APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 22-55744

Justin LYTLE and Christine Musthaler,

Plaintiffs-Appellees,

v.

NUTRAMAX LABORATORIES, INC. and
Nutramax Laboratories Veterinary Sciences, Inc,

Defendants-Appellants.

Argued and Submitted October 18, 2023
Pasadena, California

Filed April 22, 2024

Amended August 23, 2024

Before: A. Wallace Tashima and Holly A. Thomas, Circuit Judges, and Jed S. Rakoff,[*] District Judge.

ORDER

The opinion filed on April 22, 2024, and appearing at 99 F.4th 557, is hereby amended. The amended opinion will be filed concurrently with this order.

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[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

With these amendments, the panel has unanimously voted to deny the petition for panel rehearing. Judge H.A. Thomas has voted to deny the petition for rehearing en banc, and Judge Tashima and Judge Rakoff so recommend. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(a).

The petition for panel rehearing and the petition for rehearing en banc, Dkt. No. 52, are DENIED.

AMENDED OPINION

RAKOFF, District Judge:

This is a putative consumer class action concerning the marketing of the pet health product Cosequin. Plaintiffs-Appellees claim that Nutramax Laboratories, Inc. and Nutramax Laboratories Veterinary Sciences, Inc. (collectively, "Nutramax") violated the California Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code §§ 1750–1784, by marketing Cosequin as promoting healthy joints in dogs, when in fact Cosequin provided no such health benefits. Below, the district court certified a class of California purchasers of certain Cosequin products who were exposed to the allegedly misleading statements. Nutramax now appeals that grant of class certification on two grounds.

First, Nutramax challenges the district court's reliance upon the proposed damages model of Plaintiffs' expert, Dr. Jean-Pierre Dubé, to find that common questions predominated as to injury. Nutramax claims this was error because the proposed model had not actually been applied to the proposed class. We conclude that, contrary to Nutramax's contention, there is

no general requirement that an expert actually apply to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage. Rather, we hold that class action plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial. We further conclude that the district court did not abuse its discretion in finding Dr. Dubé's proposed model was sufficiently sound and developed to satisfy this standard at the class certification stage.

Second, Nutramax contends that the district court incorrectly concluded that the element of reliance was susceptible to common proof. We disagree. The district court properly found that classwide reliance may be established under the CLRA through proof that a misrepresentation is material. While the presumption of reliance is rebuttable, the district court did not abuse its discretion in concluding Nutramax had failed to rebut the presumption here.

Accordingly, for the reasons set forth more fully below, we affirm the district court's grant of class certification.

I.

Nutramax develops and sells pet health supplements. Plaintiffs-Appellees Justin Lytle and Christine Musthaler are two dog owners who purchased a product produced by Nutramax, Cosequin, for their dogs. In this action, Plaintiffs allege that Nutramax marketed Cosequin as a health supplement that would improve

their dogs' joints and mobility when, in fact, there is no evidence that Cosequin provides any such health benefit.

After the close of fact and expert discovery, Plaintiffs sought to certify the following class pursuant to Federal Rule of Civil Procedure ("FRCP") 23(b)(3):

> All persons residing in California who purchased during the limitations period the following canine Cosequin products for personal use: Cosequin DS Maximum Strength Chewable Tablets; Cosequin DS Maximum Strength Plus MSM Chewable Tablets; and Cosequin DS Maximum Strength Plus MSM Soft Chews.

Plaintiffs initially asserted that numerous statements made in marketing materials for Cosequin and/or on the packaging of the three products listed above were false and misleading. However, at class certification Plaintiffs narrowed their claims to four statements that appeared on Cosequin's packaging:

> (1): "Joint Health Supplement";
>
> (2): "Use Cosequin to help your pet Climb stairs, Rise and Jump!";
>
> (3): "Supports Mobility for a Healthy Lifestyle"; and
>
> (4): "Mobility, Cartilage and Joint Health Support."

Plaintiffs argued that these statements were false and misleading because Cosequin does not, in fact, improve dogs' joint health. According to Plaintiffs, the only two peer-reviewed, double-blinded, randomized controlled trials that have been conducted on Cosequin's efficacy have concluded that Cosequin confers no more benefit to canine joint health than a placebo. Plaintiffs' veterinary expert Dr. Steven Budsberg opined that

"the strongest available evidence ... has consistently found no reliable evidence that Cosequin provides any efficacy in supporting, maintaining, or improving joint health," and Plaintiffs' biostatistics expert Dr. Richard Evans concluded that "there is no evidence tha [glucosamine and chondroitin, the active ingredients in Cosequin, have] a greater prophylactic effect than placebo control on maintaining joint health in healthy pet dogs." Nutramax, for its part, presented contrary evidence about the products' efficacy, including non-randomized control trials and the testimony of Nutramax's own veterinary expert, Dr. Marcellin-Little. Nutramax further argues that the two studies relied on by Plaintiffs involved dogs with osteo-arthritis, even though Cosequin is not marketed to treat that condition. The district court found that Plaintiffs had adequately demonstrated for class certification purposes the reasonable likelihood that a jury could find that Cosequin provided no benefit to dogs' joint health.

The four challenged statements appeared on the labels of various Cosequin products in various combinations over time. Although the parties offer differing characterizations about the extent and significance of these variations, the parties agree that the first statement ("Joint Health Supplement") appeared on all product labels or packages throughout the class period. Further, approximately 90% of sales during the class period—including those to the named plaintiffs—were attributable to products that contained the "Joint Health Supplement" statement. The district court ultimately found that the presence of the Joint Health Supplement statement on every challenged product was sufficient to support class certification.

Before the district court, Nutramax raised a host of challenges to Plaintiffs' class certification motion, contesting each prerequisite of FRCP 23(a) and 23(b)(3). Nutramax also belatedly filed two evidentiary objections to Plaintiffs' expert witnesses Bruce Silverman and Dr. Dubeé The district court rejected each of these objections and certified the class as requested by Plaintiffs. Nutramax then promptly sought and obtained permission to file the instant interlocutory appeal of the district court's class certification order pursuant to FRCP 23(f).

On appeal, Nutramax limits its challenge to just two of the district court's findings: (1) that damages are susceptible to common proof, and (2) that causation/reliance is susceptible to common proof. Nutramax also persists in its evidentiary objection to Dr. Dubé insofar as it relates to the first question of whether damages are susceptible to common proof. The parties' briefing and the district court's rulings on these two issues are briefly described below.

A.

To establish damages on a classwide basis, Plaintiffs put forward the testimony of Dr. Dubé, a professor of marketing at the University of Chicago Booth School of Business who, as the district court found, has "extensive experience in marketing data and analytics." To measure classwide damages, Dr. Dubé proposed to conduct a "conjoint survey" (or "conjoint analysis"). Simply put, a conjoint survey allows a researcher to test the economic value a consumer places on a given product feature, such as a particular statement on a package, by showing the product to individual survey participants with and without certain features, and then using survey responses to calculate the economic value consumers place upon the feature. Dr. Dubé

explained that, in conducting a conjoint analysis, a researcher is able to control for other variables such as package size and the competing products by modifying the underlying choice-tasks presented to participants.

At the time of class certification, Dr. Dubé had not yet actually applied his conjoint analysis to a representative sample in the case, that is, he had not actually surveyed any class members or calculated what class members' damages might be. Rather, in his report, Dr. Dubé opined that, "[b]ased on [his] analysis of market data and other marketing documents made available through discovery," he believed a conjoint analysis "is well-suited to the facts of this case and will successfully isolate the economic damages associated with the Challenged Claims." Dr. Dubé acknowledged, however, that he would not know whether the class actually suffered any damages until he actually executed his survey.

Nutramax's class certification opposition criticized Dr. Dubé for failing to actually conduct (i.e., "execute") the survey and thus complete his analysis. Before the district court, Nutramax also argued that Dr. Dubé's model was under-developed in other respects, although Nutramax apparently did not argue this was a basis to exclude his testimony under Federal Rule of Evidence ("FRE") 702 or FRCP 23, but instead argued that his opinion violated FRCP 16, 26, 37 and the district court's scheduling order.

The district court rejected Nutramax's argument that it could not rely on Dr. Dubé's unexecuted damages model or that the model should be excluded under the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The district court began by noting Dr. Dubé's credentials, finding him to be well

qualified for the purposes offered. The district court further observed that conjoint surveys such as that proposed by Dr. Dubé "are a well-established method for measuring class-wide damages in CLRA mislabeling cases," and also noted that conjoint analyses previously prepared by Dr. Dubé had been upheld as reliable in similar cases. Most importantly, the court below, citing other district court precedent, held that "[a] plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are *capable* of determination on a class-wide basis."

B.

Nutramax also opposed class certification on the ground that individual questions predominated with respect to the element of reliance because (1) substantial variation in the labels precluded a finding of predominance, (2) Plaintiffs had failed to show common exposure to the challenged statements, and (3) Plaintiffs had not shown the challenged statements factored into the typical consumer's purchasing decision or would have been material to such consumers. Although reliance and materiality are separate elements, under the CLRA, a plaintiff can create a presumption of reliance by demonstrating a material misrepresentation was made to the entire class. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). To establish materiality (and relatedly, reliance for class certification purposes), Plaintiffs put forward the expert testimony of Silverman, a former advertising executive, who testified that a reasonable consumer would find the product labels misleading. As noted, Plaintiffs also put forward two expert witnesses, Dr. Budsberg and Dr. Evans, to testify to the falsity of the challenged statements and demonstrate that Cosequin did not offer joint health benefits. Plaintiffs also argued that the

survey conducted by Nutramax's own expert, Dr. Carol Scott, actually supported a finding of materiality.[1]

In response, Nutramax put forward two experts. First, Nutramax put forward Dr. Scott to present the results of a consumer survey about the purchasing decisions of Cosequin customers. Dr. Scott's survey found that purchasers "consulted a variety of information sources prior to purchasing [Cosequin] for the first time, with one's veterinarian being most frequently mentioned (*i.e.*, 57% of respondents...), followed by website ratings or reviews (26.9% of respondents)." Only about a quarter of respondents identified the packaging as a source of information they consulted prior to deciding to purchase Cosequin for the first-time. Dr. Scott's survey found that the most common motivations for purchasing Cosequin were advice from a veterinarian, advice from someone else, or research on websites, whereas only a small fraction of respondents cited the packaging for their motive. Second, Nutramax put forward Dr. Olivier Toubia, who conducted a consumer choice survey somewhat similar to that proposed by Dr. Dubé. Dr. Toubia showed one group of individuals the actual product packaging and another group a modified version that (supposedly) removed the challenged claims. The results of this

[1] In this regard, Plaintiffs homed in on one particular finding of Dr. Scott's survey that they claimed actually supports a finding of materiality. Dr. Scott showed respondents a label from Product #2, containing only the Joint Health Supplement statement, and asked: "Based on this package, what do you think[ ] Cosequin will do for your dog? That is, why should you give your dog Cosequin?" The "most frequently given response" (by nearly 80% of respondents) was "improve/help/maintain mobility, flexibility, joint health/support." In the district court and on appeal, Plaintiffs argue that this finding by Dr. Scott further demonstrates that the challenged statements would have been misleading to a reasonable consumer.

study, according to Dr. Toubia, showed that removing the statements did not materially impact the price a consumer would be willing to pay.

The district court reviewed the evidence presented by the parties and ultimately credited the evidence presented by Plaintiffs that the challenged statements would be materially misleading to a reasonable consumer. In a footnote, the district court explained that it was "unpersuaded" by Dr. Scott's and Dr. Toubia's expert reports, noting that they contained "flaws that undercut their persuasiveness." In particular, the district court cited the fact that Dr. Toubia's survey failed to remove the "Joint Health Supplement" statement from the packaging, even though that was at the core of Plaintiffs' claim. The district court did not explain the basis for its rejection of Dr. Scott's survey, but ultimately concluded Nutramax's evidence was "outweighed by the common evidence presented by plaintiffs."

II.

Before a class may be certified, the district court must conduct a "rigorous analysis" to determine if the prerequisites of FRCP 23 have been satisfied. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022) (en banc). The plaintiffs must "actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014). The plaintiffs bear "the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Olean*, 31 F.4th at 665.

At issue here is the predominance requirement: that "questions of law or fact common to class members predominate over any questions affecting only individual

members." FRCP 23(b)(3). This requirement presupposes satisfaction of the commonality requirement of FRCP 23(a)(2), which itself tests "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)). But the predominance inquiry goes further and "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016).

At the same time, it is critical to keep in mind that class certification is different from summary judgment. "A court ... is merely to decide [whether a class action is] a suitable method of adjudicating the case." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015). With respect to the predominance inquiry specifically, a district court must evaluate " 'the method or methods by which plaintiffs propose to use the [class-wide] evidence to prove' the common question in one stroke." *Olean*, 31 F.4th at 666 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008)). "In determining whether the 'common question' prerequisite is met, a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean*, 31 F.4th at 666–67.

We review the "decision to certify a class and any particular underlying Rule 23 determination involving a discretionary determination" for an abuse of discretion. *Olean*, 31 F.4th at 663 (cleaned up). We review

de novo "the district court's determination of underlying legal questions." *Id.* "A district court applying the correct legal standard abuses its discretion only 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." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018) (cleaned up). We review evidentiary rulings for an abuse of discretion. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014). We review factual findings underlying a class certification ruling for clear error. *Sali*, 909 F.3d at 1002. We review the question of whether an expert's damages model "is capable of showing class-wide impact, thus satisfying one of the prerequisites of Rule 23(b)(3) of the Federal Rules of Civil Procedure, for an abuse of discretion." *Olean*, 31 F.4th at 663.

III.

A.

Nutramax's principal argument on appeal is that the "rigorous analysis" required by FRCP 23 categorically prohibits a class-action plaintiff from relying on an unexecuted damages model to demonstrate predominance (at least where that model is the only evidence of classwide injury).[2] In addressing this argument, the parties focus on the statement in the

[2] On appeal, the parties both appear to assume that the predominance requirement would be satisfied only if damages are capable of measurement on a classwide basis. For purposes of this appeal, we adopt this assumption. We note, however, that we have held that individual questions of damages do not necessarily defeat class certification, as the district court here expressly acknowledged. *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987 (9th Cir. 2015).

Supreme Court's decision in *Comcast Corp. v. Behrend*—repeated in our *en banc* decision in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*—that a class action plaintiff must "establish[ ] that damages are *capable* of measurement on a classwide basis." 569 U.S. 27, 34, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (emphasis added). Plaintiffs contend that this phrase sanctions precisely what Dr. Dubé has done here: submit an expert report opining that damages can be measured on a classwide basis and setting forth a reliable method for doing so. Nutramax, by contrast, argues that to satisfy the predominance requirement, "[P]laintiffs must proffer admissible, affirmative evidence that classwide injury and damages *in fact* are capable of classwide measurement." In Nutramax's view, the only way to carry this burden is to actually put forward common evidence showing that classwide damages exist.

Nutramax's argument rests upon a misapprehension of the temporal focus of the class certification inquiry. As explained below, class action plaintiffs are not required to actually prove their case through common proof at the class certification stage. Rather, plaintiffs must show that they will be able to prove their case through common proof *at trial*. Given, moreover, that the Federal Rules contemplate that certification will be made "[a]t an early practicable time," FRCP 23(c)(1)(A), we see no reason why plaintiffs may not, in appropriate circumstances, satisfy this burden through a proffer of a reliable method of obtaining evidence that will come into existence once a damages model is executed, even when the results are not yet available at the class certification stage. We thus hold that class action plaintiffs may rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof so long as the district court finds, by a preponderance of the evidence, that the model will be

able to reliably calculate damages in a manner common to the class at trial.

Contrary to Nutramax's contention, there is no requirement that the evidence relied upon by Plaintiffs to support class certification be presented in an admissible form at the class certification stage. *See Sali*, 909 F.3d at 1004 ("Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification."); *B.K. v. Snyder*, 922 F.3d 957, 974 (9th Cir. 2019) ("At this 'tentative, preliminary, and limited' stage we have held strictly admissible evidence is not required, and we have indicated that plaintiffs can meet their evidentiary burden in part through allegations when the allegations are detailed and supported by additional materials" (internal citation omitted)). As we explained in *Sali v. Corona Regional Medical Center*, "an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage." 909 F.3d at 1006.[3] Of course, if it is unlikely that a particular piece of common proof will be available or admissible at trial, that possibility weighs against a finding that common questions (and common answers) will predominate. But "[n]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies" Rule 23. *Id.* at 1004–05 (quoting *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)).

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[3] The district court correctly cited *Sali* for this exact principle. Nutramax inexplicably asserts the district court committed legal error by doing so without ever discussing *Sali* or explaining why, in Nutramax's view, the rule announced in that case is inapplicable.

Nor is there a requirement that class action plaintiffs actually prove that classwide damages exist in order to obtain class certification. Rather, we have repeatedly found class treatment to be appropriate, in analogous contexts, based upon a showing that damages *could* be calculated on a classwide basis, even where such calculations have not yet been performed. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1121 (9th Cir. 2017) ("At this stage, Plaintiffs need only show that such damages can be determined without excessive difficulty and attributed to their theory of liability, and have proposed as much here."); *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017) ("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."), *rev'd and remanded on other grounds*, 586 U.S. 188, 139 S. Ct. 710, 203 L.Ed.2d 43 (2019); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (finding evidence "that damages could feasibly and efficiently be calculated once the common liability questions are adjudicated" was sufficient to satisfy predominance). For example, in *Lambert v. Nutraceutical Corp.*, we reversed a district court's denial of class certification and concluded the plaintiffs had satisfied the predominance requirement by proposing a valid damages model, even where the plaintiffs did not yet have all of the data necessary to perform their damages calculations. 870 F.3d at 1183–84. We explained that the "precise [data] is unnecessary for class certification" because "the question is only whether [plaintiff] has presented a workable method." *Id.* at 1184.

Requiring that class action plaintiffs actually prove classwide injury at this stage would improperly conflate the class certification inquiry with the merits. To be sure, courts may not avoid resolving questions

pertinent to class certification merely because they overlap with the merits of the plaintiffs' case, *see Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541; *Comcast*, 569 U.S. at 33–34, 133 S.Ct. 1426, but this does not "grant[ ] courts ... license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013). Rather, such "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.*

While acknowledging this rule, Nutramax argues that the theoretical possibility Dr. Dubé's model, once executed, might show no injury at all "goes to the heart of the Rule 23 inquiry." But Nutramax fails to convincingly explain why this is so. The focus of the predominance inquiry "is whether the method of proof would apply in common to all class members," "not whether the method of proof would or could prevail." *In re Celexa & Lexapro Mktg. & Sales Pracs. Litig.*, 915 F.3d 1, 12 (1st Cir. 2019); *see Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014) ("[W]hether class members could actually prevail on the merits of their claims is not a proper inquiry in determining the preliminary question whether common questions exist." (internal quotation marks omitted)). As the Supreme Court explained in *Tyson Foods, Inc. v. Bouaphakeo*, "[w]hen ... 'the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment, not class certification.'" 577 U.S. at 457, 136 S.Ct. 1036 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate*

Proof, 84 N.Y.U. L. Rev. 97, 107 (2009)); *see also Amgen*, 568 U.S. at 468, 133 S.Ct. 1184 ("A failure of proof on the *common* question of materiality ends the litigation and thus will never cause individual questions of reliance or anything else to overwhelm questions common to the class."); *Alcantar*, 800 F.3d at 1053 ("A common contention need not be one that 'will be answered, on the merits, in favor of the class.'" (quoting *Amgen*, 568 U.S. at 459, 133 S.Ct. 1184)). "To hold otherwise would turn class certification into a mini-trial, when the purpose of class certification is merely to select the method best suited to adjudication of the controversy fairly and efficiently." *Alcantar*, 800 F.3d at 1053 (cleaned up).

The theoretical possibility that Dr. Dubé's model, when executed, will reveal no damages thus does not undermine predominance, because that result would nonetheless be common to the class.[4] Nor does the possibility Dr. Dubé's analysis might reveal damages with respect to some, but not all, of the challenged statements undermine predominance, because the very structure of the conjoint survey allows for an overcharge to be associated with each individual statement and label, allowing the amount each class

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[4] Nutramax argues that this is not so because "Plaintiffs' complaint asserted claims based not only on the labels, but also representations on the Cosequin® website and in other media; and Plaintiffs pled alternative theories of damages beyond the price-premium theory." But if that were sufficient to defeat predominance, the rule announced in *Tyson Foods* would be rendered meaningless. In almost every case it will be possible to point to some individual proof that could substitute for the (purportedly) deficient aggregate proof. Here, however, Plaintiffs have narrowed the case to their challenge of these specific label claims using aggregate proof, and that is what the district court properly focused on.

member is entitled to recover to be easily assessed based solely on the product the class member purchased. And the possibility that an ascertainable portion of the class may be unable to recover—those not exposed to a statement with any attributable overcharge—does not in itself demonstrate class certification was improper. *See Olean*, 31 F.4th at 669, 680–81 (holding that the possibility some class members suffered no injury does not, by itself, defeat class certification); *Just Film*, 847 F.3d at 1120 ("To gain class certification, Plaintiffs need to be able to allege that their damages arise from a course of conduct that impacted the class. But they need not show that each members' damages from that conduct are identical.").

Nutramax's argument in favor of its proposed categorical rule—requiring that a damages model always be executed prior to class certification—rests almost entirely upon its misinterpretation of the Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), and our recent *en banc* decision in *Olean*. We agree that these cases demand some assessment of the adequacy of Plaintiffs' common proof at class certification, but nothing in these cases requires that Plaintiffs actually prove damages at the class certification stage or prohibits Plaintiffs from relying on an unexecuted but reliable damages model.

In *Comcast*, plaintiffs put forward four theories of liability, but the district court certified a class as to only one of them. 569 U.S. at 31, 133 S.Ct. 1426. However, the plaintiffs' damages expert—whose model provided the only means of proving classwide damages—conducted an indivisible analysis which "did not isolate damages resulting from any one [of the four]

theor[ies] of [liability]." *Id.* at 32, 133 S.Ct. 1426. On appeal, the defendants argued class certification was improper because plaintiffs had "failed to attribute damages" to the sole remaining theory in the case, but the Third Circuit affirmed the district court's grant of class certification over this objection, reasoning that it was an improper "attac[k] on the merits of the methodology [that had] no place in the class certification inquiry." *Id.*

The Supreme Court reversed. The Court explained that plaintiffs' "model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Id.* at 36, 133 S.Ct. 1426. This disconnect was fatal, because it meant plaintiffs could not "establish[ ] that damages are capable of measurement on a classwide basis." *Id.* at 34, 133 S.Ct. 1426. In other words, where an expert's damages model is untethered from plaintiff's theory of liability such that it has no possibility of demonstrating the amount of damages in a particular case, *Comcast* holds that a plaintiff may not rely upon it to show that damages are "capable of measurement on a classwide basis." *Id.* Notably, the plaintiffs in *Comcast* "never challenged" the "need to prove damages on a classwide basis" in order to demonstrate predominance. *Id.* at 42, 133 S.Ct. 1426 (Ginsburg, J., dissenting).

Nutramax contends that, as in *Comcast*, permitting Plaintiffs here to rely on an unexecuted damages model would "reduce Rule 23(b)(3)'s predominance requirement to a nullity," and would "not establish that the requirements of Rule 23 are satisfied '*in fact.*'" This is an overreading of *Comcast.* That decision has generally been construed to stand for the unremarkable proposition that "plaintiffs must be able to show that their damages stemmed from the defendant's

actions that created the legal liability." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). Indeed, even after *Comcast*, we have repeatedly reaffirmed that class treatment may be appropriate even where damages must be assessed on an individualized basis. *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987 (9th Cir. 2015). Contrary to Nutramax's contention, the possibility that Dr. Dubé's analysis might reveal damages with respect to some, but not all, of the challenged statements does not create "the problem that manifested in *Comcast*," because, as explained above, the structure of the conjoint analysis allows a damages figure to be associated with each challenged statement. The same was not true in *Comcast*, where plaintiffs' damages model, again, did not isolate damages between any of plaintiffs' theories of liability. *See Comcast*, 569 U.S. at 32, 133 S.Ct. 1426.

Nutramax's reliance on *Olean* is similarly unavailing. In *Olean*, plaintiffs brought an antitrust class action against the major U.S. packaged tuna suppliers, alleging that they engaged in unlawful price fixing. 31 F.4th at 661–62. The appeal centered around whether the district court properly granted class certification based upon plaintiffs' expert evidence showing antitrust impact. *Id.* We analyzed each of the plaintiffs' damages models and the defendants' objections to those models, and ultimately concluded that the district court did not abuse its discretion in certifying the class. *See id.* at 670–85.

Nothing in *Olean* requires that an expert actually execute a damages model before it can be relied on. In describing the legal standard, *Olean* made clear that the focus is on "'the method or methods by which

plaintiffs propose to use the [class-wide] evidence to prove' the common question in one stroke," and "a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean*, 31 F.4th at 666–67 (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 313). While *Olean* suggested that a district court must "[w]eigh[ ] conflicting expert testimony" and "consider[ ] factors that may undercut the model's reliability," *id.* at 666, 683, this does not categorically require an expert to execute the expert's model before it may be relied upon. Rather, as explained in more detail below, the fact that an expert's model has not yet been executed is simply one factor that must be considered.

Nutramax cites snippets of *Olean* to argue that "[e]vidence is 'capable of resolving a common issue' where each class member could rely on it at trial and the evidence 'could reasonably sustain a jury verdict in favor of the plaintiffs, even though a jury could still decide that the evidence was not persuasive.'" But this suggests that *Olean* required the same showing necessary to avoid summary judgment, which it plainly did not. Indeed, Nutramax's reading of the "could reasonably sustain a jury verdict" language in *Olean* would mean that we took as mandatory the Supreme Court's suggestion that class certification might sometimes overlap with the merits inquiry and would make a determination of the merits required, which would be contrary to settled law. It is settled that the question at class certification is not whether plaintiffs have put forward evidence capable of sustaining a jury verdict, but rather whether plaintiffs have shown enough to satisfy FRCP 23. To require an actual weighing, at class certification, of whether plaintiffs' evidence could

sustain a jury verdict would collapse the class certification and summary judgment inquiries in precisely the manner *Tyson Foods* warns against. 577 U.S. at 457, 136 S.Ct. 1036 (noting that failures of proof that are common to the class should be engaged "as a matter of summary judgment, not class certification"); *see also Miles v. Kirkland's Stores Inc.*, 89 F.4th 1217, 1224 n.2 (9th Cir. 2024) (noting a "merits question that should be left for summary judgment or trial, not [resolved] at class certification").

Finally, Nutramax contends that where it is uncertain that a damages model will show any injury at all, permitting a class to be certified and sending notice to class members would be an inefficient use of resources. Plaintiffs respond that executing a conjoint analysis is extremely expensive and time consuming, so that requiring Plaintiffs to do so before the precise contours of the class have been established would risk wasting resources, not save them. We regard these competing speculations as largely irrelevant to determining what Rule 23 does or does not require. And since the determination of class certification is largely within the discretion of the district court, it is worth noting that the vast majority of district courts in our circuit to consider the question have found that a damages expert need not fully execute his or her proposed conjoint analysis before it can be relied upon at class certification. *See, e.g., Gunaratna v. Dennis Gross Cosmetology LLC*, 2023 WL 5505052, at *19 (C.D. Cal. Apr. 4, 2023); *Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 408 n.14 (N.D. Cal. 2021); *Testone v. Barlean's Organic Oils, LLC*, 2021 WL 4438391, at *17 (S.D. Cal. Sept. 28, 2021); *Guido v. L'Oreal, USA, Inc.*,

2014 WL 6603730, at *13–14 (C.D. Cal. July 24, 2014).[5] This common practice weighs against imposing the categorical rule Nutramax requests.

B.

Having concluded that there is no categorical prohibition on a district court relying on an unexecuted damages model to certify a class, we must nevertheless determine whether, on the facts of this case, it was error for the district court to grant certification. In particular, Nutramax argues that the district court erred in concluding that Dr. Dubé's opinions were sufficiently reliable to satisfy FRE 702 or FRCP 23.

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[5] While there are district court cases that have found a proposed conjoint analysis to be insufficiently detailed or thorough to support a finding of predominance, they also do not support the categorical rule Nutramax proposes. Rather, they reflect the unremarkable proposition that an underdeveloped expert model is far less likely to be able to establish that a particular element is susceptible to common proof. *See In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552 (C.D. Cal. 2014) (rejecting proposed conjoint survey where expert simply "offer[ed] a basic description of the manner in which hedonic regression and conjoint analysis operate, and assert[ed] that the exact specifications [the expert's analysis would] use will be solidified as discovery progresses"); *Miller v. Fuhu Inc.*, 2015 WL 7776794, at *21-22 (C.D. Cal. Dec. 1, 2015) (concluding that expert's testimony that "it is possible and practical to design and conduct" a conjoint analysis was insufficient to establish predominance where expert had not designed such a survey). Indeed, in *ConAgra*, the district court subsequently granted class certification based upon a "proposed conjoint analysis" once the expert had provided a more fully developed methodology. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 954 (C.D. Cal. 2015); *see also Vizcarra v. Unilever United States, Inc.*, 2023 WL 2364736, at *16–18 (N.D. Cal. Feb. 24, 2023) (noting the court had previously rejected un-executed conjoint analysis based on methodological flaws, but granting class certification based on revised analysis that corrected those flaws, even where the survey had not been fully executed).

Nutramax argues that because Dr. Dubé had not yet obtained all of the data necessary to fully execute his model, the district court could not have found that his opinion satisfied the requirements of FRE 702 that his testimony be "based on sufficient facts or data." Fed. R. Evid. 702(b). But here again, we think Nutramax confuses a class certification proceeding with a summary judgment motion. As applied to class certification where the issues are commonality and predominance, the Rule 702(b) question concerns whether the data suffices to show that a common question predominates over individual issues, not whether the subsequently executed model applied to a more complete dataset would then meet the requirements of 702(b) as applied to a summary judgment motion. By the same token, we do not agree with Nutramax that the "rigorous analysis" required at the class certification stage means that every expert opinion offered at that stage must be subjected to a full evidentiary hearing to see if each such opinion meets the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

1.

The manner and extent to which the *Daubert* framework applies at the class certification stage is an unsettled question. A leading treatise has suggested that there is at least some divergence among the Circuits on this question, with some employing a "full" *Daubert* inquiry and others employing a more limited one. *See* 3 Newberg and Rubenstein on Class Actions § 7:24 (6th ed. 2022).[6]

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[6] The Supreme Court originally granted certiorari in *Comcast* to resolve this question, but ultimately resolved the case on other grounds once it became apparent the question was not properly

Our own precedent has somewhat oscillated between these two approaches. In *Ellis v. Costco Wholesale Corp.*, we affirmed a district court's application of the *Daubert* standard at the class certification stage. 657 F.3d 970, 982–83 (9th Cir. 2011); *see also* 3 Newberg and Rubenstein on Class Actions § 7:24 (6th ed. 2022) (characterizing *Ellis* as adopting a full *Daubert* test). Similarly, in *Olean*, we stated in dicta that "[i]n a class proceeding, defendants may challenge the reliability of an expert's evidence under *Daubert*," although the defendants in *Olean* did not actually raise a Daubert challenge. 31 F.4th at 665 n.7. In *Sali v. Corona Regional Medical Center*, however, we noted that while "a district court should evaluate admissibility under the standard set forth in *Daubert*," whether testimony is admissible under that standard is "not ... dispositive," but instead "should go to the weight that evidence is given at the class certification stage." 909 F.3d at 1006. We cited with approval the Eighth Circuit's decision in *In re Zurn Pex Plumbing Products Liability Litigation*, which is the leading decision endorsing a more limited *Daubert* inquiry. *Id.* at 1004; *see Cox v. Zurn Pex, Inc. (In re Zurn Pex Plumbing Prods. Liab Litig.)*, 644 F.3d 604, 613 (8th Cir. 2011) ("The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker.").

We think that, at least for purposes of this case, the distinction between a "full" and "limited" *Daubert* inquiry is a function of what aspect of FRCP 23 is being addressed. Here, the question under FRE 702 is

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presented. *Comcast*, 569 U.S. at 39–40, 133 S.Ct. 1426 (Ginsburg, J., dissenting).

whether the model that the plaintiffs' expert is offering on the issues of commonality and predominance is reliable for FRCP 23 purposes. Accordingly, such *Daubert* factors as peer review of the proffered model may be highly relevant, while others, such as known error rate, may be more applicable to the later-executed results of the test. *Daubert* itself stressed that its suggested factors were simply illustrative and needed to be applied flexibly, and this surely means applying them only to the extent helpful to the issue at hand. *See Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786 (noting that "[t]he inquiry envisioned by Rule 702 is ... a flexible one" and disclaiming any intent "to set out a definitive checklist or test").

Thus, for example, whether a "full" or "limited" *Daubert* analysis should be applied may depend on the timing of the class certification decision. If discovery has closed and an expert's analysis is complete and her tests fully executed, there may be no reason for a district court to delay its assessment of ultimate admissibility at trial. By contrast, where an expert's model has yet to be fully developed, a district court is limited at class certification to making a predictive judgment about how likely it is the expert's analysis will eventually bear fruit. This still requires determining whether the expert's methodology is reliable, so that a limited *Daubert* analysis may be necessary, but the more full-blown *Daubert* assessment of the results of the application of the model would be premature.

Here, we are satisfied that the district court's limited *Daubert* analysis was sufficient for the immediate purposes. As the district court expressly recognized, "the court considers only if expert evidence is useful in evaluating whether class certification requirements have been met," and for that purpose a

more limited *Daubert* inquiry may be sufficient. This is consistent with the Supreme Court's general rule that "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466, 133 S.Ct. 1184.

In finding that the prerequisites of FRE 702 were met for FRCP 23 purposes, the district court relied on Dr. Dubé's unchallenged credentials, Dr. Dubé's review of documentary evidence and marketing data, the fact that "[c]onjoint surveys, like the one proposed by [Dr. Dubé], are a well-established method for measuring class-wide damages in CLRA mislabeling cases," and the fact that Dr. Dubé had successfully performed conjoint analyses in prior cases similar to this. It is true Dr. Dubé has not collected all of the necessary data to perform his calculations in the instant case, but implicit in Dr. Dubé's opinion—which the district court credited—is the conclusion that he would be able to obtain such information, and Nutramax offers no reason to think he would be unable to do so. Nor, as explained below, has Nutramax shown either that Dr. Dubé's methodology is flawed or that there is a likelihood that he will improperly apply that method to the facts. In light of the foregoing, we cannot say that the district court abused its discretion in rejecting Nutramax's *Daubert* challenge to Dr. Dubé's opinion.

2.

Nutramax also argues that, even if an unexecuted damages model may in some circumstances support class certification, on the facts of this case Dr. Dubé's model is too underdeveloped to satisfy the "rigorous analysis" required under FRCP 23. Nutramax contends that Dr. Dubé has not designed the survey question-

naire, has not determined the precise demographic makeup of the individuals to be surveyed, has not selected all of the parameters for his model, and lacks certain data needed to finalize his calculations. Plaintiffs respond that Dr. Dubé has in fact fully designed the conjoint analysis and the methodology behind it, including by identifying the target population, analyzing economic data to determine the structure of the market, and specifying the mathematical analysis he will perform on the survey results. While Plaintiffs acknowledge Dr. Dubé has not yet programmed the survey (i.e., written the questions), they cite to Dr. Dubé's testimony describing this as merely "an implementation detail," and argue that it makes sense not to finalize the survey questions until the exact scope of the class is known. In short, according to Plaintiffs, the survey is fully designed and all that remains is for it to be executed.

As already discussed above, Plaintiffs may rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof. To be sure, the fact the model has not been executed remains relevant. *Olean* makes clear that "[t]he determination whether expert evidence is capable of resolving a class-wide question in one stroke may include '[w]eighing conflicting expert testimony' and '[r]esolving expert disputes' where necessary to ensure that Rule 23(b)(3)'s requirements are met." 31 F.4th at 666 (internal citation omitted) (quoting *In re Hydrogen Peroxide*, 552 F.3d at 323–24). This assessment of a "model's reliability" required by *Olean* goes beyond the *Daubert* analysis, and the fact that an expert's model is sufficiently reliable to meet the standard of FRE 702 as applied to a FRCP 23 determination may not be sufficient to satisfy the standard. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)

(suggesting FRCP 23 requires a distinct analysis beyond an assessment of admissibility under *Daubert*); *Olean*, 31 F.4th at 665–66 nn. 7, 9. Rather, the district court must also probe the likelihood that the model will be capable of generating common answers. A district court may not, however, "decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed." *Id.* at 667.[7]

In applying this test to an unexecuted damages model, the question a district court must ask is whether the model will likely be able to generate common answers at trial. The fact that a model is underdeveloped may weigh against a finding that it will provide a reliable form of proof. Merely gesturing at a model or describing a general method will not suffice to meet this standard. Rather, plaintiffs—or their expert—must chart out a path to obtain all necessary data and demonstrate that the proposed method will be viable as applied to the facts of a given case.[8]

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[7] *Olean* gave the following examples of expert evidence that, while otherwise admissible under *Daubert*, might be unable to generate common answers: where "the expert evidence was inadequate to prove an element of the claim for the entire class [i.e., is not common to all]; where the damages evidence was not consistent with the plaintiffs' theory of liability; where the evidence contained unsupported assumptions; or where the evidence demonstrated nonsensical results such as false positives, i.e., injury to class members who could not logically have been injured by a defendant's conduct." *Id.* at 666 n.9 (internal citations omitted).

[8] Plaintiffs' briefing on appeal seems to advance a rule that merely putting forward a viable method is sufficient. To the extent that is Plaintiffs' position, we disagree. Even where a method is otherwise valid and reliable under FRE 702, it may nonetheless fail to produce common answers for any number of

Here, the district court recognized that Plaintiffs were required to "show that damages are capable of measurement on a class-wide basis," while acknowledging they may do so without executing the model. On appeal, Nutramax raises a flurry of attacks on the reliability of Dr. Dubé's model that were never presented to the district court. While Nutramax referenced the underdeveloped nature of Dr. Dubé's model throughout its briefing below, the only such argument it developed with any thoroughness was the contention that Dr. Dubé lacked critical data needed to complete his analysis. Since we cannot say that the district court abused its discretion in failing to consider arguments with which it was not presented, *see Van v. LLR, Inc.*, 61 F.4th 1053, 1066 n.9 (9th Cir. 2023) ("An issue cannot form part of the district court's class certification decision if it was never raised at the class certification stage." (cleaned up)), we focus our analysis on those matters considered by the district court.[9]

With respect to the data Dr. Dubé had not yet collected, the district court acknowledged defendant's

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reasons, such as when the model does not apply in a manner common to the class. Hence, we underscore that the ultimate inquiry is whether a proposed model is likely to provide common answers at trial.

[9] In particular, on appeal Nutramax relies heavily upon the rebuttal report of their expert, Dr. Toubia, to challenge the reliability of Dr. Dubé's methodology. Had Dr. Toubia's report been fairly presented to the district court as a basis for denying class certification, it might have been error for the district court to not address it. *See Olean*, 31 F.4th at 666 (suggesting a district court must "[r]esolv[e] expert disputes" at class certification). However, our review of the record reveals that Nutramax never attempted to use Dr. Toubia's rebuttal report to attack Dr. Dubé's model, and instead cited Dr. Toubia's rebuttal report only a single time, and for an entirely unrelated proposition.

argument but credited Dr. Dubé's implicit conclusion that he would be able to obtain such data prior to trial. Nutramax has not convincingly demonstrated that the district court erred in reaching this conclusion.

Nutramax's other attacks on Dr. Dubé's methodology, to the extent they were presented to the district court, fare no better. As the district court observed, conjoint analysis is a well-accepted technique that is frequently used to establish damages in CLRA actions. *See, e.g., Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654, 657 (9th Cir. 2017) (describing conjoint analysis as a "well-established damages model"); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1107 (N.D. Cal. 2018) ("[C]onjoint analysis is a well-accepted economic methodology." (quoting *In re Dial Complete Mktg. & Sales Pracs. Litig.*, 320 F.R.D. 326, 331 (D.N.H. 2017))). Where an expert's proposed method is novel or untested, it makes sense to demand a greater degree of specificity and completeness before it is relied upon to certify a class. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 26–30 (1st Cir. 2008) (finding that "novelty and complexity of the theories advanced" by plaintiffs and their expert made certification of a class based upon incomplete model less appropriate). By contrast, here there is no dispute that a conjoint analysis is capable of measuring classwide damages, at least in the abstract, and the only real question at this stage is whether Dr. Dubé will properly apply the method to the facts of the case.

Nutramax cites a variety of potential errors Dr. Dubé might commit in executing his damages model. For example, Nutramax argues "the precise wording of a questionnaire is critical" and could "bias[ ] the results," and that "assumptions underlying [his] economic model" may not account for real-world factors. While

unanswered questions such as these, and the attendant possibility of errors, are certainly relevant, Nutramax offers no reason to think that Dr. Dubé will commit any of these errors. Dr. Dubé's qualifications are undisputed, he has successfully conducted conjoint analyses in the past, and Dr. Dubé testified he did not "envision anything particularly unique about this survey." The speculative possibility that Dr. Dubé might slip up in executing his model, standing alone, is insufficient to defeat class certification. *See Sali*, 909 F.3d at 1004–05 ("Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies [Rule 23]." (quoting *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975))).[10]

Accordingly, the record was sufficient to support the district court's conclusion that Dr. Dubé's model is capable of showing damages on a class wide basis.

C.

As the above discussion makes clear, it is not required that a plaintiff's expert must execute their damages model prior to class certification provided it is shown that the model provides a reliable and adequate method for calculating damages. We do, however, think it important to make clear that a plaintiff may not avoid ultimate scrutiny of the admissibility of their experts' final opinions simply by declining to

[10] This is especially true here given that "[c]lass wide damages calculations under the ... CLRA are particularly forgiving" and "require[ ] only that some reasonable basis of computation of damages be used." *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818 (9th Cir. 2019) (quoting *Lambert*, 870 F.3d at 1183).

develop those opinions in advance of class certification. Accordingly, on remand, Nutramax must be given the opportunity in advance of trial to test the sufficiency and reliability of Dr. Dubé's model once it has been fully executed, including through a motion for summary judgment and/or a renewed *Daubert* motion.

IV.

The second broad issue raised by Nutramax on appeal is whether the district court erred in concluding that common questions predominated with respect to the element of reliance. California's CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770(a). To bring a CLRA claim, a plaintiff must show (1) the defendant engaged in deceptive conduct and (2) the deception caused plaintiff harm. *Stearns*, 655 F.3d at 1022. However, under the CLRA, "[c]ausation, on a classwide basis, may be established by *materiality.* If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." *Id.* (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129, 103 Cal.Rptr.3d 83 (2009)). A misrepresentation is material "if a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question[.]" *Id.*

Because materiality (and, hence, in this case reliance) may be proved by reference to an objective, reasonable consumer standard, reliance under the CLRA is generally susceptible to common proof. *See Noel v. Thrifty Payless, Inc.*, 17 Cal. App. 5th 1315, 1334, 226 Cal.Rptr.3d 465 (2017) ("When the consumer shows the complained-of misrepresentation would have been material to any reasonable person, he or she has carried the burden of showing actual reliance and

causation of injury for each member of the class."), *rev'd on other grounds*, 7 Cal. 5th 955, 250 Cal.Rptr.3d 234, 445 P.3d 626 (2019); *Stearns*, 655 F.3d at 1022; *Bradach v. Pharmavite, LLC*, 735 F. App'x 251, 254 (9th Cir. 2018) ("Under California law, class members in CLRA ... actions are not required to prove their individual reliance on the allegedly misleading statements. Instead, the standard ... is whether members of the public are likely to be deceived. For this reason, ... [CLRA] claims are ideal for class certification because they will not require the court to investigate class members' individual interaction with the product." (internal quotation marks and citations omitted)). However, while materiality can support an inference of reliance, that does not necessarily mean that the inference will hold as to the entire class, such that common questions predominate. "If the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified." *Stearns*, 655 F.3d at 1022–23 (quoting *Vioxx*, 180 Cal. App. 4th at 129, 103 Cal.Rptr.3d 83).

The district court cited the correct legal standard, noting that materiality can be used to establish reliance under the CLRA, while also acknowledging that the presumption is rebuttable insofar as "reliance would vary from consumer to consumer." Nutramax nonetheless contends the district court committed legal error by finding "the 'objective test' used for materiality rendered materiality and thus causation inherently a common issue." Read in context, we do not think the district court applied an incorrect, irrebuttable presumption as Nutramax suggests. Rather, the observation that materiality and causation are "inherently common issues" was made only after the district court considered the relevant evidence of

materiality and concluded it supported an application of the presumption. We therefore review the district court's findings on this issue for abuse of discretion. *See Sali*, 909 F.3d at 1002.[11]

Plaintiffs presented ample evidence to show that the challenged statements would be materially misleading to a reasonable consumer. To demonstrate that a reasonable consumer would have understood the challenged statements to have promised that the product would improve a dog's joint health, Plaintiffs cited the testimony of the named plaintiffs, the testimony of their advertising expert, Silverman, and the survey results of Nutramax's own expert, Dr. Scott, which indicated that the near-universal understanding of Cosequin's purpose was that it would "improve/help/maintain mobility, flexibility, joint health/support." This understanding, caused by Nutramax's packaging statements, was, according to Plaintiffs' experts, false and misleading because there is no evidence that Cosequin improves a dog's joint health. The district court credited all of this evidence and expressly found that it "outweighed" the contrary evidence presented by defendants' experts, including Dr. Scott. Nutramax has not shown that this conclusion was an abuse of discretion. The district court thus correctly found that Plaintiffs had demonstrated that the presumption of reliance applied.[12]

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[11] We also do not think the district court committed legal error when it cited the rule that "a plaintiff is not required to show that the challenged statement is the 'sole or even the decisive cause' influencing the class members' decisions to buy the challenged products." As explained below, this statement is consistent with California law.

[12] Nutramax argues that Plaintiffs' evidence of falsity showed only that Cosequin was unable to treat dogs with arthritis, not

Nutramax nonetheless argues that it put forward sufficient evidence to rebut the presumption, and the district court erred in concluding otherwise. Nutramax points to what it describes as "overwhelming evidence that veterinarians frequently recommend joint supplements, including Cosequin." Nutramax similarly cites the results of Dr. Scott's survey, which suggests approximately half of survey respondents decided to purchase Cosequin before going to a physical store or website. According to Nutramax, all of this demonstrates that individualized assessments will be needed to determine whether any given class member actually relied on the label.

The fact some class members considered sources of information other than the packaging in making their purchasing decisions does not necessarily undermine reliance. To establish reliance under the CLRA, a misrepresentation need not be "the *sole* or even the *decisive* cause of the injury-producing conduct." *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1020 (9th Cir. 2020) (quoting *Kwikset Corp. v. Superior Ct.*, 51 Cal.4th 310, 120 Cal.Rptr.3d 741, 246 P.3d 877, 888 (2011)). For example, in *Moore*, we found that "[t]he fact that vets had prescribed each Plaintiff the pet food— rather than each discovering the pet food on their own— [did] not negate the allegation of actual reliance because the prescription requirement and advertising need not be the sole or even the decisive cause of the purchase." *Id.* at 1020–21. In other words, *Moore* rejected the very argument now advanced by

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that it was totally ineffective at promoting joint health generally, but Nutramax made this argument in the court below and it was expressly rejected by the district court, which credited Plaintiffs' evidence that "Cosequin has no effect on joint health."

Nutramax, that there can be no reliance where a veterinarian recommends a product.

Nutramax attempts to distinguish *Moore* on the grounds that it was decided on a motion to dismiss. However, at least one California appellate court has applied the rule beyond the motion to dismiss context. *See Veera v. Banana Republic, LLC*, 6 Cal. App. 5th 907, 919, 211 Cal.Rptr.3d 769 (2016) (applying rule to deny motion for summary judgment). And the model jury instructions for a CLRA claim promulgated by the Judicial Council of California similarly indicate that, "[t]o prove reliance, [name of plaintiff] need only prove that the representation was a substantial factor in [his/her/nonbinary pronoun] decision" and "does not need to prove that it was the primary factor or the only factor in the decision." Judicial Council of California, Model Civil Jury Instruction No. 4700.[13]

To be sure, the fact that some consumers relied on other sources of information is relevant to the assessment of reliance. In an appropriate case, such evidence might be sufficient to demonstrate that the misrepresentation was not "a substantial factor" in a large percentage of consumers' purchasing decisions. But we

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[13] The full instruction reads:

> [[Name of plaintiff]'s harm resulted from [name of defendant]'s conduct if [name of plaintiff] relied on [name of defendant]'s representation. To prove reliance, [name of plaintiff] need only prove that the representation was a substantial factor in [his/her/nonbinary pronoun] decision. [He/She/Nonbinary pronoun] does not need to prove that it was the primary factor or the only factor in the decision.
>
> If [name of defendant]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services].]

do not think it was an abuse of discretion for the district court to find to the contrary here. If one imagines a counterfactual where the packaging contained no suggestion that Cosequin benefited a dog's joint health, it is entirely plausible that no consumer would have chosen to purchase the product. *See Alvarez v. NBTY, Inc.*, 331 F.R.D. 416, 423 (S.D. Cal. 2019) ("Without [the challenged] statement, no consumer would have a reason to purchase the Products and would otherwise be purchasing a random bottle of supplements without any knowledge of what benefit, if any, the supplements provided."). Further, while one of Plaintiffs' theories of causation is that they would not have purchased the products had they known the truth, another theory is that they paid more than they otherwise would have as a result of the misleading statements. *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1108 (9th Cir. 2013) ("[T]he CLRA's 'any damage' requirement is a capacious one that includes any pecuniary damage as well as opportunity costs and transaction costs that result when a consumer is misled by deceptive marketing practices."). If, as Plaintiffs contend, Cosequin provided no benefits to joint health, it is still more plausible that the consumers would have paid less had they known the truth.

This construction of the reliance requirement comports with the objectives of the CLRA more generally. The California legislature has declared that the CLRA "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Cal. Civ. Code § 1760. Consistent with this remedial objective, we have suggested that CLRA claims "are ideal for class certification because they will not require the court to investigate class members'

individual interaction with the product." *Bradach*, 735 F. App'x at 254 (quotation omitted). Nutramax's cramped interpretation of the reliance requirement, permitting the presumption to be overcome based upon marginally different interactions with a product containing a label that is otherwise materially misleading, would undermine the presumption of reliance and the capacity to bring CLRA class actions.

None of the cases that Nutramax cites, finding that the presumption of reliance was overcome, is to the contrary. For example, in *Stearns v. Ticketmaster Corp.*, the plaintiffs sued Ticketmaster for creating a website that misled individuals who purchased tickets into inadvertently signing up for an unrelated monthly subscription. 655 F.3d at 1017. While the district court acknowledged that this practice likely violated the CLRA, it nevertheless found class certification inappropriate because the plaintiffs' proposed class was too broad. *Id.* at 1024. We upheld this holding and explained that materiality was not uniform across the class because many class members would not have been deceived by Ticketmaster's marketing practice and had intentionally signed up for the subscription. *Id.*

Again, in *In re Vioxx Class Cases*, the "[p]laintiffs suggest[ed] that Merck hid an increased risk of death, associated with Vioxx," which plaintiffs used to support an inference of reliance. 180 Cal. App. 4th 116, 133, 103 Cal.Rptr.3d 83 (2009) (cleaned up). While a risk of death is material in the abstract, the trial court found class treatment inappropriate because defendants had introduced "overwhelming evidence" that materiality varied on an individual basis. *Id.* For example, the record contained undisputed evidence that the drug actually did not increase the risk of death for all of the class members and that some individuals continued

taking the drug even after learning of the risks in light of its substantial countervailing benefits. *Id.* at 133–34, 103 Cal.Rptr.3d 83.

Finally, in *Fairbanks v. Farmers New World Life Ins. Co.*, the plaintiffs alleged that defendant's marketing practices surrounding "universal life insurance" were misleading because the marketing suggested the policies were "permanent" when in fact the policies were not permanent and were systematically underfunded. 197 Cal. App. 4th 544, 553, 128 Cal.Rptr.3d 888 (2011). The court observed that plaintiffs' class certification motion "assume[d] that anyone who purchases universal insurance does so because ... a universal policy (if sufficiently funded) can be permanent," when in fact the record showed there were many other reasons an individual might purchase a universal insurance policy unrelated to its supposed permanence. *Id.* at 565, 128 Cal.Rptr.3d 888. Therefore, not all class members would find the misrepresentations about the policy being "permanent" material or misleading.

The common theme unifying each of these cases is that a sizable portion of the class either were not misled by the statements or would not have found the misrepresentations to be material had they known the truth. Here, by contrast, Dr. Scott's own survey indicated that the near-universal reason class members purchased Cosequin was because it would "improve/help/maintain mobility, flexibility, joint health/support." Indeed, it is difficult to see why else consumers would purchase this "joint health supplement" other than to improve their dog's joint health. For purposes of class certification, Plaintiffs have adequately demonstrated that a reasonable consumer would have been misled into believing Cosequin would improve their dogs' joint health, when, in fact, Cosequin provided no such

benefits, and that this misrepresentation would have been material as to the entire class. The district court thus did not abuse its discretion in concluding reliance may be proven on a class wide basis.

V.

For the foregoing reasons, we affirm the district court's grant of class certification.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA

Case No. ED CV 19-0835 FMO (SPx)

Justin LYTLE, et al., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NUTRAMAX LABORATORIES, INC., et al.,

Defendants.

Signed 05/06/2022

ORDER RE: MOTION FOR CLASS CERTIFICATION

Fernando M. Olguin, United States District Judge

Having reviewed all the briefing filed with respect to plaintiffs' Motion for Class Certification (Dkt. 91, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, *see* Fed. R. Civ. P. 78(b); Local Rule 7-15; *Willis v. Pac. Mar. Ass'n,* 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND[1]

Justin Lytle ("Lytle") and Christine Musthaler ("Musthaler") (collectively, "plaintiffs"), on behalf of themselves and all others similarly situated, filed the operative Second Amended Complaint ("SAC") against Nutramax Laboratories, Inc. and Nutramax Laboratories Veterinary Sciences, Inc. (collectively, "Nutramax" or "defendants") asserting claims for: (1) violations of California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.,* on behalf of a putative California subclass; and (2) violations of various state consumer protection laws on behalf of a putative national class. (*See* Dkt. 53, SAC at ¶¶ 142-169).

Defendants research, develop, manufacture, and sell supplements for both humans and household pets, including Cosequin canine joint health supplements that contain glucosamine and chondroitin ("Gl/Ch") as the main active ingredient. (*See* Dkt. 53, SAC at ¶¶ 2, 17). Plaintiffs allege that in marketing Cosequin, defendants "make incomplete and inaccurate claims – both in advertising and on the packaging and packages – that would mislead and have in fact misled reasonable consumers into purchasing, using, and continuing to use [Cosequin] Products." (*Id.* at ¶ 1). According to plaintiffs, defendants' joint health claims "are refuted by peer-reviewed, randomized, controlled clinical trials[.]" (*Id.)*. Also, defendants' claims that Cosequin products "enhance joint flexibility and mobility and [ ] support or restore joint health" are unsupported "by any reliable science." (*Id.* at ¶ 5). If not for defendants' misrepresentations, plaintiffs allege that they and the putative class members either "would not have

[1] Capitalization, quotation and alteration marks, and emphasis in record citations may be altered without notation.

bought" Cosequin or were charged a "price premium" above comparable generic products. (*Id.* at ¶ 123).

Lytle purchased Cosequin DS Maximum Strength Plus MSM for his pet dogs from Amazon and Petsmart in California, with his last purchase in February 2019. (*See* Dkt. 53, SAC at ¶ 124). Musthaler purchased Cosequin DS Maximum Strength Plus MSM chewable tablets for her pet dog from a Ralph's supermarket, with her last purchase also in February 2019. (*Id.* at ¶ 126). Plaintiffs allege that they read the packaging and relied on defendants' representations in purchasing the Cosequin products, and that they would not have done so "had Defendants apprised Plaintiffs that there is no scientifically valid basis for the representations made regarding the products on the packaging[.]" (*Id.* at ¶¶ 125, 127-129). Neither plaintiff "saw improvements in their pets" after giving them Cosequin, and both plaintiffs "are still in possession of unused" Cosequin. (*Id.* at ¶ 128).

Plaintiffs seek an order certifying the following class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure:[2]

> [A]ll persons residing in California who purchased during the limitations period the following canine Cosequin products for personal use ("the Products"): Product #1: Cosequin DS Maximum Strength Chewable Tablets[;] Product #2: Cosequin DS Maximum Strength Plus MSM Chewable Tablets[; and] Product #3: Cosequin DS Maximum Strength Plus MSM Soft Chews.

[2] All "Rule" references are to the Federal Rules of Civil Procedure unless otherwise indicated.

(*See* Dkt. 120, Joint Brief on Class Certification ("Joint Br.") at 2)[3]; (*see also* Dkt. 91, Motion at 2). Plaintiffs also seek to be appointed class representatives and to have their counsel, Milberg Coleman Bryson Phillips Grossman, PLLC and Levin Papantonio Rafferty, appointed as co-lead class counsel. (*See* Dkt. 120, Joint Br. at 20); (Dkt. 145, Declaration of Adam Edwards in Support of Appointment as Co-Lead Class Counsel [ ] ("Edwards Decl.") at ¶ 5).

LEGAL STANDARD

Rule 23 permits a plaintiff to sue as a representative of a class if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions or law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Courts refer to these requirements by the following shorthand: "numerosity, commonality, typicality and adequacy of representation[.]" *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 588 (9th Cir. 2012). In addition to fulfilling the four prongs of Rule 23(a), the proposed class must meet at least one of the

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[3] This Order references the unredacted version of the Joint Brief filed under seal, (*see, e.g.,* Dkt. 120, Joint Br.), although it does not disclose any redacted information. A publicly-accessible version of the Joint Brief containing redactions is available at Dkt. 121.

three requirements listed in Rule 23(b). *See Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 345, 131 S.Ct. 2541, 2548 (2011).

"Before it can certify a class, a district court must be satisfied, after a rigorous analysis, that the prerequisites of both Rule 23(a) and" the applicable Rule 23(b) provision have been satisfied. *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.,* 2022 WL 1053459, *5 (9th Cir. 2022) (*en banc)*. A plaintiff "must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Id.*

On occasion, the Rule 23 analysis "will entail some overlap with the merits of the plaintiff's underlying claim[,]" and "sometimes it may be necessary for the court to probe behind the pleadings[.]" *Dukes,* 564 U.S. at 350-51, 131 S.Ct. at 2551 (internal quotation marks omitted). However, courts must remember that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,* 568 U.S. 455, 466, 133 S.Ct. 1184, 1194-95 (2013); *see id.,* 133 S.Ct. at 1195 ("Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites ... are satisfied."); *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 983 n. 8 (9th Cir. 2011) (The court examines the merits of the underlying claim "only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims....To hold otherwise would turn class certification into a mini-trial.") (citations omitted). Finally, a court has "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal

proceedings before the court." *United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co.,* 593 F.3d 802, 810 (9th Cir. 2010) (internal quotation marks omitted); *see also Yokoyama v. Midland Nat'l Life Ins. Co.,* 594 F.3d 1087, 1092 (9th Cir. 2010) (The decision to certify a class and "any particular underlying Rule 23 determination involving a discretionary determination" is reviewed for abuse of discretion.).

DISCUSSION

I. EVIDENTIARY OBJECTIONS

After the close of briefing on the instant Motion, defendants filed motions under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786 (1993), challenging plaintiffs' experts Bruce Silverman ("Silverman") and Dr. Jean Pierre Dubé ("Dubé"). (*See* Dkt. 109, Motion to Exclude the Testimony of Plaintiffs' Expert Witness, Bruce Silverman); (Dkt. 112, Motion to Exclude the Opinions and Testimony of Plaintiffs' Expert Witness, Dr. Jean Pierre Dubé). Despite defendants' untimely *Daubert* objections, the court will exercise its discretion to consider their motions.[4]

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[4] As explained in the Court's Order Re: Motions for Class Certification (Dkt. 70), "[a]fter the joint brief [on class certification] is filed, each party may file a supplemental memorandum of points and authorities no later than fourteen (14) days prior to the hearing date.... No other separate memorandum of points and authorities shall be filed by either party in connection with the motion for class certification." (*Id.* at 4). Here, defendants filed their *Daubert* motions, (*see* Dkt. 109, Motion to Exclude the Testimony of Plaintiffs' Expert Witness, Bruce Silverman); (Dkt. 112, Motion to Exclude the Opinions and Testimony of Plaintiffs' Expert Witness, Dr. Jean Pierre Dubé), two days prior to the

A court "evaluating challenged expert testimony in support of class certification ... should evaluate admissibility under the standard set forth in *Daubert*." *Sali v. Corona Reg'l Med. Ctr.,* 909 F.3d 996, 1006 (9th Cir. 2018). "Under *Daubert,* the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Ellis,* 657 F.3d at 982. At the class certification stage, however, "admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at th[is] stage." *Sali,* 909 F.3d at 1006. The court's "analysis [is] tailored to whether an expert's opinion was sufficiently reliable to admit for the purpose of proving or disproving Rule 23 criteria, such as commonality and predominance." *Tait v. BSH Home Appliances Corp.,* 289 F.R.D. 466, 495 (C.D. Cal. 2012). In doing so, the "requirements of relevance and reliability set forth in *Daubert* ... serve as useful guideposts but the court retains discretion in determining how to test reliability as well as which expert's testimony is both relevant and reliable." *Id.* (internal quotation marks omitted). At this stage, the court considers only "if expert evidence is useful in evaluating whether class certification requirements have been met." *Id.* (internal quotation marks omitted).

A. Silverman

Silverman has 50 years of professional experience in the marketing and communications industry, and has provided expert testimony in many cases involving allegations of false advertising. (*See* Dkt. 93-3, Exh. 3,

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hearing date set for plaintiff's motion for class certification. (*See* Dkt. 91, Motion).

Expert Report of Bruce G. Silverman ("Silverman Report") at ¶¶ 9, 11); *see, e.g., Bailey v. Rite Aid Corp.,* 338 F.R.D. 390, 400-01 (N.D. Cal. 2021); *Krommenhock v. Post Foods, LLC,* 334 F.R.D. 552, 579-80 (N.D. Cal. 2020); *Hadley v. Kellogg Sales Co.,* 324 F.Supp.3d 1084, 1115 (N.D. Cal. 2018); *Hobbs v. Brother Int'l Corp.,* 2016 WL 7647674, *4-5 (C.D. Cal. 2016). Plaintiffs rely on Silverman's opinion to support their contention that the challenged label claims would be material to a reasonable consumer. (*See* Dkt. 120, Joint Br. at 28-30).

Defendants raise several objections to Silverman's testimony. First, defendants argue that Silverman's testimony "purport[s] to get inside the head of Defendants ... as to their intent in labeling with the challenged claims[.]" (Dkt. 109-5, Joint Brief on Defendants' Motion to Exclude the Opinions and Testimony of [ ] Bruce Silverman ("Silverman Joint Br.") at 1); (*see also id.* at 6-8). But even if that were true, defendants' intent with respect to the challenged label statements is not an element of plaintiffs' CLRA claim, *see infra* at § III.A.1., and plaintiffs do not purport to rely on Silverman's testimony for such evidence in support of their motion for class certification. (*See, generally,* Dkt. 120, Joint Br.).

Second, defendants assert that Silverman "failed to save his internet searches and materials viewed online."[5] (Dkt. 109-5, Silverman Joint Br. at 1); (*see also*

[5] Defendants similarly argue that "Silverman omitted from his report 'the facts or data considered' in forming his opinions." (Dkt. 109, Silverman Joint Br. at 12) (quoting FRCP 26(a)(2)(B)(ii)). Defendants point to portions of Silverman's deposition in which the full context makes clear that Silverman was explaining that his views are informed by his cumulative experience in consumer research. (*See* Dkt. 109-7, Tab 1, Deposition of Bruce Silverman ("Silverman Depo.") at 63-64) ("[A]s I speak to in my – in the

id. at 8-10). Defendants refer to comments Silverman made during his deposition that he probably "looked at the websites from Chewy or other places where these products are sold just to get a different view of the packaging." (Dkt. 109-7, Tab 1, 109-7, Tab 1, Silverman Depo. at 66). The court is not persuaded that this is a reason to exclude Silverman's testimony. Moreover, Silverman explains that his opinions are based on the product labels and packages that defendants provided in discovery. (*See* Dkt. 93-3, Exh. 3, Silverman Report at ¶ 57).

Defendants also contend that Silverman "was recently excluded in another case for the same issue." (Dkt. 109-5, Silverman Joint Br. at 9). In *Price,* the court excluded Silverman's testimony at summary judgment "[t]o the extent that [he] opines on consumers' awareness of keratin as an ingredient in haircare products and consumers' resulting perception

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'Qualifications' section in my report, ... I've had access to literally thousands of pieces of consumer research, all of which inform my knowledge and understanding of how consumers interact with products sold in retail."); (*id.* at 64-65) ("Q. Did you rely on any consumer surveys to form the basis of your opinions? A. No. Well[,] ... other than, you know, all of the survey material that I reviewed that informs ... my opinions. Q. ... You're referring to the survey data that you reviewed in the course of ... your advertising career, not specific survey data related to this case? A. That's correct."). Courts have noted that Silverman's opinion is reliable because he "has interviewed thousands of consumers over the course of his career and has observed thousands of focus group sessions[.]" *Bailey,* 338 F.R.D. at 401; *see Price v. L'Oreal USA, Inc.,* 2020 WL 4937464, *3 (S.D.N.Y. 2020) (noting that Silverman "has reviewed thousands of proprietary quantitative studies providing insights into consumers' understanding and beliefs about various brands, products and advertising; personally interviewed more than five thousand consumers; and attended at least 3,500 focus group sessions").

of the Challenged Terms" because that opinion was "not based on his experience, nor [was] it based on a reliable methodology." 2020 WL 4937464, at *4. The court noted that "Silverman does not claim to have any experience from which he can opine on consumer knowledge of keratin as an ingredient in hair products[,]" and that his opinion on that topic was instead based "on certain Google searches[.]" *Id.*

Here, Silverman does claim to have experience from which he can opine on how a reasonable consumer would understand the challenged label claims. (*See, generally,* Dkt. 93-3, Exh. 3, Silverman Report at ¶¶ 9-32) (describing his qualifications as an advertising expert). And in *Price,* the court ultimately relied on Silverman's testimony in concluding that plaintiffs put forward sufficient evidence to survive summary judgment as to whether the challenged label claims were deceptive based on the "reasonable consumer" standard, *see Price,* 2020 WL 4937464, at *10, which is the same purpose for which plaintiffs rely on Silverman's testimony in this case. (*See* Dkt. 120, Joint Br. at 28-29). As for defendants' contention that Silverman's opinion is unreliable because it is based on his experience in the advertising industry, (*see* Dkt. 109-5, Silverman Joint Br. at 6) ("Mr. Silverman purports to rely on nothing more than his experience."), that argument also lacks merit. *See, e.g., Bailey,* 338 F.R.D. at 401 (rejecting defendant's argument that Silverman's opinions lack support "because they are based primarily on his work experience in the advertising industry"). As the court explained in *Price,* "expert reports regarding consumer perception need not be based on scientific surveys, [and] experts may testify based on their own experience." 2020 WL 4937464, at *5; *see also id.* at *3 ("Mr. Silverman's opinions that

are premised on his own experience satisfy the factors set forth in Rule 702.").

Defendants also assert that Silverman violated Rule 26(a)(2)(B)(v) because his report did not list his recent testimony in *Bailey,* and he did not identify his role in the case until his deposition.[6] (*See* Dkt. 109-5, Silverman Joint Br. at 13). According to defendants, this omission was "highly prejudicial" because they had not prepared to ask Silverman about the case during his deposition.[7] (*See id.)*. However, defendants do not assert that this omission in Silverman's report was the result of bad faith, (*see, generally,* Dkt. 109-5, Silverman Joint Br. at 12-13), and they did not explore the *Bailey* case further after Silverman mentioned it during his deposition. (*See* Dkt. 109-7, Tab 1, Silverman Depo. at 22). Under the circumstances here, the court declines to take the "extreme measure" of striking an expert witness where there is no evidence of "bad faith or willfulness[.]" *Box v. United States,* 2019 WL 6998754, *2 (D. Kan. 2019).

Finally, defendants contend that Silverman's opinions "lack any indicia of reliability" because he "did not conduct any surveys, focus groups, or formal research to form the basis of his materiality opinions." (Dkt. 109-5, Silverman Joint Br. at 16). However, California courts have "expressly rejected the 'view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public

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[6] In *Bailey,* the court, in granting class certification, relied on Silverman's opinions regarding whether a reasonable consumer was likely to be deceived by label claims. *See* 338 F.R.D. at 400.

[7] To the extent defendants believe they need additional time to depose Silverman about his testimony in *Bailey,* the court will entertain a motion to reopen discovery for this limited purpose.

is likely to be misled by a representation.'" *Mullins v. Premier Nutrition Corp.,* 2016 WL 1535057, *5 (N.D. Cal. 2016) (quoting *Colgan v. Leatherman Tool Grp., Inc.,* 135 Cal.App.4th 663, 681 (2006)). And courts in other false advertising cases have specifically rejected this argument with respect to Silverman's expert testimony as to how a reasonable consumer would understand challenged label claims. *See, e.g., Krommenhock,* 334 F.R.D. at 580 ("Post's argument that Silverman's opinions must be excluded because he did not conduct any focus group or other consumer testing is misplaced. ...Also without merit is Post's assertion that Silverman needed to have but had no methodology to support his analysis of meaning and materiality."); *Bailey,* 338 F.R.D. at 401 (rejecting defendant's argument that "Silverman's opinions have no meaningful support, because they are based primarily on his work experience in the advertising industry, and because he did not conduct a survey of Rite Aid gelcaps consumers"); *Hadley,* 324 F.Supp.3d at 1115 ("To the extent Kellogg argues that Plaintiff's expert testimony [by Silverman] is weak or that Plaintiff lacks consumer survey evidence,... that argument is without merit.").

B. Dubé.

Dubé is a professor of marketing at the University of Chicago Booth School of Business, where he has been on the faculty since 2000, and a research fellow at the National Bureau of Economic Research. (*See* Dkt. 102-1, Exh. 2, Expert Report of Professor Jean-Pierre H. Dubé ("Dubé Report") at ¶¶ 5-6).[8] He has extensive experience in marketing data and analytics, has taught courses on conjoint analysis and estimating consumer demand, and has published dozens of papers

[8] A redacted version of Dubé's report is available at Dkt. 101-1.

on topics relating to consumer demand for branded goods and business pricing decisions. (*See id.* at ¶¶ 7-9). He has testified as an expert in several cases relating to false advertising and the impact of packaging information on pricing and other market outcomes. (*See id.* at ¶ 11). Plaintiffs rely on Dubé's proposed model to establish that "damages are capable of measurement on a classwide basis." (Dkt. 120, Joint Br. at 36) (quoting *Comcast Corp. v. Behrend* ("*Comcast*"), 569 U.S. 27, 34, 133 S.Ct. 1426, 1433 (2013)).

Defendants primarily object to Dubé's testimony on the grounds that he has not "performed a damages analysis using actual evidence[,]" (Dkt. 124, Joint Brief on Defendants' Motion to Exclude the Opinions and Testimony of Plaintiffs' Expert Witness, Dr. Jean Pierre Dubé ("Dubé Joint Br.") at 5),[9] and he "lacks critical data needed to complete his analysis." (*Id.* at 16). As explained below, *see infra* at § III.A.3., "[a] plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are capable of determination on a class-wide basis with common proof" at the class certification stage. *Bailey,* 338 F.R.D. at 408 n. 14 (quoting *Comcast,* 569 U.S. at 34, 133 S.Ct. at 1426) (citation and emphasis omitted).

Defendants also assert that "[t]he vast majority of putative class members were not exposed to the majority of challenged statements." (*See* Dkt. 124, Dubé Joint Br. at 11-12). However, as noted below, all proposed class members saw at least one of the challenged label claims. *See infra* at §§ II.B. & II.C.

Finally, defendants' contention that Dubé impermissibly uses a fraud-on-the-market model for damages,

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[9] A redacted version of defendants' motion to exclude Dubé's testimony is available at Dkt. 112-5.

(*see* Dkt. 124, Dubé Joint Br. at 12), misapprehends his proposed model. Dubé proposes a choice-based conjoint analysis to measure the impact of the challenged label claims and other product features on demand for Cosequin. (*See* Dkt. 102-1, Dubé Report at ¶¶ 14-18, 32-61). According to Dubé, his analysis will control for the supply-side of the market by controlling "for the marketplace realities of competitors to [Cosequin] with different product features and different prices." (*Id.* at ¶ 14). To be clear, defendants "do[ ] not appear to dispute 'that conjoint analysis is a well-accepted economic methodology.'" *Hadley,* 324 F.Supp.3d at 1107 (quoting *In re Dial Complete Mktg. & Sales Pracs. Litig.,* 320 F.R.D. 326, 331 (D.N.H. 2017)) (collecting cases). Indeed, "[s]imilar conjoint surveys and analyses have been accepted against *Comcast* and *Daubert* challenges by numerous courts in consumer protection cases challenging false or misleading labels." *Krommenhock,* 334 F.R.D. at 575. At best, defendants' "[c]hallenges to [Dubé's] survey methodology go to the weight given the survey, not its admissibility." *Wendt v. Host Int'l, Inc.,* 125 F.3d 806, 814 (9th Cir. 1997).

In short, the court finds that Silverman's and Dubé's expert reports and testimony are admissible to the extent the court relies on them in determining class certification.

II. RULE 23(a) REQUIREMENTS.

A. Numerosity.

A putative class may be certified only if it "is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). Although impracticability does not hinge only on the number of members in the putative class, joinder is usually impracticable if a

class is "large in numbers[.]" *See Jordan v. Cty. of Los Angeles,* 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds by Cty. of Los Angeles v. Jordan,* 459 U.S. 810 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the numerosity requirement). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members[.]" *Slaven v. BP Am., Inc.,* 190 F.R.D. 649, 654 (C.D. Cal. 2000); *see Tait,* 289 F.R.D. at 473-74 (same).

Here, defendants do not contest numerosity. (*See* Dkt. 120, Joint Br. at 11). Moreover, plaintiffs assert that while "the precise number of class members is unknown[,] ... 'general knowledge and common sense indicate it is large.'" (*See id.)* (quoting *Tait,* 289 F.R.D. at 474). Having reviewed the evidence submitted in connection with the instant Motion, (*see, e.g.,* Dkt. 102-4, Declaration of David M. Moore) (providing Cosequin sales data),[10] the court is satisfied that the proposed class is sufficiently numerous that joinder of all members is impracticable.

B. Commonality.

Commonality is satisfied if "there are common questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). It requires plaintiffs to demonstrate that their claims "depend upon a common contention ... [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 564 U.S. at 350, 131 S.Ct. at 2551; *see also Wolin v. Jaguar Land Rover N. Am., LLC,* 617 F.3d 1168, 1172 (9th Cir. 2010) (explaining that the commonality requirement demands that "class members' situations share a common issue of law or fact, and are

[10] A redacted version of Moore's declaration is available at Dkt. 101-4.

sufficiently parallel to insure a vigorous and full presentation of all claims for relief") (internal quotation marks omitted). "The plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." *Mazza,* 666 F.3d at 588 (internal quotation marks omitted). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." *Abdullah v. U.S. Sec. Assocs., Inc.,* 731 F.3d 952, 957 (9th Cir. 2013) (emphasis and internal quotation marks omitted); *see Mazza,* 666 F.3d at 589. Proof of commonality under Rule 23(a) is "less rigorous" than the related preponderance standard under Rule 23(b)(3). *See Mazza,* 666 F.3d at 589 (characterizing commonality as a "limited burden[,]" stating that it "only requires a single significant question of law or fact[,]" and concluding that it remains a distinct inquiry from the predominance issues raised under Rule 23(b)(3)). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998).

Plaintiffs contend that the following statements on the subject product labels, which they refer to collectively as the "Joint Health Representations," are false and misleading because the products in question "have no effect on canine joint health": (1) "Use Cosequin to help your pet Climb stairs, Rise, and Jump!"; (2) "Joint Health Supplement"; (3) "Supports Mobility for a Healthy Lifestyle"; (4) "Mobility, Cartilage and Joint Health Support." (Dkt. 120, Joint Br. at 1-2) (internal quotation marks omitted). Under the circumstances here, there are common questions of law and fact,

including: (1) whether members of the public are likely to be deceived by the Joint Health Representations; (2) whether defendants communicated the Joint Health Representations; (3) if so, whether the Joint Health Representations were material to a reasonable consumer; and (4) if the representations were material, were they truthful. These common questions not only address required elements of plaintiffs' CLRA claim, *see Stearns v. Ticketmaster Corp.,* 655 F.3d 1013, 1022 (9th Cir. 2011), *abrogated on other grounds in Comcast,* 569 U.S. 27, 133 S.Ct. 1426, (describing CLRA claims), but they also are susceptible to common proof – for example, testimony by plaintiffs and their experts explaining whether a reasonable consumer is likely to be misled by the contested label claims, as well as the "truth or falsity" of those claims, which will resolve "issue[s] that [are] central to the [claims'] validity[.]" *See Dukes,* 564 U.S. at 350, 131 S.Ct. at 2551; *see, e.g., Johns v. Bayer Corp.,* 280 F.R.D. 551, 557 (S.D. Cal. 2012) ("[T]he predominating common issues include whether Bayer misrepresented that the Men's Vitamins 'support prostate health' and whether the misrepresentations were likely to deceive a reasonable consumer.... [T]hese predominant questions are binary – advertisements were either misleading or not, and Bayer's prostate health claim is either true or false. Plaintiffs claim each of these predominating common questions is capable of class-wide resolution using class-wide evidence, and will generate common answers to the primary questions presented in this lawsuit."); *Yamagata v. Reckitt Benckiser LLC,* 2019 WL 3815718, *1 (N.D. Cal. 2019) ("The plaintiffs have submitted evidence that Reckitt Benckiser labeled their 'Move Free' glucosamine and chondroitin-based supplements with claims suggesting that the supplements would improve joint functioning, but that scientific studies show the ingredients in the

supplements do not actually improve joint functioning. The plaintiffs have therefore shown that liability is at least susceptible to classwide proof.").

Although defendants primarily "address[ ] why plaintiffs fail to show commonality as part of [their] predominance analysis[,]" (Dkt. 120, Joint Br. at 14), they briefly raise two arguments with respect to the commonality requirement. First, defendants assert that plaintiffs "fail to cite any competent evidence that their supposed common questions can be resolved on a classwide basis." (*Id.)*. As discussed below with respect to the predominance requirement, *see infra* at § III.A.1., plaintiffs submitted expert reports and other evidence that show that the contested label claims are false and material. (*See, e.g.,* Dkt. 120, Joint Br. at 13, 23, 28-29). And aside from defendants' contention that plaintiffs lack common evidence, defendants do not say why the common questions are not "capable of classwide resolution" in "that determination of [their] truth or falsity will resolve an issue that is central to the validity of... [plaintiffs'] claims in one stroke." *Dukes,* 564 U.S. at 350, 131 S.Ct. at 2551; (*see, generally,* Dkt. 120, Joint Br. at 14).

Second, defendants contend that plaintiffs' authorities "are distinguishable as the challenged claims in each appeared on the front label of products[,]" whereas here plaintiffs "challenge labeling claims that appear exclusively on the back" of the products. (*See* Dkt. 120, Joint Br. at 14 n. 12) (citing Dkt. 120-2, Exh. 6, Cosequin Label & Ad Images).[11] As an initial matter, courts have certified similar class actions based on allegedly false advertising that appears on both the front and back labels of consumer products. *See, e.g.,*

[11] A redacted version of Exhibit 6 is available at Dkt. 121-2.

Barrera v. Pharmavite, LLC, 2016 WL 11758373, *1 (C.D. Cal. 2016) (noting that the plaintiff, "[i]n making her purchase, ... read the front, back, and sides of the TripleFlex Triple Strength Label and, relied on every single one of Defendant's renewal and rejuvenation representations") (internal quotation marks omitted). Moreover, defendants do not specify which of the contested label claims "appear exclusively on the back" of the products. (*See, generally,* Dkt. 120, Joint Br.). In any event, at least one or more of the contested label claims (*e.g.,* "Joint Health Supplement") appears on the front of each Cosequin product to which defendants refer, and the contested label claims that appear on the back are nonetheless prominent. (*See* Dkt. 120-2, Exh. 6, Cosequin Label & Ad Images at ECF 3792-3809). Defendants also do not explain why the presence of certain contested label claims on the back of Cosequin products would defeat or undermine the presence of common questions here, (*see, generally,* Dkt. 120, Joint Br. at 14), and no reason is apparent to the court.

Under the circumstances, the court is satisfied that the commonality requirement has been met here, as there are common questions relating to the likelihood of consumers being deceived by defendants' representations, the materiality of those representations, and their veracity. *See, e.g., Bailey,* 338 F.R.D. at 399 (commonality established where plaintiff identified common questions for CLRA claim regarding whether a "rapid release" statement on acetaminophen gelcaps "was likely to deceive a reasonable consumer" and "whether the 'rapid release' statement was material"); *Martinelli v. Johnson & Johnson,* 2019 WL 1429653, *6 (E.D. Cal. 2019) ("Here, every class member has the same basic claim – they purchased Benecol because of statements on the product's packaging and those statements were false. Resolution of this common

claim depends on a critical common question of fact: whether Defendants' statements were in fact false.") (citation omitted); *McCrary v. Elations Co., LLC,* 2014 WL 1779243, *10 (C.D. Cal. 2014) ("Plaintiff has identified legal issues common to the putative class claims, namely whether the claims on Elations' packaging that it contains a 'clinically-proven combination' and/or a 'clinically-proven formula' are material and false. By definition, class members were exposed to these labeling claims, creating a 'common core of salient facts.'") (citation omitted). In short, the court finds that plaintiffs have satisfied "their limited burden under Rule 23(a)(2) to show that there are 'questions of law or fact common to the class.'" *Mazza,* 666 F.3d at 589.

C. Typicality.[12]

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). The purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." *Wolin,* 617 F.3d at 1175 (internal quotation marks omitted). "The requirement is permissive, such that representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono,* 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks omitted). "The test of typicality is whether other members have the same or

[12] Because the Supreme Court has noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge[,]" *General Tel. Co. of the SW v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2371 n. 13 (1982), the court hereby incorporates the Rule 23(a) commonality discussion set forth above. *See supra* at § II.B.

similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Wolin,* 617 F.3d at 1175 (internal quotation marks omitted). The typicality requirement is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Stearns,* 655 F.3d at 1019 (internal quotation marks omitted).

Here, defendants argue that plaintiffs' claims are atypical because they are subject to several unique defenses, although defendants cite little authority to support their contentions. (*See, generally,* Dkt. 120, Joint Br. at 16-19). First, defendants contend that plaintiffs' "expectations about Cosequin were not based on any representations on the label." (*Id.* at 17). According to defendants, plaintiffs used the Cosequin products to "cure their elderly dogs' myriad diseases ... even though the Products are not and were never marketed to treat diseases." (*Id.)*. Defendants also contend that plaintiffs "have not shown that their dogs are typical of the class[,]" because their dogs were in "poor health" and plaintiffs do not "point to the percentage of other gravely ill and elderly dogs treated with Cosequin."[13] (*Id.* at 18). Defendants' contentions are unpersuasive.

Plaintiffs testified that they purchased defendants' products because they believed it would improve their dogs' joint health. For example, Musthaler testified

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[13] Defendants also do not point to any scientific data that suggests Cosequin provides joint health benefits for some types of dogs, but not for others. (*See, generally,* Dkt. 120, Joint Br. at 16-17).

that she "expected it to do what it says it's going to do on the package ... so it would give [her dog] healthy joints." (Dkt. 93-5, Exh. 5, Deposition of Christine Musthaler at 171). When defense counsel pressed Musthaler on whether she expected that Cosequin would make her older dog "healthy again[,]" Musthaler explained that she did not and reiterated that she "expect[ed] it to help with [her dog's] joints." (*Id.* at 172). Lytle similarly testified that in deciding to buy Cosequin, he "went by the labeling and what it promised to do.... Just relief, joint health for older dogs." (Dkt. 93-4, Exh. 4, Deposition of Justin Anthony Lytle ("Lytle Depo.") at 53). Lytle also testified that he did not expect that Cosequin would "treat or cure" his dogs' arthritis. (*Id.* at 119).

Defendants' argument misapprehends the nature of the alleged injury and misconduct here. Plaintiffs' claim "is about point-of-purchase loss[,]" where they "were allegedly injured when they paid money to purchase" Cosequin products that do not provide joint health benefits. *See Johns,* 280 F.R.D. at 557; *see, e.g., Hadley,* 324 F.Supp.3d at 1101 ("Kellogg's [ ] argument appears to stem from a mistaken assumption that the injury that Plaintiff is seeking to redress in the instant case is physical in nature.... Instead, Plaintiff is seeking to recover for the *economic* injury caused by Kellogg representing that its foods are healthy.") (cleaned up) (emphasis in original); *Chacanaca v. Quaker Oats Co.,* 752 F.Supp.2d 1111, 1125 (N.D. Cal. 2010) ("[T]he particular harm for which [plaintiffs] seek redress is not health related. Rather, their claims sound in deception, unfairness and false advertising.").

Second, defendants contend that "plaintiffs did not use the product as directed[,]" which "render[ed] them not typical of putative class members who did." (Dkt.

120, Joint Br. at 18). According to defendants, plaintiffs failed to adhere to "feeding instructions requir[ing] three tablets per day for their dogs for the first 4-6 weeks." (*Id.)*. It is true that Lytle testified that he gave his dogs "maybe two or three a day[,]" although he sometimes forgot and only gave them one tablet. (Dkt. 93-4, Exh. 4, Lytle Depo. at 44). However, defendants cite no evidence that plaintiffs' dogs or, for that matter, any dogs, would have received the benefits set forth in the contested label representations had plaintiffs used the product as directed. (*See, generally,* Dkt. 120, Joint Br. at 18). Nor did defendants provide any evidence that all or most members of the proposed class strictly adhered to defendants' instructions for administering Cosequin. (*See, generally, id.)*. In any event, even if Lytle differed from other class members in how often he gave Cosequin to his dogs, that would not negate the showing that, in the context of this false-advertising claim, "other members have the same or similar injury" that "is based on conduct which is not unique to" Lytle. *Wolin,* 617 F.3d at 1175 (internal quotation marks omitted). Finally, Musthaler testified that she concluded Cosequin did not work as advertised "a little over a month" after she began giving it to her dogs, (Dkt. 93-5, Exh. 5, Musthaler Depo. at 40), but defendants cite no evidence that she "failed to follow the directions." (*See, generally,* Dkt. 120, Joint Br. at 18).

Third, defendants repeatedly argue that "plaintiffs cannot be typical of the proposed class because both purchased only one of the three Cosequin products at issue, Cosequin DS Maximum Strength Plus MSM Chewable Tablets, the labeling and packaging for which did not contain three of the four challenged claims." (Dkt. 120, Joint Br. at 18); (*see, e.g., id.* at 4) ("[T]he overwhelming majority of proposed Class

Members never even saw three of the four contested labeling claims."); (Dkt. 123, Defendants' Supplemental Memorandum in Opposition to Class Certification ("Supp. Opp.") at 2-3) (same)). However, it appears that at least one of the contested label claims appeared prominently on the label of every Cosequin product purchased by the proposed class. (*See, e.g.,* Dkt. 120, Joint Br.) (copies of label images with the statement "Joint Health Supplement"); (*see also id.* at 30) (asserting that plaintiffs "can only challenge the "Joint Health Supplement" claim). Thus, at least with respect to the "Joint Health Supplement" claim, the proposed class is "defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading."[14] *Mazza,* 666 F.3d at 596; *see, e.g., Elkies v. Johnson & Johnson Servs., Inc.,* 2018 WL 11223465, *8 (C.D. Cal. 2018) ("[T]he record clearly establishes that [defendant's] alleged misrepresentations regarding the clinically proven health benefits of the Products are prominently displayed on all of the Products' packaging, a fact that [defendant] has never contested."); *Johns,* 280 F.R.D. at 557 (finding typicality based in part on evidence that "the Men's Vitamin packages purchased by Plaintiffs and all class members prominently and repeatedly featured the identical 'supports prostate health' claim[,]" and thus "Plaintiffs and class members [ ] were all exposed to the same alleged misrepresentations on the packages").

As to defendants' argument that plaintiffs are atypical because they purchased only one of the subject Cosequin products, (*see* Dkt. 120, Joint Br. at 18),

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[14] The court may later exclude evidence concerning the contested label claims viewed by only a small percentage of the class, and the court does not rely on that evidence in deciding the instant Motion.

defendants do not dispute that the Joint Health Supplement statement, and perhaps other contested label claims, appeared on all three products. (*See, generally, id.* at 18-19). Given that plaintiffs allege that they "and all class members were exposed to the same statement" and "were all injured in the same manner," *see Martin v. Monsanto Co.,* 2017 WL 1115167, *4 (C.D. Cal. 2017), the court is persuaded that plaintiffs' claims are sufficiently typical of the class claims. While some class members may have purchased a slightly different type of Cosequin than plaintiffs, that "does not defeat typicality because the alleged misrepresentation was the same as to each type of" Cosequin product purchased by the class. *Id.* (internal quotation marks omitted). In other words, "Plaintiff[s'] claims ... have nothing to do with the unique characteristics of the various [Cosequin] products; they have to do only with what is allegedly shared by all those products." *Id.* (internal quotation marks omitted); *see, e.g., Chavez v. Blue Sky Nat. Beverage Co.,* 268 F.R.D. 365, 377-78 (N.D. Cal. 2010) (even though "plaintiff did not buy each product in the Blue Sky beverage line[,]" he satisfied typicality because his claims arose "out of the [same] allegedly false statement" on the beverages and "therefore [arose] from the same facts and legal theory"); *Johns,* 280 F.R.D. at 557 ("Plaintiffs claim typicality is met because they and the proposed class assert exactly the same claim, arising from the same course of conduct – Bayer's marketing campaign.").

Finally, defendants argue that the evidence shows Lytle "believed Cosequin worked and was worth what he paid for it." (Dkt. 120, Joint Br. at 19). Specifically, defendants assert that "Lytle continued to use Cosequin after filing [this] lawsuit[,]" citing Lytle's deposition testimony in which it appears he was asked to estimate how long he continued to use the final

bottle of Cosequin he purchased. (*Id.)*; (*see* Dkt. 93-4, Exh. 4, Lytle Depo. at 78) ("Q. So at minimum, wouldn't you agree the minimum number of days that you continued to give [his dog] Zoey Cosequin after you purchased this bottle, this 250-count bottle in February 2019, is 140? ... THE WITNESS: Correct."). Defendants also assert that Lytle "continued to purchase and give Cosequin to his dogs for years" after he believed "it was not helping[,]" (Dkt. 120, Joint Br. at 19), for which they cite the following testimony: "Q. So is it fair to say, then, sometime in 2016 or 2017 is when you came to the conclusion that Cosequin wasn't – wasn't helping with your dogs, giving them relief or better mobility? A. I can't recall the exact – exactly when, but it's when I started to have my doubts." (Dkt. 93-4, Exh. 4, Lytle Depo. at 61).

Under the circumstances, the court is not persuaded that Lytle's equivocal statement that he continued buying Cosequin after he "started to have ... doubts" about its effectiveness renders him atypical. Moreover, defendants rely on cases in which the plaintiff continued purchasing a product even after the plaintiff knew the challenged claim was false, (*see* Dkt. 120, Joint Br. at 19), which is not what Lytle said. For example, in *Turcios v. Carma Lab'ys, Inc.,* 296 F.R.D. 638 (C.D. Cal. 2014), the plaintiff alleged that the defendant sold "lip balm in packaging that contains a false bottom, deceptive covering, and/or nonfunctional slack fill[,]" and "that he would not have paid the price he paid for it had he known that the entire [ ] jar was not filled." *Id.* at 642. The *Turcios* court concluded that the plaintiff's testimony revealed that he did not rely "on the external volume of the jar when he purchased the lip balm[.]" *Id.* at 643. The court explained that the "Plaintiff testified that he had no expectation about how much product he was getting when he first

purchased the lip balm ..., he knew he was getting .25 ounces before he purchased the product, he was satisfied with the product and did not have any concerns or complaints after he finished his first and second .25 ounce jars, he continued to purchase the Carmex .25 ounce jars without reading the information on or inspecting the jar, he had no expectation of how much product he was getting, he did not put any thought into what price was reasonable, and he would still use Carmex today if he needed it." *Id.* Unlike the slack-fill component in *Turcios,* where the consumer received a small quantity of the subject product, plaintiffs here allege that Cosequin was ineffective for its advertised use as a joint health supplement – *i.e.,* plaintiffs' dogs received no joint health benefit from the subject products. Moreover, Lytle's testimony that he continued buying Cosequin even though he "started to have ... doubts" provides defendants with comparably weaker evidence with which to challenge Lytle's reliance on the contested label claims.

In short, the court finds that this factor is satisfied because plaintiffs' claims are based on the same facts, that they "relied upon defendants' representations in purchasing Cosequin and expected the Products to be effective as claimed on the packaging[,]" and the same legal and remedial theories as the claims of the rest of the class members. (Dkt. 53, SAC at ¶ 128); *see, e.g., Hilsley v. Ocean Spray Cranberries, Inc.,* 2018 WL 6300479, *6 (S.D. Cal. 2018) ("Plaintiff has demonstrated that her claims are typical as the Complaint alleges that she and all class members purchased the Products, were deceived by the false and deceptive labeling and lost money as a result."); *Lilly v. Jamba Juice Co.,* 308 F.R.D. 231, 240 (N.D. Cal. 2014) ("Named Plaintiffs ... clearly have a similar alleged injury as the rest of the proposed class, since they purchased

products that are the same as, or very similar to, the products challenged by the rest of the proposed class. Their claims are not based on any conduct that is unique to them."). As plaintiffs state, their claims are co-extensive with those of the class because they allege they "were deceived by defendants' mislabeling about the efficacy of Cosequin" and "were harmed in that they paid for a product marketed to improve mobility that was, in reality, no more effective than placebo." (Dkt. 120, Joint Br. at 15).

D. Adequacy.

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A two-prong test is used to determine adequacy of representation: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis,* 657 F.3d at 985 (internal quotation marks omitted). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Id.* The adequacy of counsel is also considered under Rule 23(g).

Here, defendants only challenge Lytle's adequacy to serve as a class representative based on his "criminal history[.]" (Dkt. 120, Joint Br. at 20). However, defendants rely on inapposite cases, (*see id.* at 21), in which the plaintiff was involved in criminal activity during the class certification process or had convictions for serious offenses that could be used for impeachment. *See, e.g., Dunford v. Am. DataBank, LLC,* 64 F.Supp.3d 1378, 1396-97 (N.D. Cal. 2014) ("The undersigned judge will not leave the rights of

absent class members ... in the hands of someone who was arrested the day before the class certification hearing, convicted of vandalism while class certification was pending, and recently 'entered the wrong apartment ... while intoxicated' leading to a guilty plea of aggravated trespass, not to mention all the other convictions."); *Porath v. Logitech, Inc.,* 2019 WL 6134936, *5 (N.D. Cal. 2019) (concluding that a proposed class representative "who has seven criminal convictions, is a convicted felon three times over, has a history of substance abuse, and of not reporting to his probation officer ... is unacceptable" in part because his felony convictions would be admissible as impeachment evidence under Federal Rule of Evidence 609). Based on the evidence submitted by defendants, which includes records for speeding tickets from 1995 and 1996, (*see* Dkt. 93-26, Exh. 26, Lytle Criminal Records at ECF 1185, 1189), it does not appear that Lytle has been convicted of a felony or a crime involving a dishonest act or false statement. (*See, generally, id.)*; (Dkt. 93-27, Exh. 27, Lytle Criminal Records); (Dkt. 93-4, Exh. 4, Lytle Depo. at 131-133)

In short, the court finds that neither plaintiffs' counsel nor plaintiffs have any conflicts of interest with class members, and that counsel and plaintiffs have established that they will prosecute the action vigorously on behalf of the class. (*See* Dkt. 94, Declaration of Matt Schultz at ¶¶ 3-4);(*see, generally,* Dkt. 145, Edwards Decl.); (Dkt. 145-1, Exh. A, Milberg Coleman Bryson Phillips Grossman Firm Resume); (Dkt. 145-2, Exh. B, Levin Papantonio Rafferty Firm Resume).

III. RULE 23(b)(3) REQUIREMENTS.

Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon,*

150 F.3d at 1022 (internal quotation marks omitted). Fed. R. Civ. P. 23(b)(3) requires two different inquiries, specifically a determination as to whether: (1) "questions of law or fact common to class members predominate over any questions affecting only individual members[;]" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

A. Predominance.

"Though there is substantial overlap between [the Rule 23(a)(2) commonality test and the Rule 23(b)(3) predominance test], the 23(b)(3) test is far more demanding[.]"[15] *Wolin,* 617 F.3d at 1172 (internal quotation marks omitted). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 2249 (1997). "This calls upon courts to give careful scrutiny to the relations between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo,* 577 U.S. 442, 453, 136 S.Ct. 1036, 1045 (2016). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some

[15] Given the substantial overlap between Rule 23(a) and Rule 23(b)(3), and to minimize repetitiveness, the court hereby incorporates the Rule 23(a) discussion set forth above. *See supra* at § II.B.

affirmative defenses peculiar to some individual class members." *Id.* (citations and internal quotation marks omitted); *see Wang v. Chinese Daily News, Inc.,* 737 F.3d 538, 545 (9th Cir. 2013) ("The predominance analysis under Rule 23(b)(3) focuses on the relationship between the common and individual issues in the case and tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.") (internal quotation marks omitted); *In re Wells Fargo Home Mortg. Overtime Pay Litig.,* 571 F.3d 953, 957 (9th Cir. 2009) ("The focus is on the relationship between the common and individual issues.") (internal quotation marks omitted). The class members' claims do not need to be identical. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152, 1163 (9th Cir. 2001) (allowing "some variation" between class members); *Abdullah,* 731 F.3d at 963 (explaining that "there may be *some* variation among individual plaintiffs' claims") (internal quotation marks omitted). The focus is on whether the "variation [in the class member's claims] is enough to defeat predominance under Rule 23(b)(3)." *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund,* 244 F.3d at 1163; *see Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir. 1975) ("[C]ourts have taken the common sense approach that the class is united by a common interest in determining whether defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions[.]").

Where, as here, a plaintiff's claims arise under state law, the court "looks to state law to determine whether the plaintiffs' claims – and [defendant's] affirmative defenses – can yield a common answer that is 'apt to drive the resolution of the litigation.'" *Abdullah,* 731 F.3d at 957 (quoting *Dukes,* 564 U.S. at 350, 131 S.Ct.

at 2551); *Erica P. John Fund, Inc. v. Halliburton Co.,* 563 U.S. 804, 809, 131 S.Ct. 2179, 2184 (2011) ("Considering whether questions of law or fact common to class members predominate begins ... with the elements of the underlying cause of action.") (internal quotation marks omitted).

1. The CLRA.

"The CLRA 'shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.'" *Nguyen v. Nissan N. Am., Inc.,* 932 F.3d 811, 817-18 (9th Cir. 2019) (quoting Cal. Civ. Code § 1760). To establish a CLRA claim, the plaintiff must show that: (1) the defendant's conduct was deceptive; and (2) the deception caused plaintiff harm. *See Stearns,* 655 F.3d at 1022; *In re Vioxx Class Cases,* 180 Cal.App.4th 116, 129 (2009) (same). In the class context, a CLRA claim "requires each class member to have an actual injury caused by the unlawful practice." *Stearns,* 655 F.3d at 1022; *Edwards v. Ford Motor Co.,* 603 F.Appx. 538, 541 (9th Cir. 2015).

California courts often find predominance satisfied in CLRA cases because "causation, on a classwide basis, may be established by materiality[,]" meaning that "[i]f the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." *Stearns,* 655 F.3d at 1022 (cleaned up); *see Tait,* 289 F.R.D. at 480 (same); *In re Vioxx Class Cases,* 180 Cal.App.4th at 129 (same). A misrepresentation is material if "a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question[.]" *Stearns,* 655

F.3d at 1022 (internal quotation marks omitted); *see Williams v. Gerber Prod. Co.,* 552 F.3d 934, 938 (9th Cir. 2008) (CLRA claims are "governed by the reasonable consumer test[,]" under which plaintiffs "must show that members of the public are likely to be deceived") (internal quotation marks omitted). "If the misrepresentation ... is not material as to all class members, the issue of reliance would vary from consumer to consumer and the class should not be certified." *Stearns,* 655 F.3d at 1022-23 (internal quotation marks omitted); *see In re Vioxx Class Cases,* 180 Cal.App.4th at 129 (same). However, "a plaintiff is not required to show that the challenged statement is the 'sole or even the decisive cause' influencing the class members' decisions to buy the challenged products." *Bailey,* 338 F.R.D. at 403 (quoting *Kwikset Corp. v. Superior Ct.,* 51 Cal.4th 310, 327 (2011)).

Here, both prongs of plaintiffs' CLRA claim present predominant questions. First, plaintiffs intend to prove defendants' deceptive conduct through expert testimony addressing the evidence base for the contested label claims. (*See* Dkt. 120, Joint Br. at 22-24). Dr. Steven Budsberg opines that "[t]here is no valid and reliable medical or scientific evidence demonstrating the effectiveness of Cosequin with respect to" the challenged label claims, (Dkt. 120-1, Exh. 1, Expert Report of Steven C. Budsberg [ ] at 19),[16] or that "demonstrat[es] the effectiveness of Cosequin in supporting, maintaining, or improving canine joint health (including improvements in inactivity, joint flexibility, or mobility)" more broadly. (*Id.* at 15); (*see* Dkt. 120, Joint Br. at 23-24). Dr. Richard Evans ("Evans") similarly opines that there is "no evidence that [Gl/Ch] has a greater prophylactic effect

[16] A redacted version of Budsberg's report is available at Dkt. 121-1.

than placebo control on maintaining joint health in healthy pet dogs[,]" (Dkt. 93-12, Exh. 12, Report of Richard Evans, Ph.D. at 5), and that studies purporting to show that Gl/Ch has "a beneficial effect ... for pet dogs" lack credibility due to various methodological shortcomings. (*Id.* at 7); (*see* Joint Br. 23-24) (noting that Evans "opined on the design and validity of the key scientific key studies" relating to the joint health claims). Based on the foregoing, it may be shown that defendants' label claims are deceptive, *i.e.,* this inquiry predominates over any individualized issues that arise in connection with the labels themselves. *See, e.g., Barrera,* 2016 WL 11758373, at *1 (declining to decertify class where plaintiff had alleged that defendant's "TripleFlex line of products ... consistently conveyed the message that the products will improve joint health[,]" and "that credible scientific evidence demonstrates that these active ingredients do not confer any joint health benefits").

Second, because causation may be established by materiality, *see, e.g., Tait,* 289 F.R.D. at 479, plaintiffs point to common evidence that could resolve the question of whether a reasonable consumer is likely to be deceived by the subject label claims. Plaintiffs intend to show materiality through evidence that class members were uniformly exposed to the contested label claims on the subject Cosequin products, (*see* Dkt. 120, Joint Br. at 12–13, 27), the opinions of their advertising expert, (*see id.* at 28–29), defendants' market research regarding Cosequin, (*see id.* at 28) (under seal), and the testimony of one of defendants' expert. (*See id.* at 29). Plaintiffs' conjoint analysis, discussed further in the damages section, could also support materiality. *See, e.g., Bailey,* 338 F.R.D. at 403 (noting that plaintiff's conjoint analysis supporting damages would "serve as an indicia of materiality").

As to whether class members were exposed to the contested label claims, it appears that the class members were exposed to the statement "Joint Health Supplement" on all relevant Cosequin products and that this statement was visible before purchase.[17] The court can therefore "infer class-wide exposure to the allegedly misleading conduct at issue." *Bailey,* 338 F.R.D. at 400; *see Ehret v. Uber Techs., Inc.,* 148 F.Supp.3d 884, 895 (N.D. Cal. 2015) ("[I]n numerous cases involving claims of false-advertising, class-wide exposure has been inferred because the alleged misrepresentation is on the packaging of the item being sold. In such a case, given the inherently high likelihood that in the process of buying the product, the consumer would have seen the misleading statement on the product and thus been exposed to it, exposure on a classwide basis may be deemed sufficient.").

Expert testimony can also establish materiality. *See, e.g., Krommenhock,* 334 F.R.D. at 563 (noting that plaintiffs rely on the opinions of the same advertising expert used in the case to show that common issues

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[17] As noted above, *see supra* at §§ II.B. & II.C., defendants assert that three of the four contested label claims appeared on only a small percentage of products, as measured by sales, which they also cite in support of their argument that "individual issues predominate and prevent commonality due to diverse labels." (*See, e.g.,* Dkt. 120, Joint Br. at 30). Defendants also assert that there were dozens of "different label versions during the proposed class period." (*Id.)*. However, it appears that the contested label claim, "Joint Health Supplement," appeared prominently on each of the products purchased by the proposed class, and a review of the labels indicates that the statement was featured consistently across different label designs. (*See, e.g.,* Dkt. 120-2, Exh. 6, Cosequin Label & Ad Images); *see also Kwikset Corp.,* 51 Cal.4th at 327 ("[A] plaintiff is not required to allege that the challenged misrepresentations were the sole or even the decisive cause of the injury-producing conduct.") (cleaned up).

predominate); *see also Olean Wholesale Grocery Cooperative, Inc.,* 2022 WL 1053459, at *11 n. 16 ("[T]he persuasiveness of [an expert's] analysis is not at issue at this phase of the proceeding."). Silverman, plaintiffs' advertising expert, opines that the subject label claims, including "Joint Health Supplement," "convey the message [to consumers] that defendants' products will work, i.e., help alleviate joint health issues[,]" (Dkt. 93-3, Exh. 3, Silverman Report at ¶ 54), that the claims would be material to a reasonable consumer, (*id.* at ¶¶ 54, 59), and that "[i]f Plaintiffs are correct in their assertion that the contested label claims are not backed up by scientific evidence, or worse, contradicted by reliable scientific evidence, then ... consumers would not want to pay" higher prices for Cosequin products, "or for that matter, buy them at all." (*Id.* at ¶ 71); (*see* Dkt. 120, Joint Br. at 28–29); *see, e.g., Bailey,* 338 F.R.D. at 400 (finding common evidence that a reasonable consumer was likely to be deceived based in part on Silverman's testimony regarding materiality). Plaintiffs also point to testimony by defendants' expert, Dr. Carol Scott ("Scott"), indicating that "the most important purchase driver for purchasing joint supplements is the desire to improve a dog's mobility and flexibility." (*Id.* at 29) (quoting Dkt. 93-15, Exh. 15, Deposition of Carol Scott, Ph.D. at 101) (emphasis omitted); *see, e.g., Mullins,* 2016 WL 1535057, at *5 (noting that defendants "own marketing research and surveys tend to show that numerous consumers cite joint pain, stiffness, and function as the reasons behind their purchase" of a product with contested label claims concerning joint health).

Defendants assert that "even if the challenged statements were facially uniform," the court must deny class certification if "consumers' understanding of those representations would not be.'" (Dkt. 120,

Joint Br. at 22) (alterations omitted) (quoting *Jones v. ConAgra Foods, Inc.,* 2014 WL 2702726, *14 (N.D. Cal. 2014)).[18] However, defendants "point[ ] to no controlling authority showing that a plaintiff must establish at the class certification stage that consumers have a uniform interpretation of the term that gives rise to the alleged deception[,]" and "[c]ourts ... routinely hold to the contrary."[19] *Bailey,* 338 F.R.D. at 402 n. 12; *see, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.,* 326 F.R.D. 592, 613 (N.D. Cal. 2018) (noting that the "alleged misrepresentations were made ... to the entire class" and that "the standard requires only that the Court find there is a probability that reasonable consumers could be misled, not that they all believed 'Made From Real Ginger' means the same thing"); *Elkies,* 2018 WL 11223465, at *4 ("[A]s to the CLRA claim, the law

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[18] Defendants' reliance on *Jones* is unpersuasive, as the court in that case was specifically referring to the absence of a "fixed meaning for the word 'natural[,]'" 2014 WL 2702726, at *14, which is a more capacious label claim than the joint health representations here. *See Kumar v. Salov N. Am. Corp.,* 2016 WL 3844334, *9 (N.D. Cal. 2016) (distinguishing *Jones* because "the label phrase at issue there, 'natural,' ... is inherently ambiguous."); *Mullins,* 2016 WL 1535057, at *5 (distinguishing *Jones* and concluding that "[w]hether an ordinary consumer reasonably believes Premier advertises Joint Juice as a way to improve joint health is amenable to common proof: reviewing the advertisements, labels, and then asking the jury how they understand the message").

[19] Defendants also argue that "[t]he only record evidence ... shows most consumers do not interpret the labels as promising to treat joint disease." (Dkt. 120, Joint Br. at 25). In making that argument, however, defendants narrowly characterize plaintiffs' theory regarding why the contested label claims are misleading. Plaintiffs contend that the contested label claims are deceptive because Cosequin has no effect on joint health, (*see, e.g., id.* at 22), not that the labels falsely "promis[e] to treat joint disease." (*See id.* at 25).

appears to be that class members do *not* have to have a uniform understanding of the meaning behind the challenged representation.") (emphasis in original).

Defendants repeatedly argue that plaintiffs cannot establish predominance without offering consumer survey data. (*See, e.g.,* Dkt. 120, Joint Br. at 26) ("Plaintiffs dispute [defendants'] survey findings, but offer no other survey evidence."); (*id.* at 33) ("Plaintiffs did not conduct a materiality survey, or provide any other reliable evidence, to determine whether consumers relied on particular challenged label statements when making purchase decisions."). As noted earlier, California courts have "expressly rejected the 'view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is likely to be misled by a representation.'" *Mullins,* 2016 WL 1535057, at *5 (quoting *Colgan,* 135 Cal.App.4th at 681); *see, e.g., Krommenhock,* 334 F.R.D. at 565 (same); *Bailey,* 338 F.R.D. at 401 ("[A]n expert who offers testimony on the question of whether a reasonable consumer is likely to be deceived by an allegedly misleading statement, or whether a reasonable consumer would find such a statement to be material, is not required to conduct a consumer survey if his or her testimony is otherwise reliable."); *Hadley,* 324 F.Supp.3d at 1115 ("To the extent Kellogg argues that Plaintiff's expert testimony is weak or that Plaintiff lacks consumer survey evidence, ... that argument is without merit."). In other words, "the lack of extrinsic evidence of reliance does not automatically prevent class certification." *Mullins,* 2016 WL 1535057, at *5; *see, e.g., Johns,* 280 F.R.D. at 558 (noting, in response to defendant's argument in mislabeling case that "people buy multivitamins for various reasons," that "California's consumer protection laws evaluate materiality under

a reasonable person standard, not on an individualized basis").

In any event, "even if [defendants are] correct in [their] assertion that Plaintiff[s] ha[ve] failed to provide sufficient evidence of deception and materiality, that failure has no bearing on whether common questions will predominate over individual questions in the instant case." *Hadley,* 324 F.Supp.3d at 1115. As noted above, questions as to whether the contested label claims "were misleading and material must be evaluated according to an objective 'reasonable consumer' standard." *Id.* "This objective test renders claims under the [ ] CLRA ideal for class certification because they will not require the court to investigate class members' individual interaction with the product." *Tait,* 289 F.R.D. at 480 (internal quotation marks omitted). "As a result, there is no risk whatever that a failure of proof on the common questions of deception and materiality will result in individual questions predominating. Instead, the failure of proof on the elements of deception and materiality would end the case for one and for all; no claim would remain in which individual issues could potentially predominate."[20] *Hadley,* 324 F.Supp.3d at 1115–16 (cleaned

[20] For this reason, the court is unpersuaded that defendants' expert reports by Scott, (*see* Dkt. 122, Exh. 17, Dr. Carol A. Scott, PhD. Expert Report), and Dr. Olivier Toubia ("Toubia"), (*see* Dkt. 122-1, January 19, 2021, Expert Report of Olivier Toubia, Ph.D. ("January 2021, Toubia Report")); (Dkt. 122-2, Exh. 18, February 26, 2021, Expert Report of Olivier Toubia, Ph.D.), show that there are "individual issues that predominate and prevent commonality." (Dkt. 120, Joint Br. at 33). In addition, a review of defendants' expert reports reveals flaws that undercut their persuasiveness. For example, Toubia designed a survey to answer "whether the challenged claims on Cosequin's product packaging materially influence consumers' intent to purchase the product." (Dkt. 122-

up); *see Amgen,* 568 U.S. at 460, 133 S.Ct. at 1191 ("[A] failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims.").

In short, the court finds that plaintiffs have met their burden of showing that common questions of fact and law predominate over individual questions with respect to their CLRA claim.

2. Damages.

Under *Comcast,* "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Pulaski & Middleman, LLC v. Google, Inc.,* 802 F.3d 979, 987–88 (9th Cir. 2015) (internal quotation marks omitted); *see Just Film, Inc.,* 847 F.3d at 1120 (same). "To satisfy this requirement, plaintiffs must show that 'damages

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1, Exh. 18, January 2021, Toubia Report at 3–4). To answer this question, he showed survey respondents different images of Cosequin product packaging, with half of the respondents shown images that were "modified to only remove the challenged claims." (*Id.* at 5). However, the modified images still included the "Joint Health Supplement" statement prominently displayed on the front of the label, (*see id.* at 6), which is the contested label claim that appeared on *all* of the products purchased by the proposed class. (*See, e.g.,* Dkt. 120, Joint Br. at 2); (*see also* Dkt. 53, SAC at ¶ 37) (identifying "Joint Health Supplement" as a challenged representation). Toubia instead removed the phrase "Joint Health Support" that appeared in smaller font on the labels, (*see* Dkt. 122-1, January 2021, Toubia Report at 6), and which plaintiffs do not specifically challenge in seeking class certification. (*See* Dkt. 120, Joint Br. at 2). In short, defendants' expert reports are "outweighed by the common evidence" presented by plaintiffs, "which supports the proposition that the question of whether a reasonable consumer was likely to be deceived by [defendants'] alleged misleading conduct can be resolved with common proof." *See Bailey,* 338 F.R.D. at 402–03 (emphasis omitted).

are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc.,* 847 F.3d at 1120 (quoting *Comcast,* 569 U.S. at 34, 133 S.Ct. at 1433). Although plaintiffs must present the likely method for determining class damages, "it is not necessary to show that [this] method will work with certainty at this time." *Chavez,* 268 F.R.D. at 379. Further, "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva v. Medline Indus. Inc.,* 716 F.3d 510, 514 (9th Cir. 2013). In other words, "the 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,* 802 F.3d at 989 (internal quotation marks omitted); *see also Comcast,* 569 U.S. at 35, 133 S.Ct. at 1433 (noting that damages "[c]alculations need not be exact" at the class-certification stage); *Olean Wholesale Grocery Cooperative, Inc.,* 2022 WL 1053459, at *9 ("[A] district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones.").

As an initial matter, it should be noted that "class wide damages calculations under the CLRA are particularly forgiving[,]" because "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." *Nguyen,* 932 F.3d at 818 (cleaned up). Here, plaintiffs contend that the subject label claims "were misleading or deceptive to a reasonable consumer[,]" and that "class members paid a price premium for the [Cosequin]

Products as a result of the deceptive terms included on the label" of Cosequin products. (Dkt. 120, Joint Br. at 37); *see, e.g., McMorrow v. Mondelez Int'l, Inc.,* 2021 WL 859137, *6 (S.D. Cal. 2021) ("Plaintiffs' action is a classic mislabeling case, and their allegation is that the defendant's mislabeling of the Products caused Plaintiffs and the putative class members to pay more than they would have if the Products were properly labeled."). As a method for measuring class-wide damages, plaintiffs point to Dubé's proposed "choice-based conjoint analysis[,]" which "will determine the value consumers place on the challenged terms when purchasing these products," and "in turn permit[ ] him to calculate the price premium attributable to the challenged terms and the resulting classwide damages." (Dkt. 120, Joint Br. at 37). According to plaintiffs, "Dubé's proposed model will account for both demand and supply-side factors, and the calculation will not require individualized inquiry." (*Id.)*; (*see* Dkt. 102-1, Exh. 2, Dubé Report at ¶ 14).

Conjoint surveys, like the one proposed by plaintiffs' expert, are a well-established method for measuring class-wide damages in CLRA mislabeling cases. *See, e.g., Bailey,* 338 F.R.D. at 409 ("In mislabeling cases where the injury suffered by consumers was in the form of an overpayment resulting from the alleged misrepresentation at issue, ... courts routinely hold that choice-based conjoint models that are designed to measure the amount of overpayment satisfy *Comcast*'s requirements."); *Hadley,* 324 F.Supp.3d at 1104, 1110 (noting that "[i]t is well-established that the 'price premium attributable to' an alleged misrepresentation on product labeling or packaging is a valid measure of damages in a mislabeling case under the [ ] CLRA," and that "conjoint analysis is widely-accepted as a reliable economic tool for isolating price premia")

(quoting *Brazil v. Dole Packaged Foods, LLC,* 660 F.Appx. 531, 534 (9th Cir. 2016); *Briseno v. ConAgra Foods, Inc.,* 674 F.Appx. 654, 657 (9th Cir. 2017) (recognizing that a "conjoint analysis to segregate the portion of th[e] premium attributable to" a contested label claim was a "well-established damages model[ ]"); *Krommenhock,* 334 F.R.D. at 575 ("[C]onjoint surveys and analyses have been accepted against *Comcast* and *Daubert* challenges by numerous courts in consumer protection cases challenging false or misleading labels."); *McMorrow,* 2021 WL 859137, at *14 (finding that the plaintiff's proposed conjoint survey, which would "isolate and measure the price premium attached only to the term 'nutritious,'" satisfied *Comcast).* Courts have also found that conjoint analyses specifically designed by Dubé, and similar to what he proposes here, satisfy *Comcast. See, e.g., Price v. L'Oreal USA, Inc.,* 2018 WL 3869896, *3 (S.D.N.Y. 2018) ("Plaintiffs' proposed model for computing class-wide damages, Dr. Dubé's Conjoint Analysis, is reliable and consistent with their price premium theory of damages."); *Goldemberg v. Johnson & Johnson Consumer Companies, Inc.,* 317 F.R.D. 374, 394 (S.D.N.Y. 2016) (finding that Dubé's proposed price premium damages model easily satisfied *Comcast*'s requirements).

Defendants contend that Dubé's damages model is "defective" because "[t]he evidence ... shows the number of uninjured Class Members likely constitutes a significant majority of the class." (Dkt. 120, Joint Br. at 38–39); (*see id.* at 40) ("The class cannot be certified because it includes a non-*de minimis* number of uninjured class members."); (Dkt. 123, Supp. Opp. at 2). Specifically, defendants contend that their expert's survey data and analysis of online Cosequin product reviews show that "the majority of Cosequin purchasers are satisfied with their purchase." (Dkt. 120, Joint Br. at 39); (*see id.* at

42) ("[T]he overwhelming majority of potential Class Members do not think that they have been injured because they are satisfied with their purchase."). Defendants similarly contend that "a high proportion of uninjured potential Class Members lack standing." (*Id.)*. Defendants' contentions are unpersuasive.

As an initial matter, the Ninth Circuit recently rejected the "argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." *Olean Wholesale Grocery Cooperative, Inc.,* 2022 WL 1053459, at *9. Further, defendants cite no authority supporting the proposition that plaintiffs' proposed model is incapable of measuring damages on a class-wide basis. (*See, generally,* Dkt. 120, Joint Br. at 38–42). More to the point, defendants' arguments misapprehend the alleged injury in this case, which is that class members were deceived into buying Cosequin based on misleading label claims, including the "Joint Health Supplement" that appeared on all Cosequin products purchased by the putative class.[21] *See, e.g., Mullins,* 2016 WL 1535057, at *7 ("[Defendant's] advertising messages are the focus of the claims, not

[21] To the extent defendants contend that plaintiffs' damages model cannot satisfy *Comcast* "because they have not run their damages models[,]" (Dkt. 120, Joint Br. at 39), defendants' argument is unfounded. "A plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are capable of determination on a class-wide basis with common proof.... A plaintiff need only show that 'damages are capable of measurement' on a class-wide basis." *Bailey,* 338 F.R.D. at 408 n. 14 (quoting *Comcast,* 569 U.S. at 34, 133 S.Ct. at 1426) (citation and emphasis omitted); *see Chavez,* 268 F.R.D. at 379 (Plaintiffs "must present a likely method for determining class damages," but "it is not necessary to show that his method will work with certainty at this time.") (internal quotation marks omitted).

customer satisfaction, and therefore consumer satisfaction is irrelevant.... There is [ ] no need to examine whether consumers were satisfied with the product to find an injury."); *Ries v. Arizona Beverages USA LLC,* 287 F.R.D. 523, 536 (N.D. Cal. 2012) (finding that because "[a]ll of the proposed class members would have purchased the product bearing the alleged misrepresentations[,]" they had a "concrete injury under [California consumer protection laws] sufficient to establish Article III standing") (internal quotation marks omitted).

In short, the court is satisfied that plaintiffs have sufficiently shown that their proposed damages model is consistent with their theory of liability under *Comcast. See, e.g., Bailey,* 338 F.R.D. at 409 (Plaintiffs' proposed choice-based conjoint survey "seeks to measure the premium that consumers paid, on average, as a result of the allegedly misleading conduct at issue and is therefore directly tied to the theory of liability in the case.").

B. Superiority.

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin,* 617 F.3d at 1175 (internal quotation marks omitted). To determine superiority, the court must look at

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Courts considering similar cases routinely find that the class action device is superior to other forms of adjudication.[22] *See, e.g., Fitzhenry-Russell,* 326 F.R.D. at 616 ("[A] class action is superior because in the absence of a class action, no individual plaintiff would file suit because the amounts at issue for each class member would likely be a few dollars."). If the court did not certify the proposed class, each plaintiff would have to litigate defendants' liability separately even though it could be established by common evidence using the objective reasonable consumer standard. However, because each class member's claim involves a relatively small sum of money, there is no doubt that litigation costs would render individual prosecution of such claims prohibitive. *See, e.g., Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (noting that "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits" because of litigation costs) (emphasis in original); *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1234–35 (9th Cir. 1996) ("A class action is the superior method for managing litigation if no realistic alternative exists."); *see also Amchem Prods., Inc.,* 521 U.S. at 617, 117 S.Ct. at 2246 ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individ-

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[22] Defendants have not identified or proposed a superior adjudication method. (*See, generally,* Dkt. 120, Joint Br.); (Dkt. 123, Supp. Opp.).

ual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.") (internal quotation marks omitted).

Finally, defendants did not identify any manageability issues that preclude establishing superiority.[23] (*See, generally,* Dkt. 120, Joint Br. at 45–47); (Dkt. 123, Supp. Opp. at 8–10); *cf.* 2 *Newberg on Class Actions* § 4:73 (5th ed.) ("Two primary issues recur in courts' consideration of the manageability of a proposed class action lawsuit – concern that a case will devolve into myriad individual cases because of the salience of individual issues (i.e., that predominance is lacking) and concern that a multi-state class will provoke complicated conflict of law questions rendering management of a single trial impossible."). The court previously addressed defendants' contentions that there are "individualized questions [that] bear on the required elements of plaintiffs' claims[,]" (*see* Dkt. 123, Supp. Opp. at 9), including whether "putative class

[23] Although defendants maintain that they are "not arguing lack of ascertainability[,]" they argue that plaintiffs cannot establish superiority because there is no evidence as to "the names of any putative class members (aside from Plaintiffs themselves)[,]" "how many of each of the challenged products each putative class member purchased (aside from Plaintiffs)[,]" and other information that suggests plaintiffs are required to identify absent class members. (Dkt. 123, Supp. Opp. at 8–9). The Ninth Circuit has declined to require that plaintiffs "demonstrate that there is an administratively feasible way to determine who is in the class." *Briseno v. ConAgra Foods, Inc.,* 844 F.3d 1121, 1124 (9th Cir. 2017); *see Ries v. Arizona Beverages USA LLC,* 287 F.R.D. 523, 535 (N.D. Cal. 2012) ("There is no requirement that the identity of class members be known at the time of certification.") (cleaned up).

members interpreted the challenged statements in the same way as Plaintiffs." (*Id.)*; *see supra* at § III.A. Similarly, the court previously addressed defendants' assertion that "the majority of the class [was] never [ ] exposed to the majority of the challenged claims," explaining that at least one of the challenged claims did appear on all of the subject products. *See supra* at §§ II.B. & II.C. In short, the court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Plaintiffs' Motion for Class Certification (Document No. 91) is granted as set forth above. The court certifies the following class pursuant to Rule 23(b)(3) with respect to plaintiffs' claim under the CLRA:

> All persons residing in California who purchased during the limitations period the following canine Cosequin products for personal use: Cosequin DS Maximum Strength Chewable Tablets; Cosequin DS Maximum Strength Plus MSM Chewable Tablets; and Cosequin DS Maximum Strength Plus MSM Soft Chews.

2. Excluded from the class are defendants, as well as its officers, employees, agents or affiliates, and any judge who presides over this action, as well as all of defendants' past and present employees, officers and directors.

3. The court hereby appoints Justin Lytle and Christine Musthaler as the representatives of the certified class.

4. The court hereby appoints Milberg Coleman Bryson Phillips Grossman, PLLC and Levin Papantonio Rafferty as class counsel.

5. Defendants' Motion to Exclude the Testimony of [ ] Bruce Silverman (Document No. 109) and Motion to Exclude the Opinions and Testimony of [ ] Dr. Jean Pierre Dubé (Document No. 112) are denied.

APPENDIX C

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class,

so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General*. Any class member may object to the proposal if it requires court approval under

this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class

must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX D

Federal Rules of Evidence Rule 702

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.