 21. In other words, if "some reasonable and duly qualified scientific experts agree with a scientific proposition" made in advertising, plaintiffs cannot allege that the

proposition is ‘literally false.’” *Id.* at 19. The panel found that “[e]ither the experts supporting the [defendant] are unreasonable and unqualified (in which case, there is no real battle of the experts to begin with) or they reflect a reasonable difference of scientific opinion (in which case the challenged representation cannot said to be literally false).” *Id.* at 18-20. This extraordinary holding directly conflicts with prior opinions of this Circuit and the opinions of other circuits.

The Fourth Circuit holds that whether an expert is qualified to testify is simply an issue of admissibility of the evidence and says nothing about the weight the trier of fact should give to the expert’s opinion. *See, e.g., Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1144 (4th Cir. 1980) (holding that expert’s opinion should have been admitted and the “fallibility of the expert’s assumptions affects the weight of his testimony, not its admissibility”). That reasonable and qualified experts disagree on an ultimate issue such as falsity does not prevent the trier of fact from giving more weight to one expert’s opinion over another expert’s opinion. *See C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare, L.P.*, 131 F.3d 430, 433-44 (4th Cir. 1997).

In *C.B. Fleet*, plaintiff alleged that its competitor’s product superiority advertising claims were literally false in violation of the Lanham Act because they were unsupported by reliable scientific testing. *Id.* at 432-33. This Court recognized that the trial before the district court consisted “mostly of the parties’ conflicting expert opinion testimony ... respecting the claimed falsity of the two

challenged claims.” *Id.* at 433. After an advisory jury heard the evidence, which included conflicting testimony from experts on both sides, the jury returned a verdict for plaintiff. *Id.* at 434. The district court then rejected the advisory verdict and instead found that plaintiff had not met its burden of proving defendant’s representations were literally false, “credit[ing] the expert opinions of [defendant]’s witnesses over those of [plaintiff]’s expert....” *Id.*

On appeal, this Court affirmed the district court’s ruling based on the district court’s acceptance of defendant’s expert testimony over that of plaintiff’s expert. *Id.* at 437. After studying the testimony of all experts, this Court found that because the testimony of both experts was “equally coherent and plausible ... [the Court could] not declare clearly erroneous the district court’s acceptance of one and rejection of the other of two equally ‘permissible views of evidence’” on the ultimate issue of whether defendant’s studies supported its advertising claims. *Id.*

The panel’s opinion here -- that a battle of the experts can never exist on the issue of falsity because, in order to be false, all reasonable and duly qualified experts must agree on whether the scientific evidence provides support for the representation -- directly conflicts with the reasoning of this Court’s prior opinion in *C.B. Fleet*.

The panel’s opinion also conflicts with opinions of courts in other circuits that have similarly held that falsity can be determined based on a battle of the experts. For example, in *Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F.3d 230,

238 (5th Cir. 2014), plaintiff Eastman, a manufacturer of Tritan, a plastic resin used in water bottles and other consumer products, alleged that PlastiPure, a manufacturer of a competing plastic resin, engaged in false advertising by falsely representing that Tritan contained estrogenic activity (“EA”), which is believed to cause negative health conditions. *Id.* at 233. At trial, Eastman introduced expert witnesses who testified that the several tests used by Eastman to detect EA in Tritan demonstrated that there was no EA and that PlastiPure’s tests purporting to detect EA were unreliable. *Id.* at 238. Conversely, PlastiPure’s experts testified that PlastiPure’s tests were reliable and accurately detected EA in Tritan. *Id.* at 239. Based on this evidence, the jury found that PlastiPure’s statements that Tritan contained EA were false. *Id.* In upholding the verdict, the Fifth Circuit held that based on this evidence “[a] reasonable jury could have concluded that [PlastiPure]’s statements were false.” *Id.* at 238. The Fifth Circuit found that “the jury was free to, and apparently did, credit Eastman’s evidence that Tritan was EA-free over the contrary evidence presented by [PlastiPure].” *Id.*

Similarly, in *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997), the Ninth Circuit held that a plaintiff may demonstrate literal falsity “by attacking the validity of the defendant’s tests directly *or by showing that the defendant’s tests are contradicted or unsupported by other scientific tests.*” (Emphasis added). In reversing summary judgment in favor of defendant on the finding that the representations were not literally false, the Ninth Circuit held that

plaintiff's expert testimony regarding the insufficiency of defendant's tests created a disputed issue because a jury could reasonably conclude based on that evidence that the representations were false. *Id.* at 1141, 1144.

Accordingly, under the prior Lanham Act precedents of this Court and other circuits, a plaintiff can allege that an advertising message is false or literally false even if the plaintiff concedes at the pleading stage that at least some experts may disagree on the falsity of the message.¹ Plaintiffs seek rehearing *en banc* on this

¹ The Panel's finding that by failing to allege that "all scientists agree that glucosamine and chondroitin are ineffective at providing the promised joint health benefits," Plaintiffs have necessarily conceded that "some reasonable experts disagree and believe that glucosamine and chondroitin can provide the symptom relief promised by the Companies" is, respectfully, an erroneous overstatement. Rather, the District Court placed Plaintiffs in an untenable position by assuming, for the purposes of deciding the motion to dismiss, the admissibility as expert evidence under the *Daubert* standard Defendants' unpublished study. Plaintiffs, in their CAC (Paragraph 32), JA33, called into question the *bona fides* of that purported study. Yet, having had no opportunity to read and review that study because it is not publicly available and Defendants have not produced it in this litigation, Plaintiffs were unwilling to allege (and should not have had to under *Twombly* and *Iqbal*), under threat of imposition of sanctions under Rule 11, that no reasonable and duly qualified expert would agree that glucosamine and chondroitin can provide the symptom relief promised by Defendants. That is because, however unlikely, Defendants' unpublished study might have been conducted by a duly qualified expert in a manner that peer experts would find to be scientifically valid, and that study might have yielded statistically significant efficacy over placebo. Science is not static, and properly conducted scientific studies report new, statistically significant findings all the time. Thus, Plaintiffs respectfully state that the panel's assertion that Plaintiffs could have alleged that the private study "cannot have been conducted in a reasonable or reliable way (because all reasonable experts support the opposite conclusion)," Opinion at 20, fn. 9, does not make sense. Remember, until Galileo came along, all reasonable experts concluded that the Earth stood motionless at the center of the solar system, and Galileo was imprisoned for his heretical heliocentric views. *See*

issue of exceptional importance with respect to the pleading of state law consumer protection claims by consumers in cases which have been brought or removed to the federal court system under the Class Action Fairness Act of 2005, 28 U.S.C. §1332.

B. Rehearing And Rehearing En Banc (or Modification) Should Be Granted Regarding The Panel's Use Of Lanham Act Federal Common Law, Rather Than Court And Agency Guidance Interpreting Section 5(a) Of The Federal Trade Commission Act

The panel's opinion relies extensively on the federal Lanham Act. The panel states, "[a]lthough consumers (such as Plaintiffs) cannot invoke the protections of the Lanham Act, [] the considerable body of federal common law construing the Act is instructive in construing the state laws at issue." Opinion at 16. Tellingly, the panel does not cite any decisions which construe any of the state statutes at issue by relying upon federal common law construing the Lanham Act. Likely, that is because for each of the state consumer protection laws at issue, the law is clear that courts are to look to court and Federal Trade Commission ("FTC") decisions and FTC guidelines interpreting the Federal Trade

www.biography.com/people/Galileo. While Rule 11 sanctions are not as severe as those imposed by the Inquisition – Galileo spent the last 9 years of his life under house arrest – Plaintiffs and their counsel should not have to risk a threatened Rule 11 motion when they have not been permitted to examine the *bona fides* of Defendants' unpublished TriFlex study.

Commission Act in construing the state consumer protection statutes, not to the Lanham Act.²

The consumer protection statutes of Illinois and Florida contain express language instructing courts that interpretation of these statutes shall be done by looking to the FTC Act for guidance. *See* 815 Ill/ Comp. Stat. 505/2 (“In construing [the Act] consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.”); Fla. Stat. § 501.204(2) (“It is the intent of the Legislature that, in construing [the Florida Deceptive and Unfair Trade Practices Act], due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act...”). Thus, the courts in Illinois and Florida give great deference to FTC decisions and other FTC guidelines when interpreting their state UDAP statutes. *See, e.g., KC Leisure, Inc. v. Haber*, 972 So.2d 1069, 1072 (Fla. Dist. Ct. App. Div. 2008); *People ex rel. Fahner v. Walsh*, 122 Ill. App.3d 481, 484, 461 N.E.2d 78 (1984)(“[I]n determining whether a practice violates the [Consumer Fraud and Deceptive Business Practices Act], a court may be guided by the standards used by the Federal Trade Commission to decide whether certain activity is violative of similar Federal law.”).

² Plaintiff Calvert brought a claim for breach of warranty under Ohio’s UCC, which was not independently addressed by the panel, yet the panel’s decision dismisses that claim as well.

This Court has previously acknowledged application of similar harmonization clauses when interpreting state consumer protection statutes. *See Chuck's Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289, 1292 (4th Cir. 1987) (looking to decisions of the FTC and the courts interpreting Section 5(a) of the FTC Act based on harmonization clause in South Carolina consumer protection statute). Accordingly, it was error for the panel to utilize decisions interpreting the Lanham Act, rather than looking to decisions and agency interpretation under the FTC Act when construing the consumer protection claims brought under the Illinois and Florida consumer protection statutes. Importantly, the FTC Act does not embrace the explicit/implicit falsity distinction. Instead, factfinders use their own judgment, regardless of the nature of the claims. *See, e.g., Kraft, Inc. v. Federal Trade Commission*, 970 F.2d 311 (7th Cir. 1992).

Similarly, for the remaining consumer protection statutes at issue (California, New Jersey, New York, and Pennsylvania), state case law interpreting those statutes clearly holds that courts should look to the FTC Act and decisions and agency determinations thereunder when interpreting those statutes. *See Bank of West v. Superior Court*, 833 P.2d 545, 551 (Cal. 1993) (recognizing California's Unfair Competition Law is one of the "so-called 'little FTC Acts'"); *Mangini v. R.J. Reynolds Tobacco Co.*, 22 Cal. App. 4th 628, 639 (1993) (looking to FTC interpretations for determining unfair conduct under UCL); *In re Shack*, 426 A.2d 1031, 1034 (N.J. Sup. Ct. 1981) (looking to the FTC Act in interpreting

“deception” under the New Jersey Consumer Fraud Act); *Chattin v. Cape May Greene, Inc.*, 591 A.2d 943, (N.J. 1991) (recognizing holding in *In re Shack*); *Matter of People of the State of New York v. Applied Card Sys., Inc.*, 894 N.E.2d 1, 10 (N.Y. 2008) (recognizing that sections 349 and 350 of the New York Gen. Bus. Law are a “‘mini-FTC’ act”); *Commonwealth by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 817 (Pa. 1974) (recognizing that Pennsylvania’s Consumer Protection Law “is identical” to the FTC Act and thus courts may look to it for guidance).³

The FTC Act, on which the states’ consumer protection statutes are modeled, is intended to protect consumers and is an entirely different statute with different application and interpretation than the Lanham Act, which is designed to protect competitors. *See Nat’l Petroleum Refiners Assoc. v. F.T.C.*, 483 F.2d 672, 685 (D.C. Cir. 1973) (the overriding purpose of the FTC Act is “to protect the consumer from being misled by governing the conditions under which goods and services are advertised and sold to individual purchasers”); *compare with Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1390 (2014)(In order to have standing under the Lanham Act for false advertising, “a plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well

³ Although the *Commonwealth* court notes that Lanham Act cases may be relevant, that appears to apply to provisions of the Pennsylvania’s Consumer Protection Law not dealing with unfair and deceptive practices.

have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act.”). Respectfully, the panel should have considered relevant FTC case law, and specifically, FTC guidance concerning dietary supplements, which Plaintiffs relied upon in their opening appellate brief at 25-26, which states that health claims made about dietary supplements should be based upon the “totality of the evidence,” emphasizing:

[s]tudies cannot be evaluated in isolation. The surrounding context of the scientific evidence is just as important as the internal validity of individual studies. Advertisers should consider all relevant research relating to the claimed benefit of their supplement and should not focus only on research that supports the effect, while discounting research that does not. Ideally, the studies relied on by an advertiser would be largely consistent with the surrounding body of evidence.

See Dietary Supplements: An Advertising Guide for Industry at Section 4, a publication of the FTC (available at www.business.ftc.gov/documents/bus09-dietary-supplements-advertising-guide-industry). Accordingly, the panel’s reliance upon Lanham Act cases, and failure to consider FTC cases and guidelines was in error. Plaintiffs seek rehearing and rehearing en banc on this issue, or at the very least, a modification of the opinion.

C. Rehearing And Rehearing En Banc Should Be Granted On The Panel’s Refusal To Remand With Leave To Amend The CAC To Allege That None Of The Ingredients In Defendants’ Products Provide The Advertised Relief

The panel found the CAC to be defective because it fails to allege that all of the ingredients contained in the products are incapable of providing the represented

benefits. Opinion at 22. According to the panel, this “defect” provides an alternate ground for affirming the district court. *Id.* The panel’s alternative ground for dismissal fails to address case law of other courts which have upheld virtually identical complaints against other manufacturers of joint health dietary supplements which also contain additional ingredients. *See, e.g., Pearson v. Target Corp.*, No. 11 CV 7972, 2012 WL 7761986 (N.D. Ill. Nov. 9, 2012) (rejecting defendant’s argument that the proffered studies finding the inefficacy of glucosamine, chondroitin, and MSM are inapplicable to defendant’s specially formulated Up & Up Triple Strength product, holding that determination is a question of fact and that plaintiff’s claims are facially plausible)⁴; *Conrad v. Nutramax Laboratories, Inc.*, 13C 3780, 2013 WL 5288152, *3-4 (N.D. Ill. Sept. 18, 2013) (“Whether or not these studies apply to Cosamin DS is a question of fact that this Court cannot now decide. Conrad’s claim is facially plausible due to the finding of these studies with respect to the primary active ingredients in Cosamin DS.”); *Cardenas v. NBTY, Inc.*, 870 F.Supp.2d 984 (E.D. Cal. 2012).

⁴ The Up & Up Triple Strength label indicates the following ingredients in the product: Vitamin C; Manganese; Sodium; Glucosamine; a proprietary blend of Chondroitin sulfate sodium; MSM; hydrolyzed gelatin, *Boswellia serrata* (wood) resin; Hyaluronic acid; *Boswellia serrata* AKBA standardized (wood) resin; boron; Crospavidone; Povidone; microcrystalline cellulose; polyvinyl alcohol; titanium oxide; polyethylene glycol; stearic acid; talc; magnesium stearate; silicon dioxide; and caramel color. *See* www.Target.com/p/up-up-triple-strength-glucosamine-chondroitin-caplets-220-count.

More importantly, the panel fails to afford Plaintiffs the opportunity to “cure” by amending the CAC in the interests of justice. The District Court, in its opinions below, had never addressed Defendants’ alternative argument that the CAC should be dismissed because it failed to specify that each of the ingredients in the products is ineffective in producing the advertised relief. The panel decides this alternative argument for the first time in its Opinion. In so doing, the panel relies upon the decision of the district court in Florida in *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV, 2013 WL 5206103, at *5 (S.D. Fla. Sept. 13, 2013), for this proposition without recognizing that the district court had dismissed that complaint with leave to replead. Plaintiff had, in fact, filed an amended complaint which addressed the inefficacy of each and every ingredient in the TriFlex Vitapak, and averred that the Vitapak as a whole does not function as advertised. See Amended Complaint, Docket Entry No. 39, *Toback v. GNC Holdings, Inc.*, No. 13-80526-CIV (S.D. Fla.). Notably, the *Toback* court had not had an opportunity to rule on the sufficiency of the amended complaint before the *Toback* action was transferred from the Southern District of Florida to the District of Maryland as part of the instant multi-district litigation.⁵

⁵ The panel also cites to *McCrary v. Elations Co., LLC*, No. EDCV 13-0242 JGB (OPx), 2013 WL 6402217, at *5 (C.D. Cal. Apr. 24, 2013). As Plaintiffs noted in their reply brief on appeal, at 16, the *McCrary* decision is wrongly decided and runs contrary to the substantial majority of district court decisions that have sustained similar complaints involving similar glucosamine/chondroitin products.

Indeed, in the District Court below, after Defendants raised this argument in their motion to dismiss, Plaintiffs responded that the other minor ingredients in some of Defendants' products, such as Boswelvia extract, white willow bark, catechu root, Chinese skullcap, vitamin C, and hop cones are voodoo medicine add-ons and have been proven to provide no benefit for joint health. Plaintiffs argued that while they did not specifically address these additional ingredients in the CAC – particularly because they alleged in great detail that the main ingredients have been proven ineffective, Plaintiffs expressly requested leave to file an amended complaint to allege the facts as to why these minor ingredients also play no role in providing joint health benefits. JA 125. Since the District Court did not determine the necessity (or lack thereof) of pleading the inefficacy of the minor ingredients in its decisions below, to the extent that the panel relies on this alternative ground for dismissal, the panel should have remanded with leave to amend to cure that deficiency, which Plaintiffs could readily do, “in the interests of justice.” *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 345 (4th Cir. 2005).

CONCLUSION

Accordingly, the Court should grant rehearing or rehearing *en banc*. Alternatively, the Court should modify the Opinion.

Dated: July 6, 2015

Respectfully Submitted,

By: /s/ Robert J. Berg
Jeffrey I. Carton
DENLEA & CARTON LLP
2 Westchester Park Drive, Suite 410
White Plains, New York 10604
Telephone: (914) 331-0100
Facsimile: (914) 331-0105

*Attorneys for Plaintiffs-Appellants
and for Plaintiff Robert Toback*

Of Counsel:

**BONNETT, FAIRBOURN,
FRIEDMAN & BALINT, P.C.**

Elaine A. Ryan
Patricia N. Syverson
Lindsey M. Gomez-Gray
2325 E. Camelback Rd., 300
Phoenix, AZ 85016
Telephone: (602) 274-1100
Facsimile: (602) 274-1199
eryan@bffb.com
psyverson@bffb.com
lgomez-gray@bffb.com

**BONNETT, FAIRBOURN,
FRIEDMAN & BALINT, P.C.**

Manfred P. Muecke
600 W. Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 756-7748
Facsimile: (602) 274-1199
mmuecke@bbfb.com

BODELL & DOMANSKIS, LLC

Stewart M. Weltman
353 North Clark Street, Suite 1800
Chicago, IL 60654
Telephone: (312) 938-4070

sweltman@boodlaw.com

Counsel for Plaintiffs Michael Lerma and Jeremy Gaatz

CARLSON LYNCH LTD.

R. Bruce Carlson
Gary F. Lynch
Benjamin J. Sweet
Edwin J. Kipela, Jr.
Stephanie K. Goldin
Jamisen A. Etzel
PNC Park
115 Federal Street, Suite 210
Pittsburgh, PA 15212
Telephone: (412) 322-9243
Facsimile: (412)231-0246
bsweet@carlsonlynch.com
ekipela@carlsonlynch.com

STEVEN D. BELL CO. L.P.A.

Steven D. Bell
7650 Chippewa Road, Suite 309
Brecksville, OH 44141
Telephone: (216) 925-5484
Facsimile: (216) 925-5480
steve@stevebell-law.com

Counsel for Plaintiff Robert Calvert

CARLSON LYNCH LTD.

R. Bruce Carlson
Gary F. Lynch
Benjamin J. Sweet
Edwin J. Kipela, Jr.
Stephanie K. Goldin
Jamisen A. Etzel
PNC Park
115 Federal Street, Suite 210
Pittsburgh, PA 15212
Telephone: (412) 322-9243
Facsimile: (412)231-0246

bsweet@carlsonlynch.com
ekipela@carlsonlynch.com

MARCUS & CINELLI, LLP

David P. Marcus
2821 Wehrle Drive, Suite 3
Williamsville, NY 14221
Telephone: (716) 565-3800
Facsimile: (716) 565-3801

Counsel for Plaintiff Shawn Howard

CARLSON LYNCH LTD.

R. Bruce Carlson
Gary F. Lynch
Benjamin J. Sweet
Edwin J. Kipela, Jr.
Stephanie K. Goldin
Jamisen A. Etzel
PNC Park
115 Federal Street, Suite 210
Pittsburgh, PA 15212
Telephone: (412) 322-9243
Facsimile: (412) 231-0246
bsweet@carlsonlynch.com
ekipela@carlsonlynch.com

NYE, PEABODY, STIRLIN, HALE & MILLER, LLP

Jonathan D. Miller
Jennifer M. Miller
33 West Mission Street, Suite 201
Santa Barbara, California 93101
Phone: (805) 963-2345
Fax: (805) 563-5385
jonathan@nps-law.com
jennifer@nps-law.com

Attorneys for Rite Aid Plaintiffs

CERTIFICATE OF SERVICE

I declare under penalty of perjury that the following is true and correct:

On the 6th day of July, 2015, I electronically filed the foregoing Plaintiffs-Appellants' Petition for Rehearing and For Rehearing En Banc, And In The Alternative, For Modification of Opinion and Judgment with the Clerk of Court using the CM/ECF system, which will send a Notice of Electronic filing to all counsel of record.

Joseph R. Palmore
Morrison & Foerster LLP
Suite 6000
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006
(202) 887-6940
JPalmore@mofo.com

Counsel for Appellees

By: /s/ Robert J. Berg
Jeffrey I. Carton
DENLEA & CARTON LLP
One North Broadway, Suite 509
White Plains, New York 10601
Telephone: (914) 920-7400
Facsimile: (914) 761-1900

Attorneys for Plaintiffs-Appellants