No. _____

IN THE

Supreme Court of the United States

THE PROCTER & GAMBLE COMPANY,

Petitioner,

v.

DINO RIKOS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court at the class certification stage must evaluate the evidence regarding whether putative class members in fact suffered a common injury, and thus that the class is sufficiently cohesive to bind all putative class members under plaintiffs' proffered theory of liability, or whether such an inquiry should occur only at the merits stage.

2. Whether Article III permits a class to be certified based on (a) the standing of the named plaintiffs or (b) the violation of a state statute, where the record demonstrates that many unnamed class members have not suffered an injury caused by the defendant's alleged conduct.

3. Whether a class may be certified under Federal Rule of Civil Procedure 23(b)(3) where the named plaintiffs fail to demonstrate a reliable and feasible way to ascertain class membership beyond relying on class members' affidavits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is The Procter & Gamble Company. There is no parent corporation or publicly held company that owns 10% or more of Procter & Gamble's stock.

Respondents are Dino Rikos, Tracey Burns, and Leo Jarzembrowski, who have brought this action on behalf of a class of all persons who have purchased the product Align in California, Illinois, Florida, New Hampshire, and North Carolina.

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Petitioner, The Procter & Gamble Company ("P&G"), respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's order affirming the District Court's grant of class certification (Pet. App. 3a) is reported at 799 F.3d 497 (6th Cir. 2015). The order of the United States District Court for the Southern District of Ohio (Pet. App. 64a) is reported at 782 F. Supp. 2d 522 (S.D. Ohio 2015).

JURISDICTION

The Sixth Circuit entered judgment on August 20, 2015. On September 3, 2015, P&G requested rehearing en banc, which was denied by the Sixth Circuit on September 29, 2015. On October 27, 2015, the court of appeals granted P&G's motion to stay the mandate pending this Court's review. Pet. App. 1a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Civil Procedure 23. It also involves the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 et seq., the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 et seq., the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq., the New Hampshire Consumer Protection Act, N.H.R.S.A. 358-A et seq., and the

North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 et seq. All relevant provisions are reproduced at Pet. App. 104a.

INTRODUCTION

As made clear in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), and *Halliburton v. Erica P. John Fund*, 134 S. Ct. 2398 (2014), district courts are required to test the cohesiveness of a putative class before certification to ensure that the Rule 23 requirements are met with evidentiary proof, rather than conjecture. This case presents the important question of whether, as a sharply-divided Sixth Circuit panel held, named plaintiffs need not "produce actual proof at the class-certification stage of classwide injury," because that is a merits inquiry only, Pet. App. 43a, or whether a district court at the class certification must, as other circuits have held, "investigate the realism" of plaintiffs' theory of liability to evaluate whether all putative class members have suffered a common injury. *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014). Certiorari is warranted to answer that question.

In this case, the named Plaintiffs brought a large-scale consumer class action that rests entirely on the theory that P&G's probiotic, Align, is "snake oil" that fails to provide its advertised benefit of "promoting digestive health" to a single consumer. Pet. App. 10a, 13a. At class certification, the named Plaintiffs offered no evidence supporting their theory that Align fails to "promote digestive health" for every putative class member. Instead, they promised that someday their expert could conduct "correctly designed randomized, double-blind and placebo

controlled clinical trials" to test their theory, and if successful, seek to prove it. *Id*. at 43a. By contrast, P&G offered scientific evidence indicating that countless consumers experienced digestive benefits from using Align and that the effectiveness of Align (like all supplements) varies from person to person. *Id*. at 60a (Cook, J. dissenting).

The District Court certified the class. Over a vigorous dissent, the Sixth Circuit affirmed. Judge Moore, writing for the majority, held that courts must accept named Plaintiffs' liability theory for the class without question, even in the face of unrebutted contradictory evidence. *Id.* at 51a. Thus, the Sixth Circuit bound all unnamed class members under the same broad liability theory, despite evidence that the class was not cohesively tied together by the "snake oil" allegations.

By certifying such an overbroad and unsubstantiated class, the Sixth Circuit waded into a series of unresolved class-action questions and circuit conflicts.

First, the Sixth Circuit's decision raises the question of whether a district court's duty to examine class cohesiveness includes examining all of the record evidence and testing the theory of liability proffered by the named plaintiffs to ensure that the putative class actually shares the common injury alleged. This Court has oft-repeated that class certification must rest on facts, not allegations, for nothing is simpler than to craft a complaint that "literally raises common questions." *Dukes*, 131 S. Ct. at 2551.

Similarly, appellate courts require judges at class certification to "investigate[] the realism" of the plaintiffs' claims of class injury, especially "in light of the defendants' counterarguments," *Parko*, 739 F.3d at 1086. Without scrutinizing claims of liability and ensuring that there is evidence of common injury, a district court allows the named plaintiffs to "induce [pressure for] a substantial settlement even if the customers' position is weak." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). By allowing the named plaintiffs to dictate the terms upon which unnamed class members' claims will be presented, the court also compromises its important role in protecting absent class members. *Id.* at 677.

The Sixth Circuit, however, relegated any such inquiry to the merits stage. Pet. App. 41a-42a. It stated that so long as a common question could be posed that applied to all class members (i.e., whether Align "promotes digestive health" for even a single consumer), "[n]o more investigation into the merits (i.e., whether Align actually works) is needed" for class certification. *Id.* at 13a. P&G offered evidence that many customers experienced digestive benefits from using Align, the effectiveness of which (like all supplements) varies from person to person. P&G thus established that the putative class did not share the alleged common injury. The majority, however, concluded that such evidence went "solely to the merits; it [had] no relevance to the class certification issue." *Id.* at 41a-42a. Without analyzing Plaintiffs' allegations in light of the record evidence, the court allowed named Plaintiffs to evade the Rule 23 requirement that the class actually be cohesive. It ignored the danger that sending such an extreme

claim to the merits on behalf of all unnamed class members would do a disservice to their interests.

As Judge Cook concluded, the majority's decision not to test the named Plaintiffs' "snake oil" theory at the class certification stage "conflicts with the Supreme Court's Rule 23 jurisprudence" and the principles followed by other courts. *Id.* at 60a. "*Dukes* and its progeny teach us that [it] is insufficient to justify class certification" on named Plaintiffs "promise" to "design and conduct a clinical trial" demonstrating common injury; the Supreme Court requires lower courts to test class liability theories at class certification, even when it "entail[s] some overlap with the merits of the plaintiff's underlying claim." *Id.* at 60a-64a (Cook, J., dissenting (citing *Dukes*, 131 S. Ct. at 2551-52)). The majority should not have affirmed the district court's "certify first, question the evidence later" approach. "[W]hether Align works similarly for each class member is relevant to certification" because it reveals whether putative class members have suffered a common injury, and "therefore [is] not beyond the scope of the court's rigorous analysis" at the certification stage. *Id.* at 62a (Cook, J., dissenting).

Certifying classes on mere allegations, as the Sixth Circuit affirmed here, contravenes Rule 23 jurisprudence to the prejudice of multiple parties. The Sixth Circuit's decision leaves defendants with *in terrorem* settlement pressures stemming from unsupported claims. And it leaves unnamed plaintiffs with the risk that their potentially valid claims will be extinguished, should the broader class fail. Because this case exemplifies the problems with

broad consumer class actions driven by allegations and not evidence, the Court should grant certiorari.

Second, this case raises two class action standing questions that have divided the courts of appeals. By certifying a class that includes many members who have not suffered any injury from P&G's allegedly false advertising, the Sixth Circuit affirmed a "class definition that includes a clutch of members without standing." Pet. App. 62a-63a (Cook, J. dissenting). Other courts of appeals, in contrast, have refused to certify a class when the record demonstrates that unnamed class members lack Article III standing.

The Sixth Circuit's holding also implicates a second circuit split on class action standing: whether the violation of a statute alone creates standing for unnamed class members. The Sixth Circuit concluded that class members need not demonstrate that they purchased Align as a result of P&G's allegedly false advertising to state a claim under several state consumer protection statutes. *Id.* at 25a. Hence, many class members' standing rests not on their individual ability to demonstrate causation but on the violation of a state statute—a ground for standing that is rejected in other circuit courts.

Indeed, these class action standing questions are already before the Court. *See Tyson Foods Inc. v. Bouaphakeo*, No. 14-1146, cert. granted 135 S. Ct. 2806 (2015) (argued Nov. 10, 2015) and *Spokeo, Inc. v. Robins*, No. 13-1339, cert. granted 135 S. Ct. 1892 (2015) (argued Nov. 2, 2015). Therefore, if the Court does not grant this petition independently, it should at minimum hold this case pending its decisions in *Tyson Foods* and *Spokeo*.

Third, the Court should grant certiorari here to define the "ascertainability" requirement for class certification. Because P&G manufactures and distributes (but does not retail) Align, it does not have a list of Align purchasers, and thus has no records, either in its possession or otherwise available, to identify class members. Plaintiffs thus propose to identify class members based largely on class members' own say-so as to whether they purchased Align during the purported class period. Recognizing the due process concerns inherent in relying on bare affidavits, the Third Circuit would have denied certification here, concluding that the class is not ascertainable. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013). But the Sixth and Seventh Circuits have explicitly rejected this approach to ascertainability, creating yet another division in the courts of appeals meriting this Court's review. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) (petition for certiorari docketed Oct. 25, 2015, No. 15-549) (presenting same question).

For any of these independent reasons, P&G respectfully requests that this Court grant certiorari, or at a minimum hold this Petition pending the decisions in *Tyson Foods* and *Spokeo*.

STATEMENT OF THE CASE

1. Align is an over-the-counter probiotic supplement developed by P&G that contains the probiotic strain *Bifidobacterium infantis 35624*. Pet. App. 5a. Concisely put, probiotics are good bacteria that help maintain natural balance in the human digestive system.

Scientific evidence presented in the District Court demonstrates that the probiotic strain in Align "provides digestive health benefits." *Id.* at 40a. P&G presented expert testimony from Dr. Daniel Merenstein, a professor at Georgetown University Medical Center and an expert in probiotics, who explained that *Bifidobacterium infantis 35624* has been "well-studied," including in human clinical trials and randomized controlled trials, and that many studies have demonstrated the strain's "efficacy." *See id.* at 43a. Dr. Merenstein acknowledged that the "effectiveness of probiotics varies from person to person, as is the case with all supplements and drugs." But he concluded that, "[t]here is robust evidence" supporting Align's claim to improve gastrointestinal health. *See id.* at 40a.

Based on this body of research and evidence, P&G markets Align as a supplement that "naturally helps build and support a healthy digestive system, maintain digestive balance, and fortify your digestive system with healthy bacteria." Pet. App. 5a. Countless consumers report improvements to their digestive health as a result of using Align, and P&G's market research demonstrates that many consumers purchase it over and over again precisely because it provides them digestive health benefits. *Id.* at 67a.

For the past five years, Align has been the #1 gastroenterologist-recommended probiotic. *Id.* at 69a. As a result, many consumers purchase Align not in reliance on any advertising, but based on recommendations from their doctors, including Plaintiffs' own expert witness. *Id.* at 20a. Others purchase Align as a result of recommendations from

friends, family, or other sources of information unrelated to the advertising at issue. *Id.* at 21a.

2. The three named Plaintiffs, all purchasers of Align, claim that Align did not work as advertised because it did not promote their digestive health. *Id.* at 4a. Yet far from limiting their claims to their own experience, Plaintiffs instead brought a suit on behalf of all Align consumers in five states, alleging that Align provided no digestive health benefit to *any* of these consumers, and thus that P&G violated those states' unfair or deceptive practices statutes. *Id.*

In seeking to certify this purported class of consumers, Plaintiffs offered no evidence that Align is "snake oil" and fails, as advertised, to "promote digestive health" for even a single purchaser. Rather, they offered argument that P&G's evidence and studies supporting Align's effectiveness were not (by Plaintiffs' standards) good enough. Plaintiffs likewise dismissed (again without scientific proof) the countless positive reviews of Align and physician recommendations as based solely on a "placebo effect." *Id.* at 60a-61a (Cook, J., dissenting).

3. The District Court certified five separate classes composed of all consumers who purchased Align in California, Florida, Illinois, North Carolina, or New Hampshire, between March 1, 2009 and the date notice is first provided to the classes. *Id.* at 67a.

In granting class certification, the District Court concluded as a threshold matter that "whether or not Align actually provides benefit[s] to digestive health is not yet properly before the Court." *Id.* at 70a n.2. The District Court deemed any analysis related to

whether any consumer received the advertised benefits of Align as a "merits" question. *Id.* Relying on a 1990 decision from the District of Minnesota, the District Court "'g[a]ve the benefit of the doubt to approving the class'" and assumed Plaintiffs' allegations that Align is "snake oil" were true for class certification purposes. *Id.* at 68a, 70a (quoting *In re Workers' Comp.*, 130 F.R.D. 99, 103 (D. Minn. 1990)).

4. A panel of the Sixth Circuit granted interlocutory review under Federal Rule of Civil Procedure 23(f). Pet. App. 65a. In a split decision, a different panel of the Sixth Circuit affirmed the District Court's certification decision.

a. The majority concluded that, even without proof that Align fails to provide digestive health benefits for anyone, and even in the face of evidence that Align does benefit numerous consumers, Plaintiffs met the commonality and predominance standards.

As for commonality, the majority concluded that Plaintiffs had "identified a common question—whether Align is 'snake oil' and thus does not yield benefits to *anyone*—that will yield a common answer for the entire class." *Id.* at 13a. Articulation of that up or down question, Judge Moore reasoned, was sufficient for Rule 23(a)'s commonality requirement. The majority further found that, because the question of whether Align is "snake oil" that does not provide digestive benefits "for *anyone*" is "*capable* of classwide resolution" by future yet-to-be-conducted studies, Rule 23's predominance requirement was satisfied. *Id.* at 11a.

For the majority, P&G's unrebutted evidence that the purported class members had not suffered the same injury, because many benefit from Align, had "no relevance to the certification issue," and instead was a merits question only. *Id.* at 41a-42a. Like the District Court, the majority claimed that it had to accept "the theory of liability Plaintiffs present to us"—the theory that Align does not work "for *anyone*, i.e., that Align is 'snake oil.'" *Id.* Repeating that Plaintiffs do not have the burden of *proving* common injury at class certification, the majority asked only whether their claim could be proven true or false for the entire class. *Id.* at 10a. Judge Moore twice stated that, "if Align is shown to work, even for only certain individuals, then presumably Plaintiffs lose," *Id.* at 47a, 50a, but such a question could not be considered at the class certification stage.

As for standing, the majority reasoned that all class members were injured if the advertising was deceptive, so it need not consider circuit disagreement as to whether unnamed class members had to satisfy Article III. *Id.* at 51. Accordingly, it allowed Plaintiffs' bare allegations that Align fails to work for anyone to satisfy Article III for unnamed class members. Further, the majority found that the class was sufficiently ascertainable, directly rejecting the ascertainability standard applied by the Third Circuit in *Carrera*. *Id.* at 53a-57a.

b. District Judge Avern Cohn, sitting by designation, concurred. Even so, he emphasized that, given Plaintiffs' broad claim that Align "has no digestive health benefits to *anyone,*" P&G could move to dismiss the case *after* the class was certified by

showing that Align provides the advertised benefits to even a single person. Pet. App. 58a.

c. Judge Cook dissented from the majority opinion. She emphasized that "Plaintiffs offer[ed] no proof in support" of their claim that no putative class member received any digestive health benefits from Align, as Plaintiffs' expert "ha[d] yet to study" Align, and merely "promised to design and conduct" at some future point "a clinical trial that will prove definitively whether Align works as advertised." *Id.* at 60a, 61a. Instead, the certification record "tends to show the opposite: that consumers benefit more or less from Align based on their individual gastrointestinal health." *Id.* at 60a. At the very least, the record showed "that patients suffering from irritable bowel syndrome (IBS) benefit from Align." *Id.*

Given this record, Judge Cook concluded that certification was improper and contrary to this Court's class-action precedents. *Id.* at 60a. She reiterated that that "'plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23.'" *Id.* at 58a (quoting *Halliburton*, 134 S. Ct. at 2412). Specifically, she criticized the majority for failing to test the named Plaintiffs' allegations with the record evidence. Emphasizing the conflict with this Court's decision in *Dukes*, 131 S. Ct. at 2551 (2011), she stated:

> "Nothing about the district court's analysis here was 'rigorous,' and the majority papers over this abuse of discretion by claiming that any further inquiry would result in an

> impermissible 'dress rehearsal' for trial. More often than not, however, a district court's 'rigorous analysis' will entail 'some overlap with the merits of the plaintiff's underlying claim.' . . . And this case is no exception to that rule."

Id. at 60a.

For Judge Cook, certifying a class including members who were not injured also raised Article III problems. *Id*. at 61a.

6. After the Sixth Circuit denied rehearing en banc, P&G moved for a stay of the mandate. *See* Fed. R. App. P. 41(d)(2)(A). P&G asserted that the divided panel decision regarding commonality and predominance, the pending Supreme Court decisions on class action standing, and the circuit split on class ascertainability made a grant of certiorari (or a hold and GVR) likely in this case. The Sixth Circuit granted the motion, staying the mandate pending the Court's resolution of this Petition. *Id*. at 1a.

REASONS FOR GRANTING THE PETITION

As Judge Cook explained in her dissent, the decision below "conflicts with the Supreme Court's Rule 23 jurisprudence" and the Rule 23 principles followed by other circuits. Pet. App. 60a. Certiorari is warranted for three independent reasons.

I. THE SIXTH CIRCUIT'S DECISION IMPROPERLY PROHIBITS COURTS FROM QUESTIONING NAMED PLAINTIFFS' CLAIMS OF COMMON INJURY, ALLOWING UNSUPPORTED CLASS LIABILITY THEORIES TO BIND UNNAMED PLAINTIFFS.

The Sixth Circuit's decision raises the question of whether courts must evaluate the named plaintiffs' theory of liability—or accept it as true—in assessing class cohesiveness. The majority here recognized that Plaintiffs' ability to prove a common injury was critical to class certification, and that, at some point, Plaintiffs would need to prove that alleged common injury on a classwide basis. Yet, for class certification purposes, the majority did not require *any* evidence that there was "*in fact*" a common injury suffered by the class. *See Dukes*, 131 S. Ct. at 2551. It ignored evidence, presented by P&G at the class certification stage, demonstrating that there was *in fact* no common injury. Whether such an approach comports with Rule 23's commonality and predominance requirements is a critical question meriting this Court's review.

A. The Rule 23 requirements ensure that a class is sufficiently cohesive such that unnamed class members may be fairly bound by the case's outcome. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In particular, Rule 23(a)(2) and (3)'s commonality and typicality requirements "serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their

absence." *Dukes*, 131 S. Ct. at 2551 n.5 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). Rule 23(b)(3)'s predominance inquiry similarly "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. Failing to enforce these standards risks binding persons with "little in common but . . . [a] lawsuit." *Dukes*, 131 S. Ct. at 2557.

Accordingly, the Supreme Court has repeatedly held that Rule 23 is "not . . . a mere pleading standard" but instead requires courts to engage in "'rigorous analysis [to ensure] that the prerequisites of Rule 23(a) [and (b)(3)] have been satisfied.'" *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 161); *see also Comcast Corp.*, 133 S. Ct. at 1432 ("rigorous analysis" applies to Rule 23(b)(3)). That inquiry is not satisfied merely by framing a class liability theory, for "any competently crafted class complaint literally raises common 'questions.'" *Dukes*, 131 S. Ct. at 2551 (citation omitted). Rather, courts must "probe behind the pleadings" to ensure that named plaintiffs meet the evidentiary prerequisites of Rule 23's commonality, typicality, and predominance requirements; and courts must ensure that plaintiffs have "*in fact*" provided the evidentiary "glue" necessary to make a class sufficiently cohesive. *Id.* at 2551-52. Courts must analyze the evidentiary record even if it results in "some overlap with the merits of the plaintiff's underlying claim." *Id.* at 2551 (citations omitted).

In *Dukes*, this Court rejected certification of a class based simply on named plaintiffs' allegations that were not supported by evidence of common

injury. 131 S. Ct. at 2552. The class in *Dukes* sought to proceed on the question "whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies . . . that may have worked to unlawfully discriminate against them." *Id.* at 2549 (quotation and citation omitted). That binary question was applicable to the entire class; there either was a nationwide policy of discrimination affecting the entire class or not. But the Court still evaluated the named plaintiffs' purported evidence in support of that question, and found that it failed to show the "same injury" to all class members. *Id.* at 2555-56. It did not matter that the evidence also related to the merits of plaintiffs' claim. *Id.* at 2551-52.

Similarly, this Court's decision in *Halliburton* emphasized that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." 134 S. Ct. at 2412. Because Rule 23(b)(3) is an "adventuresome innovation" in which class treatment is "not as clearly called for," *Comcast*, 133 S. Ct. at 1432, courts must examine defendants' evidence—not just plaintiffs' allegations—at the class certification stage, and should deny certification if the record shows that the class has not suffered a common injury, *Halliburton*, 134 S. Ct. at 2416-17.

B. Consistent with these precedents, courts of appeal have held that the named plaintiffs' theory of liability must be scrutinized at the class certification stage to ensure that it is sufficiently factually supported to bind class members going forward. Even before *Dukes*, in *Szabo*, the Seventh Circuit

decertified a class asserting false-advertising claims where the class liability theory did not match the evidence of the putative class members' experiences. 249 F.3d at 676. In the Seventh Circuit, a rigorous analysis of the class claims and evidence supporting them is necessary at the certification stage because "[c]ertifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys—who may use it in ways injurious to other class members, as well as ways injurious to defendants." *Id*. at 677.

More recently, the Seventh Circuit has held that a judge must "investigate[] the realism of the plaintiffs' [common] injury . . . in light of the defendants' counterarguments, and to that end should [take] evidence." *Parko*, 739 F.3d at 1086. As it explained in decertifying a class action in *Parko*, "[n]othing is simpler than to make an unsubstantiated allegation." *Id*. The plaintiffs there alleged that defendant's oil had entered the water supply, but a close look at the expert's opinion revealed that evidence of contamination was unclear. *Id*. As a result, it was not "even clear that the plaintiffs ha[d] identified a common issue," because, "[i]f the expert's evidence is rejected, there will be no basis for" the common injury claimed. *Id*.

Accordingly, in the Seventh Circuit, among others, district courts cannot rest on plaintiffs' intent to produce common evidence. "[I]f intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window." *Id*. Likewise, the Tenth Circuit has recognized in decertifying a class that the "mere raising of a common question does not

automatically satisfy Rule 23(a)'s commonality requirement." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013). And the D.C. Circuit has emphasized that predominance requires "the common evidence to show all class members suffered *some* injury." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). *See also Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266, 270 (3d Cir. 2011) (certification improper where only evidence of "hypothetical, composite persons" provided, as Rule 23(b)(3) "require[s] considering individual proof").

C. Together, these decisions require a thorough review of the record evidence, at the certification stage, to ensure that the putative class is cohesive enough to merit certification. The decision below conflicts with this Supreme Court and circuit court jurisprudence.

Neither the District Court nor the Sixth Circuit majority here considered any evidence regarding whether named Plaintiffs' actually could show a common injury based on their theory of liability. Specifically, the Sixth Circuit recognized named Plaintiffs' theory of liability was that Align is composed of inert ingredients and does not provide the advertised benefits to anyone. Pet. App. 51a. And it "accepted" the theory as true for class certification purposes, recognizing that at the merits stage, if P&G could show that even one consumer benefitted from Align, the entire class would fail. *Id.* at 50a. It did so even though the named Plaintiffs had offered no evidence in support of their theory, and P&G had offered ample evidence contradicting it. *Id.* at 61a (Cook, J., dissenting). Despite evidence

showing that the class was indeed not cohesive on the named Plaintiffs' theory, the Sixth Circuit said it had to turn a blind eye and wait for the merits stage. *Id.* at 41a-42a. Accordingly, this case raises the question whether named plaintiffs' theory of liability and resulting common injury can be tested at the class certification stage or not.

To be clear, the Sixth Circuit's decision did not mistakenly overlook evidence showing the class was not cohesive. No member of the panel disputed that Plaintiffs lacked evidence of a common injury (and the District Court identified none), so this case is not factbound. Instead, the majority explicitly held that evidence that established the absence of a common injury was *irrelevant* and could not be considered at class certification. *Id.* ("P&G's claim that Align works for some individuals goes solely to the merits; it has no relevance to the class certification issue."). The majority noted that the District Court could "allow[] rebuttal evidence on issues that affect predominance, not evidence that affects only the merits of a case." *Id.* at 49a. And "[g]iven Plaintiffs' theory of liability in this case, the evidence that P&G has presented [showing that Align works] fails this test—it affects only the merits of this case, not predominance." *Id.* For the majority, the named Plaintiffs need only show "that there is a common question that will yield a common answer for the class," and they need not "produce actual proof at the class-certification stage of classwide injury," *id.* at 11a, 45a. It made no difference whether the evidence in the record supported the liability theory or instead showed no common injury. Hence, the entire class

could be tied together on a theory that had no basis in fact.

The Sixth Circuit's decision conflicts with the jurisprudence of the Supreme Court, the Seventh Circuit, and the other courts cited above. As Judge Cook stated, it is insufficient for Rule 23 to "trot out an expert without any opinion as to the supplement's efficacy, and promise to conduct the definitive trial of Align that accounts for all variables of human physiology." *Id.* at 63a-64a. Quite simply, "*Dukes* and its progeny teach us that this is insufficient to justify class certification." *Id.* at 64a.

Moreover, the Sixth Circuit's decision has important implications meriting this Court's review. Certifying a class based on an overbroad, unsubstantiated theory risks the extinguishment of potentially viable individual claims, threatening absent class members' interests, and creating further tension in circuit court precedent. "Both the absent class members and defendants are entitled to the protection of independent judicial review of the plaintiff's allegations," to ensure that class adjudication is fair to all concerned. *Szabo*, 249 F.3d at 677; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) ("dominant" concerns in class certification include "the protection of absent parties").

This case demonstrates that very danger. The class liability theory named Plaintiffs present is extremely broad. As both judges in the majority recognized, Plaintiffs' framing of the class question means that every single class member's claim rises or falls on P&G's ability to point to even a single individual aided by Align. Judge Moore twice stated

that, "if Align is shown to work, even for only certain individuals, then presumably Plaintiffs lose." Pet. App. 47a, 50a. District Judge Cohn concurred: if "Plaintiffs' proof fails to establish that Align has no digestive health benefits, the case should be dismissed." *Id.* at 59a. Pointing out that the entire class could lose so easily on the merits begs the question whether it is fair and proper to require unnamed class members to bet their claims on named Plaintiffs' unsupported "snake oil theory"—especially given the record here.

Moreover, under the Sixth Circuit's reasoning, certification of false advertising claims is appropriate anytime a litigant alleges that a product does not work for any purchaser, on the promise that evidence adduced post-certification will support that claim—even if evidence at the certification stage shows otherwise. This lenient approach not only allows plaintiffs with "weak claims to extort settlements from innocent companies," but also threatens the viability of products that provide relief to millions. *See Halliburton*, 134 S. Ct. at 2424 n.7 (quotation marks and citation omitted). Thus, the Sixth Circuit's decision subjects numerous consumer products to the threat of class claims based upon alleged false advertising, a result with widespread national impact. Certiorari review is warranted.

II. COURTS ARE SPLIT REGARDING THE SHOWING NECESSARY TO SATISFY ARTICLE III STANDING FOR ABSENT CLASS MEMBERS.

The Sixth Circuit's decision also implicates two critical Article III standing questions. *First*, the decision raises the question of whether a class may

be certified when the record reflects that many class members lack Article III standing. *Second*, this case raises the question whether a defendant's violation of a state statute creates Article III standing for unnamed class members. Because these questions are presently pending in cases before the Court (in *Tyson Foods* and *Spokeo*, respectively), at a minimum P&G requests that the Court hold this petition pending those outcomes, and GVR in light of its decisions. If the Court does not reach these issues in the matters already pending before it, then this case provides an optimal vehicle for resolving these acknowledged certworthy questions.

A. CIRCUITS ARE SPLIT AS TO WHETHER STANDING FOR ABSENT CLASS MEMBERS MAY BE ESTABLISHED EXCLUSIVELY BY CLASS REPRESENTATIVES' STANDING.

This Court's review is needed to resolve a circuit conflict concerning whether a class may be certified based on named plaintiffs' standing alone, even where the evidence shows that many unnamed class members lack Article III standing.

Rule 23 must be "interpreted in keeping with Article III constraints." *Amchem Prods.*, 521 U.S. at 613. And the federal courts, of course, are open only to justiciable cases. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Justiciability requires a plaintiff to have suffered an injury in fact attributable to the defendant that may be redressed by a favorable decision. *Id.* Because granting certification opens the doors of federal court to *all* members of that class, and not just the named

plaintiff or plaintiffs, absent class members must also have standing for a class case to proceed past certification.

In this case, the three named Plaintiffs satisfied Article III's standing requirements based on their testimony that they relied on P&G's advertising that Align would "promote digestive health" in purchasing the product, and that Align failed to provide any digestive health benefit. But P&G has long maintained—and has produced evidence demonstrating—that many class members (unlike the named plaintiffs) received the advertised benefits from taking Align, and thus would have no standing to sue. Pet. App. 63a (Cook. J. dissenting); *id.* at 67a. Equally true, not all unnamed class members purchased Align as a result of the allegedly false advertising, and plaintiffs do not contend as much. Nor could they. Indeed, the record shows the opposite—many consumers purchased it because of recommendations from doctors or relatives, not because of any allegedly false advertising. *Id.* at 20a.

By affirming certification despite evidence that many consumers benefitted from Align and/or did not rely on P&G's advertising in purchasing Align, the Sixth Circuit waded into a circuit split. *See In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014) *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014). As the Fifth Circuit recently noted, circuits have followed two distinct approaches in evaluating standing for class certification purposes, with some circuits taking internally conflicting approaches. *Id.*

The Third and Seventh Circuits take the position that, as long as the class representatives have standing, Article III is satisfied as to the entire class. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306–07 (3d Cir. 1998) (holding that if "the named plaintiffs satisfy Article III," the "absentee class members are not required to make a similar showing."); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) (holding that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied.").

By contrast, the Second and D.C. Circuits have held that lower courts must closely scrutinize the class to be sure that all members suffered a common injury, giving them standing to sue. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("no class may be certified that contains members lacking Article III standing."); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 252 (vacating certification order where plaintiffs could not "prove, through common evidence, that all class members were in fact injured").

Adding to the confusion, several circuits, including the Eighth and Ninth, have issued inconsistent decisions, making it uncertain which test will apply in any given case. *Compare e.g.*, *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779-80 (8th Cir. 2013) (reversing certification order because "it contains members who lack standing"), *with Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014) (certifying class despite evidence that many class members were not injured); *compare Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020–

21 (9th Cir. 2011) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements . . ." (internal quotation marks and citations omitted)), *with Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012) (adopting Second Circuit test).

The Sixth Circuit's decision below adds to the circuit split. To be sure, the court attempted to evade this split by assuming, for purposes of class certification, that "P&G falsely advertised to every purchaser of Align" and hence every purchaser has standing. Pet. App. 52a. But Article III requires more than a "mere pleading." *Lujan*, 504 U.S. at 561. And as Judge Cook observed, "[t]he only evidence before the court shows that IBS patients suffered no injury (because Align works as-advertised for them)." Pet. App. 63a. The record evidence also demonstrated that many class members could not prove causation, because they purchased Align not as a result of the advertising, but because of a doctor's recommendations. As such, the Sixth Circuit affirmed a "class definition that includes a clutch of members without standing." *Id.* at 62a-63a.

The Court should grant certiorari in this case to resolve the circuit split on this issue. Indeed, this Court already has acknowledged the importance of this issue in granting certiorari in *Tyson Foods* to address "[w]hether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages." Petition for Writ of Certiorari

at i, *Tyson Foods*, No. 14-1146. There, the Eighth Circuit affirmed class certification even though "evidence at trial showed that some class members did not work overtime" and hence had no injury for Tyson's alleged labor violations. *Tyson Foods*, 765 F.3d at 797.

The Court's resolution of *Tyson Foods* therefore could directly impact a central question in this case, potentially requiring Plaintiffs to make a clearer demonstration of standing for its absent members before the district court may certify a class. Should the Court decline to reach the second question presented in *Tyson Foods*, this case presents an optimal vehicle to resolve the circuit split. Accordingly, the Court should, at a minimum, hold this Petition pending the outcome in *Tyson Foods*.

B. THE COURT SHOULD RESOLVE A CIRCUIT SPLIT AS TO WHETHER A STATUTORY VIOLATION ALONE CAN SATISFY ARTICLE III STANDING.

This case also presents the question of whether an alleged violation of a statute—here a state statute—is sufficient to confer Article III standing for unnamed class members. As noted above, the record below demonstrates that many putative class members purchased Align as a result of information *unrelated* to P&G's advertising. Instead, they purchased Align based on, for example, a recommendation from a doctor or relative. As such, many unnamed class members never suffered an injury caused by the allegedly false advertising.

Despite this evidence, Plaintiffs claim that they can maintain actions under California's consumer

protection statutes and other state laws as long as the plaintiffs allege that P&G's advertising was "deceptive." Plaintiffs contend that, under these statutes, they need not prove that any purchaser actually relied on the allegedly deceptive advertising. The Sixth Circuit agreed. Pet. App. 37a. Instead, according to the majority, a material misrepresentation in advertising directed "in a generally uniform way to the entire class" is enough to state a claim under these state statutes. *Id*. at 25a. As a result, even though unnamed class members could never show Article III "causation," *Lujan*, 504 U.S. at 562, the Sixth Circuit allowed their claims to proceed in federal court. Their standing rests only on the alleged statutory violation and nothing more.

The courts of appeal are divided over whether an alleged statutory violation satisfies Article III standing requirements. The Sixth, Seventh, and Ninth Circuits have held that plaintiffs can maintain an action in federal court for a violation of a statute even without a showing that they suffered any injury as a result of the challenged practice. *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) (FCRA violation); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952–53 (7th Cir. 2006) (FCRA violation); *Edwards v. First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (RESPA violation), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012).

By contrast, the Second and Fourth Circuits have rejected the notion that deprivation of a statutory right is sufficient to create Article III standing for absent class members. *See Kendall v. Emp. Ret.*

Plan of Avon Prods., 561 F.3d 112, 121 (2d Cir. 2009) (plaintiff cannot maintain claim without "alleg[ing] some injury or deprivation of a specific right that arose from a violation of [ERISA]."); *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) ("this theory of Article III standing [based on a statutory violation] is a non-starter as it conflates statutory standing with constitutional standing.").

The Court should grant certiorari to resolve the circuit split. This issue too is already pending before the Court. In *Spokeo, Inc. v. Robins*, the Court is considering "[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." No. 13-1339, *cert. granted* 135 S. Ct. 1892 (2015) (oral argument held Nov. 2, 2015). In *Spokeo*, the Ninth Circuit concluded that violation of a statute *ipso facto* satisfies Article III's injury-in-fact requirement even in the absence of any concrete and particularized injury. 742 F.3d 409, 413-14 (9th Cir. 2014). Even though the plaintiff and absent class members did not suffer any monetary, emotional, or other "tangible" harm, the Ninth Circuit concluded that the class had standing based solely on the defendant's alleged violation of the Fair Credit Reporting Act. *Id.*

Given the similarities between the respective plaintiffs' standing theories in *Spokeo* and this case, there is a reasonable probability that this Court's resolution in *Spokeo* will impact at least several of the state law claims in this case. Accordingly, if the Court does not grant certiorari in this case, the

Petition should be held pending the outcome of *Spokeo*, and disposed of as appropriate depending on the outcome of that decision.

III. THE SIXTH CIRCUIT'S DECISION REGARDING ASCERTAINABILITY DEEPENS AN EXISTING CIRCUIT SPLIT.

Finally, the Court should grant certiorari here for another, independent reason: to resolve a deepening circuit split regarding the generally accepted "ascertainability" requirement for class certification. *See* William B. Rubenstein, Newberg on Class Actions § 3:3 (5th ed.); Joseph M. McLaughlin, McLaughlin on Class Actions § 4:2 (11th ed. 2014). To be ascertainable, a class must be defined by "objective criteria" and "identifying class members [must be] a manageable process that does not require much, if any, individual factual inquiry." Rubenstein, Newberg on Class Actions § 3:3. Accordingly, the district court at class certification must determine how class members will be identified. *See* Fed. R. Civ. P. 23 Advisory Committee Note, 2003 Amendments.

As P&G argued before the Sixth Circuit, there is no reliable and feasible way to identify the class members in this case, even assuming that the other Rule 23 requirements are met. P&G does not retail Align (except for a limited number of purchases through its website), and it does not have the names or identities of customers who purchased Align from a vast array of retailers. Most customers, moreover, would not have saved receipts or proof of purchase—notably, none of the Plaintiffs did. Likewise, many consumers may be unsure which probiotic they purchased, when they purchased it, where they

purchased it, and how much they paid. In short, to identify most class members, Plaintiffs would have to rely on class members' bare affidavits.

Under the standard adopted by the Third Circuit, exemplified by *Carrera*, Plaintiffs' class is not ascertainable. *See Carrera*, 727 F.3d at 304. In *Carrera*, the Third Circuit held that "if class members cannot be ascertained from a defendant's records," the plaintiffs must demonstrate that there is a "'reliable, administratively feasible alternative,'" beyond relying on individuals' bare affidavits. *Id*. There, like here, Plaintiffs brought a false advertising claim against a product's manufacturer on behalf of all purchasers. Because the dietary supplements at issue were sold in retail stores, "Bayer ha[d] no list of purchasers," and, as here, purchasers were "unlikely to have documentary proof of purchase." *Id*. at 304. The Third Circuit rejected the plaintiffs' proposal to rely on "potential class members' say so," through the use of affidavits, as that approach would raise serious due process concerns. *Id*. at 304-06.

The same is true here. If this were an individual claim, due process would require Plaintiffs to prove that they purchased Align, and P&G would have a chance to challenge that showing. *See Hayes v. Wal-Mart Stores Inc.,* 725 F.3d 349, 355 (3d Cir. 2013). Given that not even the three named Plaintiffs can remember how many packages they purchased, or when, certifying five statewide classes of all Align purchasers invites enormous due process concerns. As *Carrera* holds, "a class action cannot be certified in a way that eviscerates [due process]," which is

why making sure class members can be reliably identified is so crucial. 727 F.3d at 307.

Citing *Carrera*, the Fourth and Eleventh Circuits have also required plaintiffs to demonstrate that members of a proposed class be "readily identifiable." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (internal quotation marks and citation omitted); *Karhu v. Vital Pharm., Inc.*, __ F. App'x __, 2015 WL 3560722, at *2-4 (11th Cir. June 9, 2015). And numerous district courts outside of the Third Circuit have followed its ascertainability standard.[1]

The Sixth Circuit in this case, however, explicitly rejected the *Carrera* approach, Pet. App. 53a, as did the Seventh Circuit in *Mullins*, 795 F.3d at 657 (petition for certiorari docketed Oct. 25, 2015, No. 15-549.)[2] Instead, the Sixth Circuit deemed Plaintiffs' class ascertainable because it could be "defined by objective criteria: anyone who purchased Align" in the five states at issue. Pet. App. 55a. As for how those individuals could be identified, the majority referenced "internal P&G data, . . . receipts,

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[1] *See, e.g.*, *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3-4 (N.D. Ill. Feb. 25, 2015); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *8-11 (N.D. Cal. June 13, 2014), appeal docketed, No. 14-16327 (9th Cir. July 15, 2014); *In re POM Wonderful LLC*, No. ML 10-02199 DDP RZX, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *5-6 (N.D. Cal. Feb. 13, 2014).

[2] If the Court grants the petition for certiorari in *Direct Digital, LLC v. Mullins*, No. 15-549, this case should be held pending a resolution of the standard for ascertainability, and then remanded for the Sixth Circuit to consider its decision in light of that decision.

affidavits, and a special master"—even though P&G's data does not identify class members, the named Plaintiffs did not even keep their receipts, and it is unclear how a special master could effectively screen self-serving affidavits for fraud. *Id.* The Sixth Circuit *sua sponte* proposed that P&G could verify whether a "customer purchased Align by, for instance, requesting a signed statement from that customer's physician," even though Align is an over-the-counter probiotic taken by individuals based on recommendations of friends and family, not solely doctors. *Id.* at 58a.

Notably, after rejecting *Carrera*, the Sixth Circuit did not make an alternative holding that Plaintiffs' class would pass the Third Circuit's ascertainability standard. Rather, it stated that Plaintiffs' class was "more ascertainable" than the class in *Carrera*, where not a "single" class member could be ascertained. *Id.* at 56a. And it made this comparison based on its *sua sponte* evaluation of a powerpoint included in the record showing that almost half of Align's sales were completed online, where there are records of who purchased the product. *Id.* at 57a. Yet Plaintiffs never claimed that half of their class's sales were completed online, nor did the District Court make that conclusion in evaluating the class's ascertainability. And for good reason. That powerpoint included Align sales only from 2005 to 2009, when Align was sold exclusively online or in a few individual retail test markets. *Id.* at 68a. Align did not fully launch retail sales nationwide until 2009, which is when Plaintiffs' class period begins. *Id.*

Thus, unlike the standard applicable in the Third, Fourth, and Eleventh Circuits, the Sixth Circuit's approach leaves room for individuals to claim membership in a class based on foggy memories, confusion, conjecture, or even outright fraud. The Sixth Circuit's decision thus deepens an existing circuit split on the standard courts should use in assessing a class's ascertainability. The Court should grant certiorari to resolve this important issue for countless consumer class actions nationwide.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted. Alternatively, the Petition should be held pending this Court's decisions in *Tyson Foods* and *Spokeo*, and adjudicated as appropriate in light of those decisions.

Respectfully submitted,

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December 28, 2015

APPENDIX

APPENDIX A

CASE NO. 14-4088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

DINO RIKOS, On Behalf of Himself, All Other Similarly Situated and the General Public; TRACEY BURNS, On Behalf of Themselves, All Others Similarly Situated and the General Public; LEO JARZEMBROWSKI, On Behalf of Themselves, All Others Similarly Situated and the General Public

Plaintiffs — Appellees

v.

PROCTER & GAMBLE COMPANY

Defendant — Appellant

BEFORE: MOORE and COOK, Circuit Judges; COHN, U.S. District Judge.*

Upon consideration of motion to stay mandate,

It is **ORDERED** that the mandate be stayed to allow appellant time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER
OF THE COURT
Deborah S. Hunt, Clerk

Issued: October 27, 2015

/s/ Deborah S. Hunt

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DINO RIKOS et al., *Plaintiffs-Appellees*, v. THE PROCTER & GAMBLE COMPANY, *Defendant-Appellant*.	No. 14-4088

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 1:11-cv-00226—Timothy S. Black, District Judge.

Argued: June 16, 2015

Decided and Filed: August 20, 2015

Before: MOORE and COOK, Circuit Judges; COHN, District Judge.*

COUNSEL

ARGUED: Brian J. Murray, JONES DAY, Chicago, Illinois, for Appellant. Timothy G. Blood, BLOOD HURST & O'REARDON, San Diego, California, for Appellees. **ON BRIEF**: Brian J. Murray, JONES DAY, Chicago, Illinois, D. Jeffrey Ireland, FARUKI

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

IRELAND & COX P.L.L., Cincinnati, Ohio, Joanne Lichtman, BAKER & HOSTETLER LLP, Cleveland, Ohio, Chad A. Readler, Rachel Bloomekatz, JONES DAY, Columbus, Ohio, for Appellant. Timothy G. Blood, Leslie E. Hurst, Thomas J. O'Reardon II, BLOOD HURST & O'REARDON, San Diego, California, for Appellees.

MOORE, J., delivered the opinion of the court in which COHN, D.J., joined. COHN, D.J. (pg. 37), delivered a separate concurring opinion. COOK, J. (pp. 38–40), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. The named plaintiffs-appellees ("Plaintiffs") are three individuals who purchased Align, Procter & Gamble's ("P&G") probiotic nutritional supplement, and found that the product did not work as advertised—that is, it did not promote their digestive health. Plaintiffs subsequently brought suit, alleging violations by P&G of various state unfair or deceptive practices statutes because it has not been proven scientifically that Align promotes digestive health for *anyone*. On June 19, 2014, the district court certified five single-state classes from California, Illinois, Florida, New Hampshire, and North Carolina under Federal Rule of Civil Procedure 23(b)(3) comprised of "[a]ll consumers who purchased Align . . . from March 1, 2009, until the date notice is first provided to the Class." On appeal, P&G contends that the district court abused its discretion in granting

Plaintiffs' motion for class certification. For the reasons set forth below, we **AFFIRM** the district court's judgment granting class certification to Plaintiffs.

I. BACKGROUND

A. Facts

Align contains a patented probiotic strain, *Bifidobacterium infantis* 35624 ("Bifantis"), which it developed in the 1990s and early 2000s in partnership with Alimentary Health, a company based in Ireland. Sealed App. at 497. According to the World Health Organization, probiotics are "live microorganisms . . . which when administered in adequate amounts confer a health benefit to the host." R. 108-8 (Komanduri Decl. ¶ 12) (Page ID #1596). "While there is a consensus within the medical and scientific communities that utilizing bacteria as a therapeutic measure in human disease is promising, current knowledge of the use of bacteria for these purposes remains fairly primitive." *Id.* ¶ 13 (Page ID #1596). Although a limited number of probiotics have been approved as prescription treatments for pouchitis and infectious diarrhea, the overall "[m]edical understanding of probiotics in humans is still in its infancy." *Id.* ¶¶ 13–14 (Page ID #1596–97).

Align is not a prescription probiotic. Instead, it is marketed to the general public as a supplement that "naturally helps build and support a healthy digestive system, maintain digestive balance, and fortify your digestive system with healthy bacteria." Appellant Br. at 12 (alterations omitted). In addition, unlike some other non-prescription

probiotics, Align is not included as an add-on ingredient to another consumer product (e.g., yogurt), but is rather sold in a capsule that is "filled with bacteria and [otherwise] inert ingredients." R. 140 (Dist. Ct. Order at 30) (Page ID #6444).

P&G began selling Align in various test markets in October 2005, with sales representatives dropping off samples to doctors' offices in St. Louis, Boston, and Chicago. Sealed App. at 410. P&G was also able to sell a limited amount of product online, although "physician-driven sales outpaced internet-driven sales by about 2:1." *Id*. One of the initial hurdles faced by P&G was convincing consumers of the product's value, particularly given Align's premium price point. *See id*. at 535 (company document noting that "[v]alue is a trial barrier due to the premium price point of $29.99. Probiotics on shelf at major retailers range from $9.99-$29.99. Of note, other probiotics *detailed through physicians* cost upwards of $45") (emphasis added). After a successful rollout across multiple markets, P&G launched Align nationwide in 2009, promoting Align through a comprehensive advertising campaign, which included in-person physician visits, television and print advertisements, in-store displays, and product packaging. Appellant Br. at 11–12.

B. Procedural History

Dino Rikos, Tracey Burns, and Leo Jarzembrowski, the named plaintiffs-appellees, are residents of Illinois, Florida, and New Hampshire, respectively. From 2009 to 2011, Rikos, Burns, and Jarzembrowski were "exposed to and saw Procter & Gamble's claims by reading the Align label." R. 85 (Second Amended

Class Action Compl. ¶¶ 10–12) (Page ID #963–64). In reliance on P&G's claims of Align's effectiveness, they proceeded to purchase Align at various stores in California, Illinois, North Carolina, Florida, and New Hampshire.

In their complaint, Plaintiffs allege that they "suffered injury in fact and lost money as a result of the unfair competition described [t]herein" after finding that Align did not provide them with the digestive benefits that it promised to provide. *Id*. Plaintiffs initially filed suit in the United States District Court for the Southern District of California, but the case was eventually transferred to the Southern District of Ohio. R. 25 (S.D. Cal. Dist. Ct. Order at 4) (Page ID #374). In January 2014, Plaintiffs filed a motion and memorandum in support of class certification. Sealed App. at 15–63. In their motion, Plaintiffs requested that the district court certify the following five single-state classes and appoint them as class representatives:

> ***California Class (Represented by Plaintiff Dino Rikos)***: All consumers who purchased Align in California from March 1, 2009, until the date notice is first provided to the Class.
>
> ***Illinois Class (Represented by Plaintiff Dino Rikos)***: All consumers who purchased Align in Illinois from March 1, 2009, until the date notice is first provided to the Class.
>
> ***Florida Class (Represented by Plaintiff Tracey Burns)***: All consumers who purchased Align in Florida from March 1, 2009, until the date notice is first provided to the Class.

> ***New Hampshire Class (Represented by Plaintiff Leo Jarzenbowski [sic])***: All consumers who purchased Align in New Hampshire from March 1, 2009, until the date notice is first provided to the Class.
>
> ***North Carolina Class (Represented by Plaintiff Tracey Burns)***: All consumers who purchased Align in North Carolina from March 1, 2009, until the date notice is first provided to the Class.
>
> Excluded from each of the Classes are the defendant, its officers, directors, and employees, and those who purchased Align for the purpose of resale.

Id. at 16.

After hearing oral argument from both sides, the district court issued an order granting Plaintiffs' motion for class certification. In its order, the district court made clear that it was not attempting to provide a ruling on the merits of the case (i.e., whether or not Align promotes digestive health), but was instead reviewing only whether Plaintiffs had presented sufficient evidence to satisfy Federal Rule of Civil Procedure 23. R. 140 (Dist. Ct. Order at 5–6) (Page ID #6419–20). It then determined that class certification was proper. *Id*. at 1, 38 (Page ID #6415, 6452). P&G has timely appealed.

II. ANALYSIS

A. Standard of Review

"Class certification is appropriate if the [district] court finds, after conducting a 'rigorous analysis,' that the requirements of Rule 23 have been met." *In*

re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 851 (6th Cir. 2013) (quoting *Walmart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (2011)). Nonetheless, we have noted that "[t]he district court maintains substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 559 (6th Cir. 2007) (internal quotation marks omitted). We review the district court's decision to grant or deny class certification under an abuse-of-discretion standard. *Id.* "An abuse of discretion occurs when we are left with the definite and firm conviction that the [district] court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where it improperly applies the law or uses an erroneous legal standard." *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002) (alterations in original) (internal quotation marks omitted).

B. Rule 23(a)[1]

1. Plaintiffs Have Sufficiently Demonstrated Commonality

Federal Rule of Civil Procedure 23(a)(2) states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . there are questions of law or fact common to the class." "Commonality requires the plaintiff to demonstrate that the class members have suffered

[1] P&G has not challenged on appeal two other requirements of Federal Rule of Civil Procedure 23(a), numerosity and adequacy of representation.

the same injury." *Dukes*, 131 S. Ct. at 2551 (internal quotation marks omitted).

P&G contends that, like the plaintiffs in *Dukes*, Plaintiffs here have failed sufficiently to demonstrate commonality. According to P&G, *Dukes* requires that named plaintiffs present evidence proving that class members suffered an actual common injury to establish commonality. Appellant Br. at 25–26. P&G argues that Plaintiffs here have presented only anecdotal evidence that Align does not work *for them*—Plaintiffs have "presented no evidence that the reported consumer benefits [of Align to all purchasers] were due solely to the placebo effect." *Id.* at 29. Instead, P&G claims that "consumer satisfaction—and repeat purchasing—is probative of Align's benefits to consumers." *Id.* In addition, P&G notes that at least some studies appear to conclude that Align is effective in promoting digestive health.[2]

P&G misconstrues Plaintiffs' burden at the class-certification stage. Whether the district court properly certified the class turns on whether Plaintiffs have shown, for purposes of Rule 23(a)(2), that they *can prove*—not that have already shown—that all members of the class have suffered the "same injury." *Dukes*, 131 S. Ct. at 2551. The Supreme Court in *Dukes* did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact injured to

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[2] Although not relevant to the commonality inquiry, Plaintiffs point to flaws in the scientific studies relied upon by P&G that Plaintiffs claim mean that it has not been proven with proper scientific analysis that Align works for anyone who takes it. *See*, *e.g.*, Sealed App. at 42–44.

meet this requirement. Rather, the Court held that named plaintiffs must show that their claims "depend upon a common contention" that is "of such a nature that it is *capable* of classwide resolution—which means that determination of its truth or falsity *will* resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* (emphases added). In other words, named plaintiffs must show that there is a common question that will yield a common answer for the class (to be resolved later at the merits stage), and that that common answer relates to the actual theory of liability in the case.

Since *Dukes*, the Supreme Court has made clear that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits 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 Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013) (emphasis added); *see also In re Whirlpool*, 722 F.3d at 851–52 ("[D]istrict courts may not turn the class certification proceedings into a dress rehearsal for the trial on the merits." (internal quotation marks omitted)); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 417 (6th Cir. 2012) (explaining that although "conformance with Rule 23(a) . . . must be checked through rigorous analysis, . . . it is not always necessary . . . to probe behind the pleadings before coming to rest on the certification question, because sometimes there may be no disputed factual and legal issues that strongly influence the wisdom of class treatment" (internal quotation marks omitted)).

A brief overview of the class claims in *Dukes* illustrates the Supreme Court's more limited holding than what P&G claims. The named plaintiffs were "three current or former Wal-Mart employees who allege[d] that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964." *Dukes*, 131 S. Ct. at 2547. They sought to have a class certified of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices." *Id.* at 2549 (internal quotation marks omitted). Significantly, "[t]hese plaintiffs . . . [did] not allege that Wal–Mart ha[d] any express corporate policy against the advancement of women." *Id.* at 2548. Rather, plaintiffs "claim[ed] that the discrimination to which they have been subjected [was] common to *all* [of] Wal–Mart's female employees" because "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice." *Id.*

The Supreme Court rejected this theory, finding that the plaintiffs had failed to demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). After reviewing the details of Wal-Mart's discretionary promotion policy, the Court noted that, "[i]n such a company, demonstrating the invalidity of one manager's use of

discretion will do nothing to demonstrate the invalidity of another's." *Dukes*, 131 S. Ct. at 2554. Thus, "[a] party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions." *Id.* The plaintiffs, the Court noted, had presented no evidence that managers at Wal-Mart had exercised their discretion in the same way—i.e., that they had used it to discriminate against women. It would have been possible for some managers to discriminate in favor of women, for others to discriminate against women, and for still others not to discriminate at all. *Id.*

Here, in contrast, Plaintiffs have identified a common question—whether Align is "snake oil" and thus does not yield benefits to *anyone,* Appellee Br. at 7—that will yield a common answer for the entire class and that, if true, will make P&G liable to the entire class. The district court conducted a sufficient analysis of the record evidence in finding commonality here. It concluded that no individual would purchase Align but-for its digestive health benefits, which P&G promoted through an extensive advertising campaign. If Align does not provide any such benefits, then every class member was injured in the sense that he or she spent money on a product that does not work as advertised. No more investigation into the merits (i.e., whether Align actually works) is needed for purposes of satisfying Rule 23(a)(2)'s commonality requirement.[3] Thus,

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[3] Neither *FTC v. Pantron I Corporation*, 33 F.3d 1088 (9th Cir. 1994), nor *In re Whirlpool* support P&G's argument that the district court did not sufficiently consider the merits of the case

although P&G argues that some class members were not injured because they kept buying Align—a sign that Align works, says P&G—that is not the right way to think about "injury" in the false-advertising context. The false-advertising laws at issue punish companies that sell products using advertising that misleads the reasonable consumer. *See*, *e.g.*, *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) ("Appellants' claims under these California statutes [the Unfair Competition Law and the Consumer Legal Remedies Act] are governed by the 'reasonable consumer' test. . . . Under the reasonable consumer standard, Appellants must show that members of the public are likely to be deceived." (internal quotation marks omitted)). Whether consumers were satisfied with the product is

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to grant class certification. *Pantron* was not a class action, and thus the decision cited conducts a full merits analysis. The evidence we noted that the district court properly considered in *In re Whirlpool* related to whether there was in fact a common question *capable* of a common answer. Specifically, we highlighted evidence that confirmed that mold the class claimed was due to design defects in Whirlpool products occurred "despite variations in consumer laundry habits." 722 F.3d at 854. Such evidence was critical to disproving Whirlpool's claim that "proof of proximate cause must be determined individually for each plaintiff in the class," i.e., that the class's common question would not yield a common answer. *Id.* Significantly, however, we did not examine whether the named plaintiffs had presented evidence that the alleged design defects in Whirlpool products had in fact proximately caused the mold of which they complained. That issue went solely to the merits of the case. Similarly, the evidence P&G has presented here that it claims the district court insufficiently examined goes solely to the merits of the case, not to whether Plaintiffs' common question will yield a common answer.

irrelevant. *See*, *e.g.*, *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB, 2014 WL 1779243, at *14 (C.D. Cal. Jan. 13, 2014) ("Defendant's concern that some putative class members were happy with Elations and thus were uninjured is unpersuasive. The requirement of concrete injury is satisfied when the Plaintiffs and class members . . . suffer an economic loss caused by the defendant, namely the purchase of defendant's product containing misrepresentations." (alteration and internal quotation marks omitted)). In fact, courts have held that it is misleading to state that a product is effective when that effectiveness rests solely on a placebo effect. *See*, *e.g.*, *FTC v. Pantron I Corporation*, 33 F.3d 1088, 1100–01 (9th Cir. 1994).

P&G has failed to identify a single false-advertising case where a federal court has denied class certification because of a lack of commonality. *See*, *e.g.*, *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 405 (S.D.N.Y. 2015) ("A common question with respect to the first theory of liability is whether EZ Seed grows grass. If plaintiffs can prove EZ Seed 'does not grow at all' and thus is worthless, plaintiffs will be entitled to relief."); *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) ("By definition, all class members were exposed to such representations and purchased AriZona products, creating a common core of salient facts. Courts *routinely find commonality in false advertising cases* that are materially indistinguishable from the matter at bar." (emphasis added) (internal quotation marks and citation omitted)); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (distinguishing *Dukes* from consumer false-

advertising class actions by noting that "[w]here the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question. . . . In this case, the plaintiffs' claims and those of the class they would like to represent all derive from a single course of conduct by Sturm: the marketing and packaging of GSC").

In addition, as Plaintiffs point out, every court has, when presented with the opportunity, found commonality sufficient to satisfy Rule 23(a)(2) where plaintiffs have alleged that probiotics are ineffective. *See*, *e.g.*, *Johnson v. Gen. Mills, Inc.*, 278 F.R.D. 548, 551 (C.D. Cal. 2012) ("Mr. Johnson has presented sufficient facts to show that all of the class members' claims have at their heart a common contention: Defendants made a material misrepresentation regarding the digestive health benefits of YoPlus that violated the UCL and the CLRA. The class members all assert they were misled by a common advertising campaign that had little to no variation."); *Wiener v. Dannon Co.*, 255 F.R.D. 658, 664–65 (C.D. Cal. 2009) ("The proposed class members clearly share common legal issues regarding Dannon's alleged deception and misrepresentations in its advertising and promotion of the Products.").

In *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279 (11th Cir. 2011), for instance, plaintiff Julie Fitzpatrick brought suit under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") against General Mills, alleging that the company had made "false and misleading claims that YoPlus provides digestive health benefits that other yogurt products do not." *Id.* at 1281. "YoPlus is ordinary yogurt

supplemented with probiotic bacteria, inulin, and vitamins A and D. The mixture of probiotic bacteria and inulin in YoPlus allegedly provides habitual consumers with digestive health benefits by aiding in the promotion of digestive health." *Id.* Fitzpatrick moved to certify a class of "all persons who purchased YoPlus in the State of Florida." *Id.* The district court granted Fitzpatrick's motion. *Fitzpatrick v. Gen. Mills, Inc.*, 263 F.R.D. 687 (S.D. Fla. 2010). On the issue of commonality, the district court explained "[w]hether General Mills' claim that Yo–Plus aids in the promotion of digestive health is 'deceptive' is a mixed question of law and fact common to every class member seeking damages under the FDUTPA." *Id.* at 696. The district court continued that "[e]ven though a few consumers likely purchased Yo–Plus for reasons unrelated to Yo–Plus' purported digestive health benefits, . . . the Court is convinced that a significant number of Yo–Plus consumers purchased Yo–Plus because of its purported digestive health benefit, which is, as General Mills' marketing documents plainly state, Yo–Plus' primary distinguishing feature." *Id.* at 696–97. The Eleventh Circuit did not discuss the commonality requirement on appeal. *Fitzpatrick*, 635 F.3d at 1282. It did note, however, that "[t]he district court's analysis . . . [was] sound and in accord with federal and state law." *Id.* at 1283.[4]

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[4] The Eleventh Circuit ultimately vacated the district court's decision and remanded the case to the district court, but for a reason unrelated to its commonality findings. The district court's "class definition limit[ed] the class to those who purchased YoPlus 'to obtain its claimed digestive health benefit,' which takes into account individual reliance on the digestive

As the preceding false-advertising cases make clear, the district court correctly found that Plaintiffs have demonstrated that their claims share a common question—whether Align is "snake oil" and thus does not yield benefits to *anyone*. Appellee Br. at 7. That common question will yield a common answer for the entire class that goes to the heart of whether P&G will be found liable under the relevant false-advertising laws. That is all *Dukes* requires.

2. Plaintiffs' Claims Are Typical Of The Class

Federal Rule of Civil Procedure 23(a)(3) requires plaintiffs to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." As the Supreme Court made clear in *Dukes*, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." 131 S. Ct. at 2551 n.5 (alteration in original) (internal quotation marks omitted); *see also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7A Federal Practice and Procedure § 1764 (3d ed. 2005) ("Thus, many courts have found typicality if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory. Of course, when this is true the typicality standard is closely related to the test for the common-question prerequisite in subdivision (a)(2)."

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health claims." 635 F.3d at 1283. However, the Eleventh Circuit found that proof of individual reliance is unnecessary under the relevant law in Florida (a claim evaluated in more detail below), and thus the district court's "analysis would lead one to believe that the class [sh]ould be defined as 'all persons who purchased YoPlus in the State of Florida.'" *Id.* n.1.

(footnotes omitted)). Indeed, in challenging the district court's finding of typicality, P&G largely repeats its arguments against commonality. Appellant Br. at 30–32.

P&G does appear to make a slight variation of its consumer-satisfaction argument by contending that "many of the unnamed class members have no interest in pursuing restitution, nor in crippling the product. Indeed, this lawsuit may be *antithetical* to their interests." *Id.* at 31. The district court considered and rejected this argument in its order granting class certification. *See* R. 140 (Dist. Ct. Order at 19) (Page ID #6433) ("Defendant advertised to all that the proprietary probiotic bacteria in Align provides proven digestive health benefits. The question is not whether each class member was satisfied with the product, but rather whether the purchaser received the product that was advertised."). The district court's conclusion is consistent with those of other district courts who have reviewed similar arguments. *See*, *e.g.*, *Johnson*, 278 F.R.D. at 552 ("Both Mr. Johnson's and the fourth generation purchasers' claims center on the assertion that in deciding to purchase YoPlus they relied to their detriment on the allegedly false digestive health message communicated by Defendants. Mr. Johnson's claims are, therefore, 'reasonably co-extensive' with those of the fourth generation purchasers, and he satisfies the typicality requirement."). Consistent with its findings on commonality, the district court did not abuse its discretion in finding 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).

C. Rule 23(b)(3): Plaintiffs Have Demonstrated That Common Questions Will Predominate Over Individualized Inquiries In Assessing the Merits of Their Claims

"[E]ach class meeting [the] prerequisites [of Rule 23(a)] must also pass at least one of the tests set forth in Rule 23(b)." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). Plaintiffs have sought certification under Federal Rule of Civil Procedure 23(b)(3), which states that a class action may be maintained only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members."[5]

P&G contends that the district court erred in four separate but related ways. First, it alleges that some individuals were not actually exposed to P&G's marketing campaign—that some individuals purchased Align upon receiving advice from a family member, friend, or physician. Second, it claims that, under the state laws at issue, individual issues of causation and reliance predominate over the common questions that allegedly affect all members of the class. Third, P&G claims that Align does actually work for many purchasing it, and thus Plaintiffs cannot prove injury on a classwide basis. Finally and relatedly, P&G claims that Plaintiffs' damages model

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[5] P&G has not challenged on appeal the district court's holding that the other element of Rule 23(b)(3) is met, "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

is inconsistent with their theory of liability and that individual calculation of damages will be necessary.

1. Actual Exposure

According to P&G, "significant numbers of consumers became aware of and purchased Align based on sources of information *unrelated* to the advertising at issue," and thus individual proof that class members purchased Align because of its advertising will be necessary, thereby defeating predominance. Appellant Br. at 40. P&G contends that "[d]octors do not simply recommend Align based on P&G's professional marketing. Doctors make independent decisions based on their review of the science, experience, and expertise." Appellant Reply Br. at 25. In support of its point, P&G relies on *Minkler v. Kramer Laboratories, Inc.*, No. 12-9421, 2013 WL 3185552, at *4 (C.D. Cal. Mar. 1, 2013), and *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996).

These cases are, however, readily distinguishable from the case at hand. In *In re American Medical Systems*, we made clear that our decision to vacate the district court's conditional certification order was based "on the extraordinary facts of [the] case." 75 F.3d at 1074. In that case, the plaintiff brought suit over alleged defects in a number of different prosthetic devices, although the plaintiff had problems only with one of the ten types of prosthetics manufactured by American Medical Systems. We determined class certification to be inappropriate because we held that the claims at issue—strict liability; fraudulent misrepresentation; negligent testing, design, and manufacture; and failure to

warn—would "differ depending upon the model and the year [the prosthetic] was issued." *Id.* at 1081. "Proof[] . . . will also vary from plaintiff to plaintiff because complications with an AMS device may be due to a variety of factors, including surgical error, improper use of the device, anatomical incompatibility, infection, device malfunction, or psychological problems." *Id.* Thus, on the issue of predominance, we noted that, "[a]s this case illustrates, the products are different, each plaintiff has a unique complaint, and each receives different information and assurances from his treating physician. Given the absence of evidence that common issues predominate, certification was improper." *Id.* at 1085.

Minkler—an unpublished district court decision from a court outside of the Sixth Circuit—involved a plaintiff seeking certification of a class consisting of "[a]ll persons domiciled or residing in the State of California who ha[d] purchased a Fungi–Nail anti-fungal product." 2013 WL 3185552, at *1. The plaintiff purchased Fungi-Nail in order to treat some discoloration of his toenail, which he believed was a nail fungus. *Id.* In finding class certification inappropriate, the district court did note that some members of the proposed class purchased Fungi-Nail based "on the recommendations of physicians or pharmacists, and the appearance of the products' packaging would not have been important to their purchasing decision." *Id.* at *4. Yet the district court also noted that "Fungi–Nail is marketed for use as a treatment for ringworm, athlete's foot and other conditions that can appear in places other than 'on nails.'" *Id.* It was not, in other words, necessarily

even marketed for treatment of the plaintiff's condition, and "Defendants [even] raise[d] significant doubts as to whether Plaintiff actually ha[d] a fungal infection." *Id.*

The facts in this case paint a far different picture. Unlike the plaintiff in *American Medical Systems,* Plaintiffs here do not take aim at a panoply of P&G products. They focus their attention on Align. Plaintiffs all purchased Align because it allegedly promoted digestive health. That is the only reason to buy Align. In addition, Plaintiffs here have produced evidence showing that P&G undertook a comprehensive marketing strategy with a uniform core message, even if its packaging has changed somewhat over time: buy Align because it will help promote your digestive health. *See* Sealed App. at 253–55. That marketing campaign focused on physician recommendations, with many sales representatives dropping off samples in various doctors' offices over a multi-year period. *Id.* at 255.

The district court's decision to certify the proposed class is also in accord with the decision of courts in other consumer-products class action cases. In *Johnson*, for instance, the plaintiff—like Plaintiffs here—"presented evidence demonstrating that Defendants marketing campaign was prominent *and not limited to statements made on the YoPlus packaging*." 278 F.R.D. at 551 (emphasis added). The *Johnson* court made clear that the form of presentation was irrelevant: "Regardless of how the message was communicated, the claims brought by Mr. Johnson on behalf of the class under the UCL and the CLRA center around a common question: Did Defendants state a false claim of a digestive

health benefit that a reasonable person would have been deceived by, for purposes of the UCL, or would have attached importance to, for purposes of the CLRA?" *Id.* Likewise, in *Wiener*, defendant Dannon "contend[ed] that a class-wide inference of proof is not appropriate in this case, because purchasers were not uniformly exposed to Dannon's advertising claims and the materiality of the misrepresentation is an issue unique to each purchaser, as Dannon's consumer surveys show that purchasers bought the Products for different reasons." 255 F.R.D. at 668. Echoing the language in *Johnson*, the district court held that "[r]egardless of whether every class member was exposed to Dannon's television, print, and internet advertisements, the record clearly establishes that Dannon's alleged misrepresentations regarding the clinically proven health benefits of the Products are prominently displayed on all of the Products' packaging, a fact that Dannon has never contested." *Id.* at 669. "Because, by definition, every member of the class must have bought one of the Products and, thus, seen the packaging, Plaintiffs have succeeded in showing that the alleged misrepresentations were made to all class members." *Id.*; *see also In re ConAgra Foods, Inc.*, No. CV 11-05379 MMM, 2015 WL 1062756, at *46 (C.D. Cal. Feb. 23, 2015) (noting that "it is undisputed that ConAgra made the same alleged misrepresentation on each bottle of Wesson Oils purchased by class members" in finding predominance on the issue of causation/reliance).

The facts at issue in *Johnson* and *Wiener* are identical to the ones at issue here. Regardless of how customers first heard about Align—whether through

P&G's direct advertising campaign, through a physician who had learned about Align through a P&G sales representative, or through a friend or family member who had used Align—they nonetheless decided to purchase the product only for its purported health benefits. Although P&G contends that a doctor could recommend Align based on "her independent judgment," that argument is belied by the fact that P&G developed Bifantis, the probiotic behind Align, and P&G, in turn, developed the marketing campaign to promote Align. In light of this point, the *Johnson* and *Wiener* decisions, and the differences between the facts at issue here and the facts in *American Medical Systems* and *Minkler*, the district court did not abuse its discretion in rejecting P&G's contention that certain class members did not rely on P&G advertising in making their decision to buy Align.

2. State Laws

On a related point, P&G also claims that Plaintiffs cannot prove reliance and causation, which P&G claims are required by the false-advertising laws at issue, on a classwide basis. Appellant Br. at 41. We examine each of these false-advertising laws below. We conclude that, under each of the five laws, Plaintiffs can prove causation and/or reliance on a classwide basis provided that (1) the alleged misrepresentation that Align promotes digestive health is material or likely to deceive a reasonable consumer, and (2) P&G made that misrepresentation in a generally uniform way to the entire class.

a. California

Rikos seeks "certification of claims arising under Cal. Bus. & Prof. Code § 17200 (California's Unfair Competition Law or 'UCL'), Cal. Civ. Code § 1750 (California's Consumers Legal Remedies Act or 'CLRA'), and breach of express warranty." Sealed App. at 19–20. None of these causes of action require individualized proof of reliance or causation such that classwide proof will never suffice.

In *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009), the California Supreme Court held that, "[t]o state a claim under . . . the UCL . . . based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived." *Id.* at 29 (internal quotation marks omitted). "[T]he UCL's focus [is] on the defendant's conduct . . . in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *Id.* at 30. Thus "relief under the UCL is available without individualized proof of deception, reliance and injury" for absent class members. *Id.* at 35. Plaintiffs thus need not show that every purchaser of Align in California relied on the product's advertising. Courts have qualified, however, that if the defendant made disparate misrepresentations to the class, then there still may be issues of predominance. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011) ("We do not, of course, suggest that predominance would be shown in every California UCL case. For example, it might well be that there was no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant. *See, e.g.*, . . . *Kaldenbach v. Mut. of*

Omaha Life Ins. Co., 178 Cal. App. 4th 830, 849–50 (2009).").

It is true that, "[u]nlike the UCL, . . . plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1292 (Cal. Ct. App. 2002). However, "[c]ausation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class." *Id.* (internal quotation marks omitted). Thus, "plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all. . . . '[I]f the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class.'" *Id.* at 1292–93 (quoting *Vasquez v. Superior Court*, 484 P.2d 964, 973 (Cal. 1971)). Materiality is measured by an objective standard: "[m]ateriality of the alleged misrepresentation generally is judged by a reasonable man standard. In other words, a misrepresentation is deemed material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 157 (Cal. Ct. App. 2010), *as modified on denial of reh'g* (Feb. 8, 2010) (internal quotation marks omitted); *see also Stearns*, 655 F.3d at 1022–23; *In re ConAgra Foods*, 2015 WL 1062756, at *34.

Finally, proof of individualized reliance or causation is not necessary under California law to establish breach of an express warranty. Under

California law, "[a]n express warranty is a term of the parties' contract." *In re ConAgra Foods*, 2015 WL 1062756, at *35. "Product advertisements, brochures, or packaging can serve to create part of an express warranty." *Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012). "[T]o prevail on a breach of express warranty claim, the plaintiff must prove (1) the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached." *Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227 (Cal. Ct. App. 2010) (internal quotation marks omitted). "Proof of reliance on specific promises or representations is not required."[6] *In re ConAgra Foods*, 2015 WL 1062756, at *35 (and citing cases); *see also Weinstat*, 180 Cal. App. 4th at 1227 ("The lower court ruling rests on the incorrect legal assumption that a breach of express warranty claim

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[6] The case cited by P&G that states that reliance is required cites a decision that predates California's Uniform Commercial Code ("UCC"). *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 142 (Cal. Ct. App. 1986) ("In order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury. (*See Burr v. Sherwin Williams Co.* (1954) 42 Cal. 2d 682 . . . .")). Section 2313 of California's UCC governs breach of express warranty claims. *Weinstat*, 180 Cal. App. 4th at 1227. However, as the *Weinstat* court explained, although "[p]re-Uniform Commercial Code law governing express warranties required the purchaser to prove reliance on specific promises made by the seller," a close analysis of the text and official comments to the UCC reveals that "[t]he Uniform Commercial Code . . . does not require such proof." *Id.*

requires proof of prior reliance. While the tort of fraud turns on inducement, as we explain, breach of express warranty arises in the context of contract formation in which reliance plays no role."); *Rosales*, 882 F. Supp. 2d at 1178 ("Product advertisements, brochures, or packaging can serve to create part of an express warranty. While this does not require that plaintiff relied on the individual advertisements, it does require that plaintiff was actually exposed to the advertising."). However, "class treatment of breach of express warranty claims is only appropriate if plaintiffs can demonstrate that the alleged misrepresentation would have been material to a reasonable consumer." *In re ConAgra Foods*, 2015 WL 1062756, at *36.

b. Illinois

Rikos also seeks "certification of claims arising under the Illinois Consumer Fraud and Deceptive Business Practices Act ('ICFA')." Sealed App. at 20. A claim under the ICFA requires: "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception." *De Bouse v. Bayer AG*, 922 N.E.2d 309, 313 (Ill. 2009). When the deceptive act alleged is a misrepresentation, that misrepresentation must be "material" and "is established by applying a reasonable person standard." *In re ConAgra Foods*, 2015 WL 1062756, at *45. Reliance is not required to establish an ICFA claim. *Id*. (citing cases). However, to establish the last two elements of an ICFA claim, plaintiffs must show "that the allegedly deceptive act

'proximately caused any damages' suffered by the plaintiff." *Id*. (quoting *De Bouse*, 922 N.E.2d at 313); *see also Clark v. Experian Info. Solutions, Inc.*, 256 F. App'x 818, 821 (7th Cir. 2007) ("We concluded that 'a private cause of action under the ICFA requires a showing of proximate causation.'" (quoting *Oshana v. Coca–Cola Co.*, 472 F.3d 506, 514–15 (7th Cir. 2006))). As part of proving proximate causation, a plaintiff must "receive, directly or indirectly, communication or advertising from the defendant." *De Bouse*, 922 N.E.2d at 316.

It is true that courts have denied class certification of ICFA claims on the grounds that individual issues of proving proximate causation predominate over common issues. *See, e.g.*, *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935–36 (7th Cir. 2010) (holding that individualized inquiries regarding "why a particular plaintiff purchased a particular brand of [the product]" were necessary to establish harm to each class member under the ICFA and, thus, common issues could not predominate); *In re Glaceau Vitaminwater Mktg. & Sales Practice Litig.*, No. 11-CV-00925 DLI RML, 2013 WL 3490349, at *8 (E.D.N.Y. July 10, 2013) (citing other cases); *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 586 (N.D. Ill. 2005) ("To establish proximate causation, each individual must provide evidence of his or her knowledge of the deceptive acts and purported misstatements. This showing requires an individual analysis of the extent to which Coca-Cola's marketing played a role in each class member's decision to purchase fountain diet Coke." (citations omitted)).

As Plaintiffs note, ICFA claims do not *necessarily* require individualized proof of causation such that

class certification is never proper. Appellee Br. at 40 n.5. Rather, "where the representation being challenged was made to all putative class members, Illinois courts have concluded that causation is susceptible of classwide proof and that individualized inquiries concerning causation do not predominate if plaintiffs are able to adduce sufficient evidence that the representation was material." *In re ConAgra Foods*, 2015 WL 1062756, at *46 (and citing cases); *see also In re Glaceau Vitaminwater Mktg. & Sales Practice Litig.*, 2013 WL 3490349, at *9 ("Illinois courts have certified classes asserting violations of the ICFA, where the defendant engaged in 'uniform' conduct toward the class, and the successful adjudication of the named plaintiff's claims would establish a right to recovery for all class members."); *S37 Mgmt., Inc. v. Advance Refrigeration Co.*, 961 N.E.2d 6, 16 (Ill. App. Ct. 2011) ("The defendant argues that individual issues regarding deception and damages preclude class certification in this case. However, just as we found in *P.J.'s Concrete*, where a defendant is alleged to have acted wrongfully in the same manner toward the entire class, the trial court may properly find common questions of law or fact that predominate over questions affecting only individual members.").

c. Florida

Burns seeks "certification of claims arising under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201 *et seq*. ('FDUTPA')". Sealed App. at 20. "A claim under FDUTPA has three elements: (1) a deceptive or unfair practice; (2) causation; and (3) actual damages." *Siever v. BWGaskets, Inc.*, 669 F. Supp. 2d 1286, 1292 (M.D.

Fla. 2009). The Florida Supreme Court has not addressed whether reliance and/or causation requires individualized proof. Like Illinois, Florida courts of appeals and federal courts interpreting Florida law have reached somewhat diverging conclusions. *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, No. 05 C 4742, 2012 WL 1015806, at *7–9 (N.D. Ill. Mar. 22, 2012) (noting this tension in the case law applying the FDUTPA).

Many courts have held that the FDUTPA does not require proof of actual, individualized reliance; rather, it requires only a showing that the practice was likely to deceive a reasonable consumer. *In re ConAgra Foods*, 2015 WL 1062756, at *42 ("Claims under the FDUTPA are governed by a 'reasonable consumer' standard, obviating the need for proof of individual reliance by putative class members."); *Office of the Att'y Gen. v. Wyndham Int'l, Inc.*, 869 So. 2d 592, 598 (Fla. Dist. Ct. App. 2004) ("When addressing a deceptive or unfair trade practice claim, the issue is not whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances. . . . [U]nlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue."); *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973–74 (Fla. Dist. Ct. App. 2000) ("A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue. . . . [T]he question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was likely to deceive a consumer acting reasonably in the same

circumstances."); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 703 (Fla. Dist. Ct. App. 2000) ("[M]embers of a class proceeding under the [FDUTPA] need not individually prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations." (internal quotation marks omitted)). In *Fitzpatrick*, 635 F.3d at 1283, the Eleventh Circuit affirmed the "legal analysis of the district court," which included the district court's conclusion that the FDUTPA's "causation requirement is resolved based on how an objective reasonable person would behave under the circumstances." *Fitzpatrick*, 263 F.R.D. at 695.

If the defendants did not make a generally uniform material misrepresentation to the entire class, other courts have held that plaintiffs do need to show individualized causation. The sole case cited by P&G, Appellant Br. at 39 n.6, falls into this camp. *Miami Auto. Retail, Inc. v. Baldwin*, 97 So. 3d 846, 857 (Fla. Dist. Ct. App. 2012) ("FDUTPA requires proof of each individual plaintiff's actual (not consequential) damage and defendant's causation of damage."). However, *Miami Automotive Retail* did not involve a "uniform representation," a circumstance in which the court noted "individual reliance may not be necessary under FDUTPA." *Id.* The district court in *In re Sears, Roebuck & Co. Tools Marketing & Sales Practices Litigation* similarly distinguished this latter group of cases requiring proof of individual causation on the grounds that, unlike in the *Latman* and *Davis* line of cases, these cases did not involve one product advertised by a

generally uniform theme to all consumers. 2012 WL 1015806, at *10.

d. New Hampshire

Jarzembrowski seeks "certification of claims arising under the New Hampshire Consumer Protection Act, N.H.R.S.A. 358-A *et seq*. (the 'New Hampshire CPA')." Sealed App. at 20. Very few New Hampshire cases are on point, but the limited case law indicates that proof of individual reliance or causation is not required under the New Hampshire CPA.

In *Mulligan v. Choice Mortgage Corp. USA*, a federal district court explained that:

> New Hampshire courts use an objective standard to determine whether acts or practices are unfair or deceptive in violation of the CPA. In order to come within the CPA, [t]he objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce. For such conduct to be actionable, the plaintiff need not show that he or she actually relied on the deceptive acts or practices . . . . Rather, a CPA plaintiff need only establish a causal link between the conduct at issue and his or her injury.

No. CIV. 96-596-B, 1998 WL 544431, at *11 (D.N.H. Aug. 11, 1998) (internal quotation marks and citations omitted); *see also Leonard v. Abbott Labs., Inc.*, No. 10-CV-4676 ADS WDW, 2012 WL 764199, at *20 (E.D.N.Y. Mar. 5, 2012) ("[T]he New Hampshire statute also does not include the elements of reliance or scienter."). The *Mulligan* court described the "causal link" as requiring that a plaintiff "show[] only

that their injuries . . . [were] a consequence of [the defendant's] allegedly unfair and deceptive practices." 1998 WL 544431, at *12.

Greater clarity on the proof necessary to establish causation can be found in decisions from Massachusetts courts interpreting its analogous consumer fraud statute, to which "the New Hampshire Supreme Court frequently looks for guidance." *Id.* at *11 n.7. The Massachusetts Court of Appeals has held that causation under its consumer fraud statute "is established if the deception could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted," and "can also be established by determining whether the nondisclosure [or misrepresentation] was of a material fact" because "[m]ateriality . . . is in a sense a proxy for causation." *Casavant v. Norwegian Cruise Line, Ltd.*, 919 N.E.2d 165, 169 (Mass Ct. App. 2009), *aff'd*, 952 N.E.2d 908 (2011) (first alteration in original). Materiality is an objective inquiry. *See id.* The sole case cited by P&G, Appellant Br. at 39 n.6, does not contradict this case law, because that case interpreted a different statute regarding unfair, deceptive, or unreasonable collection practices. *Gilroy v. Ameriquest Mortgage Co.*, 632 F. Supp. 2d 132, 137–38 (D.N.H. 2009).

e. North Carolina

Finally, Burns also seeks certification of claims arising under North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §75-1.1 *et seq.* ("UDTPA"). Sealed App. at 20. "To state a claim under the UDTPA, a claimant must allege (1) an

unfair or deceptive act or practice (2) in or affecting commerce (3) which proximately caused injury to the plaintiff or his business." *Rahamankhan Tobacco Enters. Pvt. Ltd. v. Evans MacTavish Agricraft, Inc.*, 989 F. Supp. 2d 471, 477 (E.D.N.C. 2013). The North Carolina Supreme Court recently clarified that "a claim under section 75–1.1 stemming from an alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause." *Bumpers v. Cmty. Bank of N. Virginia*, 747 S.E.2d 220, 226 (N.C. 2013). "Actual reliance is demonstrated by evidence [that the] plaintiff acted or refrained from acting in a certain manner due to [the] defendant's representations." *Williams v. United Cmty. Bank*, 724 S.E.2d 543, 549 (N.C. Ct. App. 2012) (internal quotation marks omitted). Plaintiffs base their claim under the UDTPA on misrepresentations by P&G regarding Align's efficacy. R. 85 (Second Amended Compl. ¶ 113) (Page ID #985). Thus, they must show actual reliance.

The issue, therefore, is whether North Carolina recognizes any circumstances under which classwide proof might suffice to show reliance. In *Bumpers*, which did not involve the issue of class certification, the North Carolina Supreme Court did describe the evidence necessary to prove reliance as focused on the mental state of the plaintiff and his/her decision-making process, which would seem to be difficult to prove on a classwide basis. *Bumpers*, 747 S.E.2d at 227 ("In making this inquiry we examine the mental state of the plaintiff. . . . In the context of a misrepresentation claim brought under section 75–1.1, actual reliance requires that the plaintiff have

affirmatively incorporated the alleged misrepresentation into his or her decision-making process: if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether."). No North Carolina decision applying a presumption of reliance in class actions like that in California under the CLRA could be identified. The one case cited by Plaintiffs doing so, *In re Milo's Dog Treats Consolidated Cases*, is a federal district court decision and gave no explanation or support for its conclusion that its discussion of reliance under California law "is equally applicable to North Carolina's UDTPA." 9 F. Supp. 3d 523, 544 (W.D. Pa. 2014).

However, the North Carolina Supreme Court has held that reliance can be proved circumstantially, not just from direct testimony from the plaintiff. *Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 428 S.E.2d 648, 661 (N.C. 1992) ("This Court has recognized that proof of circumstances from which the jury may reasonably infer the fact is sufficient in proving the element of reliance." (internal quotation marks omitted)). Moreover, the North Carolina Court of Appeals has held that a trial court erred in holding that a class action bringing a claim of fraud can never be certified because "establishing the elements of fraud requires Plaintiff to make individual showings of facts on the element of reliance." *Pitts v. Am. Sec. Ins. Co.*, 550 S.E.2d 179, 189 (N.C. Ct. App. 2001) (internal quotation marks omitted), *aff'd*, 356 N.C. 292 (2002). As the court explained, "although individualized showings may be required in actions for fraud, this does not in and of itself preclude a finding of the existence of a class" so long as common

issues predominate. *Id*. at 190. The court added that "the benefit of allowing consumer fraud actions to proceed as class actions must be considered when determining whether the element of reliance, an individual issue, renders a class non-existent." *Id*. at 189. The court then held that common issues predominated. *Id*. at 190. While its reasoning is sparse, the court appeared to focus on the general uniformity in the defendant's conduct towards the class, but did not spell out whether or how it was finding a classwide presumption of reliance or inferring reliance based on the identical circumstances faced by the class members. *Id*.

f. Summary of State Laws

As this survey of the relevant state laws demonstrates, Plaintiffs can prove causation and/or reliance on a classwide basis provided that (1) the alleged misrepresentation that Align promotes digestive health is material or likely to deceive a reasonable consumer, and (2) P&G made that misrepresentation in a generally uniform way to the entire class. As previously discussed, both factors are met here. The first factor is met—there is only one reason to buy Align, to promote digestive health, and thus the alleged misrepresentation would be material to or likely to deceive a reasonable consumer. As to the second factor, P&G undertook a comprehensive marketing strategy with a generally uniform core message such that all class members were likely exposed to the alleged misrepresentation. At a minimum, all class members saw P&G's advertising on Align's packaging.

Although a somewhat closer call, we believe that this classwide proof—that the alleged misrepresentation is material and was made in a generally uniform manner to all class members—would also suffice in North Carolina to show actual reliance such that individual issues would not predominate. The Eleventh Circuit's discussion in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), is instructive on how classwide circumstantial evidence in this case likely satisfies the individual reliance requirement under the UDTPA (although the case admittedly did not involve the UDTPA). Physicians brought a class action alleging that various HMOs had defrauded them, in part based on misrepresentations that the HMOs would reimburse them for medically necessary services plaintiffs provided to the HMOs' insureds. *Id.* at 1259. The court explained that "while each plaintiff must prove his own reliance in this case, we believe that, based on the nature of the misrepresentations at issue, the circumstantial evidence that can be used to show reliance is common to the whole class. That is, the same considerations could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' representations." *Id.* The court noted that the defendant made a uniform representation to class members. *Id.* And the court explained, "[i]t does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the

amounts they were due" because the promise to reimburse was a central reason physicians would sign the agreements. *Id.* Similarly, in this case the alleged misrepresentation that Align promotes digestive health is *the* reason to buy Align. Thus, a jury could "legitimate[ly] infer[] [reliance classwide] based on the nature of the alleged misrepresentations at issue." *Id.*

3. Whether Align Actually Works

Echoing its commonality argument, P&G claims that it has put forth unrebutted evidence that Align actually works—that it provides digestive health benefits for at least some of its consumers—and thus Plaintiffs will not be able to prove injury on a classwide basis. Appellant Br. at 33–37. The dissent also focuses on this argument. Even if P&G had not produced such proof, P&G argues that scientific evidence might establish that Align "provides benefits for some purchasers, but not all—the exact middle ground Plaintiffs ignore," and thus it would still be necessary to determine whether Align works for each individual class member to prove injury, such that common issues do not predominate. Appellant Reply Br. at 7. P&G cites several cases in which it claims that courts required class plaintiffs to provide some evidence of actual classwide injury to establish predominance at the class certification stage. Appellant Br. at 34–36.

As an initial matter and as already discussed, Plaintiffs contest whether the studies produced by P&G actually demonstrate that Align works for some individuals. Contrary to what the dissent claims, Plaintiffs have not tacitly conceded that Align works

for individuals with IBS. Plaintiffs point to methodological flaws and problems with the studies on the effectiveness of Align for individuals with IBS to question the scientific validity of the studies in their own right, *in addition to* questioning whether those studies can be used to claim Align works for healthy individuals. *See*, *e.g.*, R. 9 (Amended Compl. ¶¶ 36–37) (Page ID #73–74) (for example, noting that in one study of women with IBS cited by P&G on its website, "the study tested *Bifidobacterium infantis 35624* at amounts (referred to as 'colony-forming units' or 'CFUs') different than what is present in Align® probiotic supplement" and "[t]he study authors expressly emphasized the variability of results depending on the amount of CFUs"). Although P&G and the dissent claim that Plaintiffs' own expert appeared to concede, in his deposition, that Align might have worked for one of his patients having digestive health issues, Dr. Komanduri stated later in the deposition that he did not know whether Align was helpful for his patient because it actually worked or because of a placebo effect. *See* R. 133 (Dep. of Srinadh Komanduri at 29–30, 58) (Page ID #5748, 5755).

More fundamentally, however, P&G's and the dissent's argument attacks a theory of liability that Plaintiffs have not actually presented—that Align is not effective unless it works for 100% of consumers who take it. Appellant Br. at 32. However, what Plaintiffs actually argue is that it has not been shown that Align works for *anyone*, i.e., that Align is "snake oil." Appellee Br. at 7. Thus, under Plaintiffs' theory of liability, P&G's claim that Align works for some individuals goes solely to the merits; it has no

relevance to the class certification issue. *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 408 ("Under plaintiffs' first theory of liability, *nobody* was able to grow grass using EZ Seed. Plaintiffs will succeed or fail on this theory based on whether they are able to prove EZ Seed is worthless. Defendants' argument that the products worked for some individual class members goes to the proof of the merits of plaintiffs' claims. Any argument that challenges the merits of plaintiffs' allegations about the uniform inefficacy of [EZ Seed] has no bearing on the Rule 23 predominance inquiry." (internal quotation marks and citation omitted)); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 594 (C.D. Cal. 2011) ("Defendant's arguments that it can present proof that Coldcalm worked for some individual class members goes to the proof of the merits of Plaintiff's claim, not to the common question as to the overall efficacy of the product."); *Fitzpatrick*, 263 F.R.D. at 701 (holding that "General Mills' other objection, that Yo–Plus might have worked for some consumers, does not preclude a finding of predominance; that question is largely encompassed by the predominant—and, according to Plaintiff, binary—issue of whether science supports General Mills' claim that Yo–Plus aids in the promotion of digestive health"). We have an obligation to assess the theory of liability Plaintiffs present to us, rather than dismiss it as mere artful pleading, and Plaintiffs' theory of liability—that Align is entirely ineffective—is hardly unprecedented in the consumer fraud context as these cases demonstrate.

Plaintiffs have presented sufficient evidence in the form of testimony from Dr. Komanduri that their

theory of liability—that Align is worthless—is capable of resolution through classwide scientific proof such that common issues predominate. R. 108-8 (Komanduri Decl. at 2–4) (Page ID #1596–98). Specifically, Dr. Komanduri attested that whether Align works for *anyone* can be tested by "correctly designed randomized, double-blind and placebo controlled clinical trials testing relevant outcomes." *Id.* ¶ 15 (Page ID #1597). The studies that P&G's own expert cites and the dissent highlights as allegedly demonstrating that Align in fact has been proven to work for some individuals (such as those with IBS) are of a similar kind. R. 115 (Merenstein Decl. at 12–16) (Page ID #4302–06). At the merits stage, Plaintiffs will have the opportunity to put forth their own scientific evidence on Align's efficacy and to present expert testimony more fully contesting the accuracy of these studies and others P&G may produce. The key point at the class-certification stage is that this kind of dueling scientific evidence will apply classwide such that individual issues will not predominate. In other words, assessing this evidence will generate a common answer for the class based on Plaintiffs' theory of liability—whether Align in fact has been proven scientifically to provide digestive health benefits for anyone. That common answer, of course, may be that Align does work for some subsets of the class. That does not transform this classwide evidence into individualized evidence that precludes class certification, however. Neither P&G nor the dissent has articulated how evidence that Align might work for some sub-populations actually would necessitate individualized mini-trials that should

preclude class certification. Rather, the more straightforward impact of this evidence is simply that it may prevent Plaintiffs from succeeding on the merits.

The possibility that, at a later point in the litigation, the district court may choose to revisit the issue of class certification rather than dismiss the case if assessment of the fully developed evidence presented by both parties suggests Align actually works for some sub-populations is hardly as unprecedented or problematic as the dissent suggests. "Federal Rule of Civil Procedure 23 provides district courts with broad discretion to determine whether a class should be certified, *and to revisit that certification throughout the legal proceedings before the court*." *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001) (emphasis added), *abrogation on other grounds recognized in Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir. 2014). If later evidence disproves Plaintiffs' contentions that common issues predominate, "the district court may consider at that point whether to modify or decertify the class." *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."). This possibility, however, is not a reason to deny class certification now when Plaintiffs have demonstrated that their current theory of liability will be proved or disproved through scientific evidence that applies classwide.

Moreover, the cases P&G cites do not hold that establishing predominance means that named

plaintiffs must produce actual proof at the class-certification stage of classwide injury, here that Align is "snake oil." On predominance specifically, we emphasized in *In re Whirlpool* that "the [*Amgen*] Court repeatedly emphasized that the predominance inquiry must focus on common questions that *can be proved* through evidence common to the class." *In re Whirlpool*, 722 F.3d at 858 (emphasis added). In other words, named plaintiffs must show that they will be able to prove injury through common evidence, not that they have in fact proved that common injury. Or, as the *Amgen* Court expanded, "While Connecticut Retirement certainly must prove materiality to prevail on the merits, we hold that such proof is not a prerequisite to class certification. Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 133 S. Ct. at 1191. Here, "an inability of the plaintiff class 'to prove [that Align does not work for anyone] would not result in individual questions predominating. Instead, a failure of proof on th[is] issue . . . would end the case.'" *In re Whirlpool*, 722 F.3d at 858 (quoting *Amgen*, 133 S. Ct. at 1191). *See also id.* at 860 ("To the extent that *Comcast Corp.* reaffirms the settled rule that liability issues relating to injury *must be susceptible of proof* on a classwide basis to meet the predominance standard, . . . that requirement is met in this case." (emphasis added)).

The two cases cited by P&G are better characterized as holding that the plaintiffs had not demonstrated that the alleged injuries were *capable* of resolution by classwide proof that would

predominate over individual issues. *Pilgrim v. Universal Health Card, LLC* involved a class action claiming health care programs were falsely advertised as providing "consumers access to a network of healthcare providers that had agreed to lower their prices for members." 660 F.3d 943, 945 (6th Cir. 2011). We affirmed the district court's denial of class certification in part on the basis of lack of predominance. *Id.* at 947–48. Although we noted that there was evidence that "the program apparently satisfied some consumers," *id.* at 948, our holding actually rested on the fact that the "program did not operate the same way in every State and the plaintiffs suffered distinct injuries as a result." *Id.* at 947–48. As previously discussed, this case involves one product with a uniform marketing scheme and message that either does not work for anyone or does work at least for some individuals.

Similarly, the decision in *Phillips v. Philip Morris Cos.*, 298 F.R.D. 355 (N.D. Ohio 2014), denying class certification in a false advertising challenge to Philip Morris's claim that light cigarettes had low tar hinged on the plaintiffs' inability to prove that a common injury *could be proved*. First, "there [was] no inherent design defect that rendered the product less valuable," and "[t]he potential to realize an injury from the product . . . depend[ed] upon the manner in which each consumer used the product and the unique characteristics of each consumer." *Id.* at 368. Second, the court noted that some consumers might have purchased the cigarettes for a reason unrelated to the alleged misrepresentation about lower tar and nicotine, such as flavor. *Id.* n.20. Here, however, there is only one reason to buy Align:

its digestive health benefits. And whether or not Align works as promised for *anyone*—the issue here—is a scientific question that will not turn on the individual behavior of consumers; if Align is shown to work, even for only certain individuals, then presumably Plaintiffs lose.

In the other two cases cited by P&G, the courts denied class certification because there was a disconnect between the class's theory of liability and the class's damages model, not because the named plaintiffs had not conclusively proved injury to the entire class at the class-certification stage, as P&G claims. As discussed in the next subsection, there is no similar disconnect here.

In *In re Rail Freight Fuel Surcharge Antitrust Litigation-MDL No. 1869*, for example, the D.C. Circuit denied class certification because the damages model presented by the plaintiffs could not reliably prove classwide injury in fact, i.e., it would "detect[] injury where none could exist." 725 F.3d 244, 252–53 (D.C. Cir. 2013). It was in this context that the D.C. Circuit stated that it "do[es] expect the common evidence to show all class members suffered *some* injury." *Id.* at 252. However, the D.C. Circuit did not alter the normal rule that named plaintiffs need only show at the class-certification stage "that they *can prove*, through common evidence, that all class members were in fact injured by the alleged conspiracy," not that they have in fact proved that injury. *Id.* (emphasis added).

Similarly, in *Parko v. Shell Oil Co.*, the Seventh Circuit held that the district court abused its discretion in certifying a class because of a disconnect

between the class's damages model and its liability theory. 739 F.3d 1083 (7th Cir. 2014). The class alleged nuisance and related torts on the basis of alleged groundwater contamination occurring over a 90-year period. *Id*. at 1084. The court, in finding a lack of predominance, did note that the plaintiffs had presented nothing more than "unsubstantiated allegation." *Id*. at 1086. But the unsubstantiated allegation was not whether the groundwater was actually contaminated, as P&G claims, but the plaintiffs' claim that they "intend[ed] to rely on common evidence and a single methodology to prove both injury and damages" that was sound and plausible. *Id*. Thus, the Seventh Circuit reversed class certification because the district court had not "investigated the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments." *Id*. Specifically, the plaintiffs proposed to measure damages "by the effect of the groundwater contamination on the value of the class members' properties," but the defendants pointed out that the plaintiffs did not own the groundwater underneath their property and that their water supply did not come from that groundwater. *Id*. at 1084, 1086. Thus, it was not clear how contamination in the groundwater could affect property values. *Id*. at 1086. It was this disconnect between the plaintiffs' damages model and their liability theory that led the Seventh Circuit to deny class certification.[7]

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[7] Further evidence that the plaintiffs' failure to prove that the groundwater was in fact contaminated was immaterial to the Seventh Circuit's decision is found in the case that the Seventh

Moreover, our holding today is consistent with the Supreme Court's recent decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014). In that case, the Supreme Court held that, at the class-certification stage, defendants in private securities fraud class actions must be able to present evidence rebutting a particular presumption of classwide reliance available in these kinds of cases. 134 S. Ct. at 2417. The *Halliburton* Court's holding is limited to allowing rebuttal evidence on issues that affect predominance, not evidence that affects only the merits of a case. *Id.* at 2416. Given Plaintiffs' theory of liability in this case, the evidence that P&G has presented fails this test—it affects only the merits of this case, not predominance. Even if the evidence P&G presented did affect predominance, however, it is not clear how P&G alleges the district court violated *Halliburton* given that P&G was not prevented from putting forth this evidence.[8]

Circuit cites as properly granting class certification, *Mejdreck v. Lockformer Co.*, No. 01 C 6107, 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002). *Parko*, 739 F.3d at 1087. As described by the *Parko* court, in that case "the leakage of the noxious solvent *was claimed* to have contaminated the water supply, as noted by the district court." *Id.* (emphasis added). In other words, the plaintiffs had not actually proved that the water supply was contaminated for most class members at the class-certification stage; rather, they had articulated a coherent theory of injury and damages because they alleged that the contaminated water had entered the water supply, and therefore more clearly could affect property values.

[8] P&G also argues in its reply brief that Plaintiffs have at most presented evidence that P&G's claims about Align are unsubstantiated, but false advertising claims require affirmative proof of falsity, not just lack of substantiation.

4. Whether Plaintiffs' Damages Model Is Consistent With Their Liability Theory

Finally and relatedly, P&G claims that Plaintiffs have "failed to provide any viable method to determine or award classwide damages, as required by *Comcast Corp. v. Behrend*, 133 S. Ct. [1426,] 1433 [(2013)]," because P&G presented evidence that some class members benefited from Align, or the scientific evidence could establish Align works for some individuals. Appellant Br. at 43–44.

The premise of this argument suffers from the same problems with P&G's preceding argument. Plaintiffs are claiming that Align works for *no one*, and if they are correct, all class members suffered from the same injury, buying a product that does not work as advertised. If Align in fact is proven scientifically to work for some individuals, Plaintiffs will lose on the merits.

Moreover, Plaintiffs' damages model—a full refund of the purchase price for each class member—satisfies Comcast. In that case, the Supreme Court held that courts must conduct a "rigorous analysis" to ensure at the class-certification stage that "any

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Appellant Reply Br. at 16–19. P&G argues that lack of substantiation claims are within the sole province of the Federal Trade Commission and other regulatory agencies. *Id.* at 17. P&G's argument goes to the merits of the case, not to whether class certification is proper. Indeed, all of the cases cited by P&G involve discussions of the *merits* of false advertising claims and do not indicate that this distinction is at all relevant to whether a class should be certified. Whether the standard is affirmative proof of falsity or lack of substantiation, the evidence necessary to prove this issue will be the same for the entire class such that individual issues will not predominate.

model supporting a plaintiff's damages case [is] consistent with its liability case," i.e., that the model "measure[s] only those damages attributable to that theory" of liability. *Comcast*, 133 S. Ct. at 1433 (internal quotation marks omitted). That is the case here. A full refund for each class member is appropriate because, as the district court explained, there is no reason to buy Align except for its purported digestive benefits—"[i]t is a capsule filled with bacteria and inert ingredients. If, as alleged, the bacteria does nothing, then the capsule is worthless." R. 140 (Dist. Ct. Order at 30) (Page ID #6444). Whether purchasers were nevertheless satisfied with Align does not affect the propriety of a full-refund damages model. *See*, *e.g.*, *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK MRWX, 2014 WL 1410264, at *9 (C.D. Cal. Apr. 9, 2014) (holding that restitution is the appropriate damages model even for satisfied customers if the plaintiffs prove that "Defendants' products are placebos, and that the products' effectiveness arises solely as a result of the placebo effect") (internal quotation marks omitted). And this analysis is the same for all class members: "either 0% or 100% of the proposed class members were defrauded. There is no evidence that some proposed class members knew of the alleged falsity of Defendant's advertising yet purchased Align anyway." R. 140 (Dist. Ct. Op. at 31) (Page ID #6445). Thus, Plaintiffs' damages model measures only damages attributable to its theory of liability, i.e., that P&G is liable if it is not proven scientifically that Align helps *anyone*, and thus satisfies *Comcast*. *See*, *e.g.*, *In re Scotts EZ Seed Litig.*, 304 F.R.D. at 412 (holding that a "full compensatory damages

model, under which consumers would receive a full refund for their purchases of EZ Seed[,] . . . matches plaintiffs' first theory of liability—that EZ Seed does not grow grass, and is thus valueless," and therefore "satisfies Comcast because it measures damages properly if EZ Seed is valueless" (internal quotation marks omitted)).

In sum, the district court did not abuse its discretion in determining that common issues will predominate over individual issues in resolving the key merits issue of this case—whether Align promotes digestive health for *anyone*.

D. Standing

P&G also contends that the class is overbroad and thus raises Article III standing issues because Plaintiffs have failed to produce evidence that most of the class suffered an injury, i.e., that Align did not work for them. Appellant Br. at 45–47. This argument again misconstrues the basic theory of liability at issue in this case. Under Plaintiffs' theory of liability, P&G falsely advertised to every purchaser of Align. As the district court put it, there is no reason to purchase Align except for its promised digestive health benefits. If Align does not work as advertised for *anyone*, then every purchaser was harmed, and a direct line can be drawn from P&G's advertising campaign and the decision to buy Align.[9]

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[9] P&G urges us to enter a circuit split over whether it is sufficient that the named class plaintiff has standing, regardless of whether unnamed class members do. Appellant Br. at 48–50. Because reaching this argument requires accepting P&G's inaccurate characterization of Plaintiffs' theory of liability in this case, we do not find it necessary to evaluate this claim.

E. The Proposed Class is Sufficiently Ascertainable

Finally, P&G contends that the proposed class is not ascertainable because "Plaintiffs have failed to demonstrate that there is a 'reliable' and 'administratively feasible' method for *identifying* the class members." Appellant Br. at 50. Most consumers do not buy Align directly from P&G. Instead, they purchase the product from a commercial retailer, either in stores or online. This circumstance, P&G contends, makes ascertainability impossible—there is no plausible way to verify that any one single individual actually purchased Align. In making this point, P&G relies on the Third Circuit's decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

The district court did not abuse its discretion in holding that the class is sufficiently ascertainable. In our circuit, the ascertainability inquiry is guided by *Young v. Nationwide Mutual Insurance Co.*, 693 F.3d 532 (6th Cir. 2012). And under *Young*, Plaintiffs have produced evidence sufficient to show that the class is ascertainable. We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts. *See*, *e.g.*, *Mullins v. Direct Digital, LLC*, No. 15-1776, 2015 WL 4546159, at *7 (7th Cir. July 28, 2015) (declining to follow *Carrera* because "[t]he Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23"); *In re ConAgra Foods, Inc.,* 302 F.R.D. 537, 566 (C.D. Cal. 2014) (discussing *Carrera* and noting that

"ConAgra's argument would effectively prohibit class actions involving low priced consumer goods—the very type of claims that would not be filed individually—thereby upending '[t]he policy at the very core of the class action mechanism'" (quoting *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 617 (1997))). Even if *Carrera* governed, there are a number of factual differences that make a finding of ascertainability more appropriate here.

In *Young*, the named plaintiffs sued their respective insurance companies, alleging "that their insurer charged them a local government tax on their premiums when either the tax was not owed or the tax amount owed was less than the insurer billed." 693 F.3d at 535. The district court certified a class of "[a]ll persons in the Commonwealth of Kentucky who purchased insurance from or underwritten by [Defendant insurer] . . . and who were charged local government taxes on their payment of premiums which were either not owed, or were at rates higher than permitted." *Id.* at 536 (second alteration in original). On appeal, the insurance companies argued "that the class definition [was] not administratively feasible" because the plaintiffs' class description was not "sufficiently definite so that it [would be] administratively feasible for the court to determine whether a particular individual is a member." *Id.* at 538.

We rejected this argument. We noted that "[f]or a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria." *Id.* (internal quotation marks omitted). The plaintiffs had presented such a class,

because class membership could be determined by reviewing factors such as "the location of the insured risk/property" and "the local tax charged and collected from the policyholder." *Id.* at 539. Unlike the Third Circuit in *Carrera*, we considered—and rejected—the defendants' claim "that the class properly could [not] be certified without . . . 100% accuracy." *Id.* Instead, we agreed with the district court's conclusion that "the subclasses can be discerned with reasonable accuracy using Defendants' electronic records and available geocoding software, though the process may require additional, *even substantial*, review of files." *Id.* (emphasis added) (internal quotation marks omitted). The court added that "[i]t is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies." *Id.* at 540.

This same reasoning applies to the instant case. The proposed class is defined by objective criteria: anyone who purchased Align in California, New Hampshire, Illinois, North Carolina, or Florida. As in *Young*, these single state sub-classes can be determined with reasonable—but not perfect—accuracy. Doing so would require substantial review, likely of internal P&G data. But as the district court pointed out, such review could be supplemented through the use of receipts, affidavits, and a special master to review individual claims. R. 140 (Dist. Ct. Order at 13–15) (Page ID #6427–29).

Even if we were to apply *Carrera*, there are significant factual differences that make this class more ascertainable. In *Carrera*, the plaintiff brought a class action against Bayer Corporation, "claiming that Bayer falsely and deceptively advertised its product One–A–Day WeightSmart." 727 F.3d at 304. "Carrera allege[d] [that] Bayer falsely claimed that WeightSmart enhanced metabolism by its inclusion of epigallocatechin gallate, a green tea extract." *Id.* Carrera moved to certify a class consisting of "all persons who purchased WeightSmart in Florida," which the district court granted. *Id.* In vacating and remanding the district court's order, the Third Circuit held that Carrera's proposed class was not sufficiently ascertainable under the methods proposed by Carrera. *Id.* at 308–11.

First, Carrera proposed "using retailer's records of sales made with loyalty cards . . . , and records of online sales." *Id.* at 308. The Third Circuit rejected this approach. It noted that "there is no evidence that a *single purchaser* of WeightSmart could be identified using records of customer membership cards or records of online sales." *Id.* at 309 (emphasis added). Still, the court maintained that, "[d]epending on the facts of a case, retailer records may be a perfectly acceptable method of proving class membership." *Id.* at 308–09. Second, Carrerra proposed taking affidavits from various class members, the veracity of which could be assessed by a private firm tasked with administering class settlements. The Third Circuit likewise rejected this approach. It noted that this method "does not show [that] the affidavits will be reliable," thereby

undercutting Bayer's due-process interests. *Id.* at 311.[10]

Here, in contrast, there is "evidence that a *single purchaser* [in the proposed class] . . . could be identified using records of customer membership cards or records of online sales." *Id.* at 309 (emphasis added). P&G's own documents indicate that more than half of its sales are online. Sealed App. at 514. At a minimum, online sales would provide the names and shipping addresses of those who purchased Align. In addition, studies conducted by P&G reveal that an overwhelming number of customers learned

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[10] It is worth noting that the Third Circuit subsequently has cautioned against a broad reading of *Carrera*. In *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015), the court discussed the ascertainability requirement in detail. The Third Circuit noted that *Carrera* "only requires the plaintiff to show that class members *can be identified*." *Id.* at 164 (quoting *Carrera*, 727 F.3d at 308 n.2). "*Carrera*," in other words, only "stands for the proposition that a party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements." *Id.* In *Byrd*, the Third Circuit went on to characterize the defendants' "reliance on *Carrera*" as "misplaced." *Id.* at 170. "In *Carrera*, we concluded that the plaintiffs' proposed reliance on affidavits alone, *without any objective records to identify class members or a method to weed out unreliable affidavits*, could not satisfy the ascertainability requirement." *Id.* (emphasis added). On the other hand, the Byrds—like Plaintiffs in this case—"presented the District Court with multiple definitions of class members and simply argued that a form similar to those provided could be used to identify household members." *Id.; see also id.* ("There will always be some level of inquiry required to verify that a person is a member of a class."). To emphasize the point, the Third Circuit stated that, "[c]ertainly, *Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be certified." *Id.* at 171.

about Align through their physicians. *See* Sealed App. at 160–61 (documenting surveys showing 39% to 80% of all users hearing about Align through a physician). Unlike the proposed class in *Carrera*, P&G could verify that a customer purchased Align by, for instance, requesting a signed statement from that customer's physician. Store receipts and affidavits can supplement these methods.

In sum, the district court did not abuse its discretion in finding the proposed class to be sufficiently ascertainable. As the district court pointed out, there is significant evidence that Plaintiffs could use traditional models and methods to identify class members. *See* R. 140 (Dist. Ct. Op. at 12–15) (Page ID #6426–29). These methods satisfy *Young*.

III CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment granting class certification.

CONCURRENCE

AVERN COHN, District Judge, concurring. I concur in the lead opinion and have this to add. As I read Plaintiffs' false-advertising claims, they are predicated on the proposition that Align has no digestive health benefits to *anyone*, and that there is no reason to purchase Align other than for its promised digestive health benefits. On return to the district court, given the disagreements between the lead opinion and dissent, I believe the district judge, before proceeding further, should consider bifurcation

under Fed R. Civ. P. 42(b) the issue of the digestive health benefits of Align. If, as Plaintiffs claim, there is no scientific evidence that Align promotes digestive heath for *anyone*, the case can proceed in the regular course. If, on the other hand, Plaintiffs' proofs fail to establish that Align has no digestive health benefits, the case should be dismissed. *See*, *e.g.*, *Gillie v. Law Office of Eric A. Jones, LLC*, No. 2:13-CV-212, 2013 WL 6255693 (S.D. Ohio Dec. 4, 2013) (to conserve judicial resources, bifurcating under Rule 42(b) issues relating to liability, such as whether defendants are considered "debt collectors" under the Fair Debt Collection Practices Act), *granting defendants' motion for summary judgment on liability*, 37 F. Supp. 3d 928 (S.D. Ohio 2014), *vacated and remanded*, 785 F.3d 1091 (6th Cir. 2015); *see generally* Susan E. Abitanta, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 Sw. L.J. 743, 744 (1982) (discussing the economic benefits of bifurcation in class actions).

DISSENT

COOK, Circuit Judge, dissenting. Recent Supreme Court precedent clearly holds that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194 (2013); *Wal-Mart*

Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). District courts may certify a class only where the plaintiff presents "evidentiary proof" sufficient to withstand "rigorous analysis" of Rule 23's requirements. *Comcast*, 133 S. Ct. at 1432. Nothing about the district court's analysis here was rigorous, and the majority papers over this abuse of discretion by claiming that any further inquiry would result in an impermissible "dress rehearsal" for trial. More often than not, however, a district court's "'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. at 2551–52 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 614 (1982)). And this case is no exception to that rule. Because the majority opinion conflicts with the Supreme Court's Rule 23 jurisprudence, I dissent.

Plaintiffs proclaim that Align is "snake oil" that produces nothing more than a placebo effect. But Plaintiffs offer no proof in support of this argument, and all the available evidence tends to show the opposite: that consumers benefit more or less from Align based on their individual gastrointestinal health. P&G's scientific studies and anecdotal evidence tend to show, at the very least, that patients suffering from irritable bowel syndrome (IBS) benefit from Align. Plaintiffs tacitly acknowledge as much in their amended complaint, challenging the design of these studies and arguing that P&G relies on an impermissible string of inferences to conclude that Align also benefits "healthy" people.

Plaintiffs' attempt to distinguish Align's impact on IBS sufferers from its effect on the general population exposes the flaw in their proposed class

definition. At this stage, Plaintiffs must demonstrate that they can disprove Align's efficacy for every member of the class at one time. The class certified by the district court includes all consumers who purchased Align, IBS patients and "healthy" consumers alike. Because the evidence tends to show that these two groups respond differently to Align, Plaintiffs have failed to meet their burden of showing that their theory of liability lends itself to common investigation and resolution. *See Dukes*, 131 S. Ct. at 2551 (stating that the benchmark for commonality is a classwide proceeding's ability to generate common answers rather than counsel's ability to formulate common questions).

Furthermore, Plaintiffs offer no proof that the benefits associated with Align result solely from a placebo effect. Their expert, Dr. Komanduri, expressed no opinion on the question and declined to confront any of P&G's studies directly. He dismissed all these trials as too unscientific, although he has yet to study the product himself and acknowledges that the IBS symptoms of at least one of his patients improved after taking Align. In lieu of an expert opinion, Dr. Komanduri promised to design and conduct a clinical trial that will prove definitively whether Align works as advertised, notwithstanding the experts who already conclude that it works for at least some consumers. With nothing more than that promise, the district court certified a class of millions across five states. In doing so, the court impermissibly shifted the burden to P&G, forcing it to disprove the commonality and predominance elements of Rule 23.

To avoid confronting these flaws, the majority quotes *Amgen*'s admonition 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." 133 S. Ct. at 1195. But whether Align works similarly for each class member is relevant to certification and therefore not beyond the scope of the court's rigorous analysis. *See Dukes*, 131 S. Ct. at 2551–52 ("The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." (quoting *Falcon*, 457 U.S. at 160)). If Align works to varying degrees—or at all—depending on each member's unique physiology, then the question of Align's efficacy involves myriad individual inquiries. *See Comcast*, 133 S. Ct. at 1432 ("The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)."). This fundamental defect will not disappear by allowing Plaintiffs to define the question at an impossibly high level of abstraction. As the case proceeds, the problems with the district court's certification order will become painfully clear. Either the court will have to whittle down the class definition every time P&G produces a study showing that patients with a certain makeup benefit from Align or the court must award judgment to P&G and preclude class members with colorable claims from recovery because it defined the class too broadly in the first place.

By discounting the evidence presented at the certification stage, moreover, the majority affirms a class definition that includes a clutch of members

without standing. *E.g.*, *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . . ." (citations omitted)); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("The class must therefore be defined in such a way that anyone within it would have standing."). The class definition includes all purchasers of Align despite the fact that Plaintiffs offer no proof to rebut the studies showing that the product improves digestive health for IBS patients. The only evidence before the court shows that IBS patients suffered no injury (because Align works as-advertised for them), and therefore Plaintiffs have failed to show a properly defined class. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). Unless Plaintiffs muster some evidence rebutting the IBS studies, their claim is already doomed.

For these reasons, the Supreme Court requires plaintiffs to affirmatively prove that common questions both exist and predominate. Though Plaintiffs artfully frame the question in a binary fashion, a rigorous analysis of their evidence shows that resolution of the Plaintiffs' question cannot apply universally to all class members. Plaintiffs offer nothing in support of their claim that Align benefits no one. Instead, they nitpick P&G's competent evidence, trot out an expert without any

opinion as to the supplement's efficacy, and promise to conduct the definitive trial of Align that accounts for all variables of human physiology. *Dukes* and its progeny teach us that this is insufficient to justify class certification. I must dissent.

APPENDIX C

No. 14-0303

FILED
Nov 03, 2014
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: PROCTER & GAMBLE COMPANY,	)	
	)	O R D E R
Petitioner.	)	

Before: GUY, SUHRHEINRICH, and KETHLEDGE, Circuit Judges.

The Procter & Gamble Company seeks interlocutory review of the district court's order certifying five class actions under Rule 23(b)(3). The classes are comprised of consumers in five states who bought Procter & Gamble's product, Align. No opposition to the petition has been filed. Having reviewing the district court's order and Procter & Gamble's petition, we find that an interlocutory appeal is warranted.

We grant Procter & Gamble's Rule 23(f) petition.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DINO RIKOS, *et al.*	:	Case No. 1:11-cv-226
	:	
Plaintiffs,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
THE PROCTER & GAMBLE	:	
COMPANY,	:	
	:	
Defendant.	:	

ORDER GRANTING PLAINTIFFS' MOTION FOR RULE 23 CLASS CERTIFICATION (Doc. 110)

Before the Court is Plaintiffs' motion for class certification (Doc. 110) and the parties' responsive memoranda. (Docs. 127 and 137). Additionally, the Court held a hearing on class certification on May 5, 2014. Upon careful review, the Court concludes that this case is appropriate for certification as a five single-state class action, and, accordingly, Plaintiffs'

motion for class certification is **GRANTED** for the reasons stated below.

Plaintiffs seek certification of five single-state classes of consumers who purchased Defendant's product Align in California, Florida, Illinois, North Carolina, and New Hampshire from March 1, 2009 to the date notice is first provided to the classes. Excluded from the proposed classes are Defendant, its officers, directors, and employees, and those who purchased Align for the purpose of resale. Plaintiffs also seek to be appointed class representatives for the claims they assert, and Plaintiffs move the Court to appoint Timothy G. Blood, Esq., of Blood Hurst & O'Reardon, LLP, as class counsel.

I. BACKGROUND FACTS[1]

Align is an over-the-counter probiotic supplement manufactured by Defendant, which contains the probiotic strain Bifidobacterium infantis 35624 (trademarked as Bifantis®). (Doc. 125 at ¶ 4). The World Health Organization ("WHO") defines probiotics as "[l]ive microorganisms which, when administered in adequate amounts, confer a health benefit on the host." (Doc. 110-2 at 20). Align's development started in 1999 when Defendant entered into a research agreement with Alimentary Health Limited ("Alimentary Health"), which researches and develops proprietary probiotic and pharmabiotic treatments. (Doc. 125 at ¶ 5). Through its research, Alimentary Health identified Bifidobacterium infantis 35624, and, in 2005, Defendant entered into

[1] The facts set forth here are undisputed and drawn from the parties' pleadings (*see* Docs. 110 and 127).

a licensing agreement with Alimentary Health to manufacture and market products containing Bifidobacterium infantis 35624. (*Id.* at ¶¶ 6-7). Under this agreement, Defendant created the probiotic supplement that became Align. (*Id.* at ¶ 7).

Align was first made available to consumers in September 2005, and it was sold through the Align eStore (www.alignngi.com) and a toll-free number. (*Id.* at ¶ 9; Doc. 124 at ¶¶ 11 and 19). In addition, Defendant's sales representatives personally met with doctors in three test cities to introduce Align. (Doc. 124 at ¶ 19; Doc. 125 at ¶ 9). Within four months of the introduction of the product through these channels, sales of Align expanded to 49 states. (Doc. 125 at ¶ 9). Over the next few years, Defendant's sales representatives continued to meet with doctors in additional cities, and Defendant expanded the product's availability to pharmacists and certain online retailers, in addition to the Align eStore. (Doc. 124 at ¶ 20; Doc. 125 at ¶ 10).

Defendant introduced Align in retail stores and advertised via mass media in three test markets in late 2007, and then launched in retail stores nationwide with a corresponding mass media campaign in April 2009. (Doc. 124 at ¶ 20; Doc. 125 at ¶¶ 10 and 11). Align also continued to be sold through online retailers the Align eStore (until June 2010) and the P&G eStore (www.pgestore.com) from January 2010 to September 2013. (Doc. 125 at ¶ 11). Defendant's sales representatives continued to meet with doctors, primarily gastroenterologists and primary care physicians. (Doc. 124 at ¶¶ 11 and 21; Doc. 125 at ¶ 11). Defendant now markets Align

through mass media, including print and television advertisements. (Doc. 124 at ¶ 63; Doc. 125 at ¶ 11).

Defendant has marketed Align to both professionals and consumers since the national launch of the product in April 2009. (Doc. 124 at ¶¶ 11, 21, and 63). Defendant's professional marketing has focused on in-person visits by Defendant's sales representatives with gastroenterologists and primary care physicians. (Doc. 124 at ¶¶ 64 and 66; Doc. 125 at ¶¶ 9-10 and 12). Materials prepared specifically for doctors focused on the scientific substantiation for the probiotic strain in Align (Bifidobacterium infantis 35624), and provided citations and/or links to the published scientific studies concerning probiotics and Bifidobacterium infantis 35624. (Doc. 125 at ¶ 14).

When Align launched nationally in April 2009, the consumer advertising emphasized defending against five specific signs of digestive imbalance: constipation, diarrhea, urgency, gas and bloating. (Doc. 124 at ¶ 71). After September 2009, the advertising focused more generally on digestive balance, and added the statement that Align is the "#1 Gastroenterologist Recommended" brand. (*Id.* at ¶ 72). The Align packaging also includes a money-back guarantee. (*Id.*).

Nearly half of consumers who purchase Align are repeat purchasers. (Doc. 124 at ¶¶ 14 and 46; Doc. 126 at ¶ 16). A high repeat purchase rate generally indicates satisfaction, and the market research on Align confirms this product satisfaction. (Doc. 124 at ¶¶ 14 and 47-56). Consumers report that that the

product improved their digestive health, and in many cases, their quality of life. (Doc. 114 at ¶ 18).[2]

II. REQUIREMENTS FOR CLASS CERTIFICATION

A plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 of the Federal Rules of Civil Procedure are met. *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994). In considering the Fed. R. Civ. P. 23 requirements, the Court acknowledges that "[w]hen there is a question as to whether certification is appropriate, the Court should give the benefit of the doubt to approving the class." *In re Workers' Comp.*, 130 F.R.D. 99, 103 (D. Minn. 1990) (citations omitted). Consumer protection claims are ideal for class certification. *See, e.g., Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997); *System Fed'n No. 91, Ry. Emp. Dept. v. Reed*, 180 F.2d 991, 995 (6th Cir. 1950); *Delahunt v. Cytodyne*

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[2] The question whether or not Align actually provides benefit to digestive health is not yet properly before the Court. "***In determining the propriety of a class action, the question is not whether the*** plaintiff or ***plaintiffs*** have stated a cause of action or ***will prevail on the merits, but rather whether the requirements of Rule 23 are met.***" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, (1974) (emphasis supplied). ***The Court*** may consider "only those matters relevant to deciding if the prerequisites of Rule 23 are satisfied" and **"*may not 'turn the class certification proceedings into a dress rehearsal for the trial on the merits.*'"** *In re Whirlpool*, 722 F.3d at 851-52 (*quoting Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 811 (7th Cir. 2012) and *citing Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013) (emphasis supplied)); *see also Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 560 (6th Cir. 2007); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553-54 (6th Cir. 2006).

Techs., 241 F. Supp. 2d 827 (S.D. Ohio 2003). Class treatment is particularly appropriate where "the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct." *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971); *see also Amchem*, 521 U.S. at 617 (policy at core of class actions is to permit adjudication of small claims); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801-02 (7th Cir. 2013).

As previously emphasized, ***"[i]n determining the propriety of a class action, the question is not whether the*** plaintiff or ***plaintiffs*** have stated a cause of action or ***will prevail on the merits, but rather whether the requirements of Rule 23 are met.***" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, (1974) (emphasis supplied). ***The Court*** may consider "only those matters relevant to deciding if the prerequisites of Rule 23 are satisfied" and ***"may not 'turn the class certification proceedings into a dress rehearsal for the trial on the merits.'"*** *In re Whirlpool*, 722 F.3d at 851-52 (*quoting Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 811 (7th Cir. 2012) and *citing Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013) (emphasis supplied)); *see also Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 560 (6th Cir. 2007); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553-54 (6th Cir. 2006).

As a preliminary matter, this Court must determine whether the proposed classes are ascertainable. *See, e.g., Romberio v. UnumProvident Corp.*, 385 Fed. Appx. 423, 431 (6th Cir. 2009);

Cerdant, Inc. v. DHL Express (USA), Inc., No. 2:08-cv-186, 2010 U.S. Dist. LEXIS 95085, at *14-15 (S.D. Ohio Aug. 25, 2010). Then, Fed. R. Civ. P. 23 establishes a two-step analysis to determine whether class certification is appropriate. "First, plaintiffs must satisfy the four prerequisites of Federal Rule Civil Procedure 23(a). Second, the action must satisfy at least one of three subdivisions of Federal Rule Civil Procedure 23(b)." *In re Retek Inc. Sec. Litig.*, 236 F.R.D. 431, 434 (D. Minn. 2006).

A. Ascertainability

Ascertainability is not satisfied if the putative classes, as defined, are overbroad. *See, e.g., McGee v. East Ohio Gas Co.*, 200 F.R.D. 382, 388 (S.D. Ohio 2001); *Givens v. Van Devere, Inc.*, No. 1:11-cv-666, 2012 U.S. Dist. LEXIS 131934, at *40 (N.D. Ohio Apr. 27, 2012). Nor is the ascertainability requirement satisfied if the class members cannot be reliably and feasibly identified. *See, e.g., Carrera v. Bayer Corp.*, 727 F.3d 300, 307-08 (3d Cir. 2013).

Defendant argues that the classes are overbroad and therefore that no class should be certified because (1) not all class members were injured because they benefitted from or are satisfied with Align or received refunds; (2) some class members lack Article III standing; and (3) class membership cannot be reliably or feasibly ascertained. (Doc. 127 at 15-20).

1. Injury

Consumer happiness is not the touchstone in a false advertising case. ***The question is whether the defendant falsely advertised the product***:

> The focus of the [California] UCL and [false advertising law] is on the actions of the defendants, not on the subjective state of mind of the class members. All of the proposed class members would have purchased the product bearing the alleged misrepresentations. Such a showing of concrete injury under the UCL and [false advertising law] is sufficient to establish Article III standing. Accordingly, the Court need not examine whether each putative class member was unsatisfied with the product in order to find that common issues predominate.

McCrary v. Elations Co., LLC, No. 13-00242, 2014 U.S. Dist. LEXIS 8443, at *44-45, *41-44 (C.D. Cal. Jan. 13, 2014) (*quoting Ries v. Arizona Beverage USA LLC*, 287 F.R.D. 523, 536 (N.D. Cal. 2012) and *citing In re Google AdWords Litig.*, No. 08-3369, 2012 U.S. Dist. LEXIS 1216, at *30-31 (N.D. Cal. Jan. 5, 2012)). Courts "need not examine whether each putative class member was unsatisfied with the product in order to find that common issues predominate." *Id.* at *44-45; *see also Johnson v. General Mills, Inc.*, 275 F.R.D. 282, 289 (C.D. Cal. 2011) ("individualized proof of deception and reliance are not necessary for Mr. Johnson to prevail on the class claims. Again, the common issue that predominates is whether General Mills' packaging and marketing communicated a persistent and material message that YoPlus promoted digestive health"); *Cabral v. Supple*, No. 12- 00085-MWF, 2012 U.S. Dist. LEXIS 137365, at *9-11 (C.D. Cal. Sept. 19, 2012) (rejecting defendant's argument that "satisfied customers" were not injured and finding that "[t]he truth or falsity of Supple's advertising will be determined on the basis

of common proof—i.e., scientific evidence that the Beverage is 'clinically proven effective' (or not)—rather than on the question whether repeat customers were satisfied").

Further, neither Defendant nor its expert, Dr. Merenstein, contends that Align works for some, but not others. This is consistent with Defendant's advertising, which makes unqualified claims that Align will provide improved digestive health. Dr. Merenstein also agrees that ***the question of whether Align works is a classwide one***. (Doc 137-2 at 15-16). The issue of whether class members actually "benefitted from" Align – regardless of their perception – is a classwide question of science, because it applies to all class members. *Johnson*, 275 F.R.D. at 288-89 ("***General Mills could defeat the claims of the entire class by proving that YoPlus promotes digestive health in the manner that General Mills allegedly represented***") (emphasis supplied); *Cabral*, 2013 U.S. Dist. LEXIS 184170 at *10-11 (whether beverage was "clinically proven effective" was common issue); *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1100 (9th Cir. 1994) ("Where, as here, a product's effectiveness arises solely as a result of the placebo effect, a representation that the product is effective constitutes a 'false advertisement' even though some consumers may experience positive results"). Although repeat purchasers may mean some customers were satisfied or believed the product was effective, "this (arguable) inference does not threaten class ascertainability or demonstrate that most or all potential class members lack standing." *Cabral*, 2013 U.S. Dist. LEXIS 184170 at *8-9. Moreover, whether Defendant is correct and

proof of repurchase means Align works as advertised is itself a classwide question. *Id.* at *10-11.

Finally, the fact that Defendant has paid refunds to a small fraction of the proposed classes does not defeat certification. (Doc. 126 at ¶¶ 6 and 20). Defendant would simply have an offset defense with regard to those amounts, which would reduce the class judgment. Alternatively, upon an adequate showing that full refunds have been paid, these class members could simply be excluded from the classes, as the Court may modify a class definition if it so wishes. *Kendrick v. Std. Fire Ins. Co.*, No. 06-141, 2012 U.S. Dist. LEXIS 135694, at *35-36 (E.D. Ky. Sept. 30, 2010) ("The definition of the class ultimately is to be determined by the court, not the parties").

2. Article III Standing

Defendant next argues that certification is not appropriate because proposed class members do not have Article III standing if they benefited from or were happy with Align or received Defendant's advertising message from somewhere other than the label. (Doc. 127 at 17-18). "The class representative must allege an individual, personal injury in order to seek relief on behalf of himself or any other member of the class." *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005). Other Circuits agree that the Article III standing inquiry focuses on the class representative's standing, not each member of the class. *See Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 532 (C.D. Cal. 2011) ("the majority of authority indicates that it is improper for this Court to analyze unnamed class members' Article III standing where, as here, Defendants do not

successfully challenge the putative class representative's standing") (*citing Lewis v. Casey*, 518 U.S. 343, 395 (1996) (Souter, J., concurring) (class certification "does not require a demonstration that some or all of the unnamed class could themselves satisfy the standing requirements for the named plaintiffs") and *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (observing that the Ninth Circuit has repeatedly held that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements…. Thus, we consider only whether at least one named plaintiff satisfies the standing requirements")); *In re Deepwater Horizon*, 739 F.3d 790, 800-02 (5th Cir. 2014) (collecting cases). Defendant concedes that absent proposed class members do not have to submit evidence of personal standing. (Doc. 127 at 18). Indeed, regardless of the approach, individual inquiry is not required because, at a minimum, standing is established if the class representative has standing and the class is defined in such a way that anyone within it would have standing. *Deepwater Horizon*, 739 F.3d at 801.

Here, any purchaser of a falsely advertised product would have standing under the false advertising laws where, as here, the class is defined as the purchasers of that product. And here, the evidence is uncontroverted that there is only one reason to buy Align: for its advertised digestive health benefits. All proposed class members spent money on the allegedly falsely advertised product. Such economic loss is a classic form of injury-in-fact and confers Article III standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184

(2000); *Johns v. Bayer Corp.*, 280 F.R.D. 551, 560 (S.D. Cal. 2012). All proposed class members were necessarily exposed to and purchased Align with the alleged false and deceptive digestive health statements on the packaging and labeling. *Johns*, 280 F.R.D. at 558 (granting class certification where "at a minimum, everyone who purchased the Men's Vitamins would have been exposed to the prostate claim that appeared on every package from 2002 to 2009"); *Wiener v. Dannon Co.*, 255 F.R.D. 658, 669 (C.D. Cal. 2009) (same).

3. Class Membership

Fed. R. Civ. P. 23 presumes the existence of "a definite or ascertainable class." 1 Rubenstein, *Newberg on Class Actions* §3:2 (5th ed. 2013). "[A] class must exist," and it must "be susceptible of precise definition.'" 5 *Moore's Federal Practice* §23.21[1] (3d ed. 1997). The requirement "focus[es] on the question of whether the class can be ascertained by objective criteria" as opposed to "subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against)." Newberg, §3:3; *Manual for Complex Litigation* §21.222 (4th ed. 2004).

The Sixth Circuit's ascertainability criteria were applied in *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532 (6th Cir. 2012). The district court certified the proposed classes, and, on appeal, the defendants challenged ascertainability. The Sixth Circuit rejected the defendants' argument that the classes were impermissibly indefinite, holding that "[f]or a class to be sufficiently defined, the court must be able

to resolve the question of whether class members are included or excluded from the class by reference to objective criteria." *Id.* at 538. Because plaintiff's classes were "defined by classic categories of objective criteria," including location, geographical boundaries, the local tax for that district, and the local tax charged, they were adequately defined (and by objective criteria). *Id.* at 539. The Sixth Circuit also considered the administrative feasibility of the class and defendant's argument that it would be required to review millions of policies to determine which policyholders were overcharged. The court held the district court properly rejected these arguments and noted "the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." *Id.* Courts throughout the country have routinely used this definition.[3] Courts in this Circuit routinely certify

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[3] *See, e.g., Ebin v. Kangadis Food, Inc.*, No. 13-2311, 2014 U.S. Dist. LEXIS 25838, at *13-15 (S.D.N.Y. Feb. 24, 2014) (granting certification of a class of purchasers of olive oil because accepting the argument that without receipts a class is unmanageable "would render class actions against producers almost impossible to bring" although "the class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered injury sufficiently large as to justify bringing an individual lawsuit"); *Ries*, 287 F.R.D. at 535-36 (granting certification of a false advertising case involving purchases of AriZona Iced Tea, and rejecting arguments that most class members do not have proof they are in the class because they do not have receipts, and that the class was overbroad because it includes absent class members who lack Article III standing); *Forcellati v. Hyland's, Inc.*, No. 12-1983, 2014 U.S. Dist. LEXIS 50600, at *13-14 (C.D. Cal. Apr. 9, 2014) (rejecting defendant's argument that the class is unascertainable because there are no

classes of purchasers of over-the-counter products where it will be impossible to identify and notice every member of the class.[4] To deny certification on ascertainability grounds in this case would be to abandon the law in the Sixth Circuit that only requires that the class definition describe objective

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purchase records); *McCrary*, 2014 U.S. Dist. LEXIS 8443 at *22-27, 41-44 (rejecting ascertainability argument and finding that "it is enough that the class definition describes 'a set of common characteristics sufficient to allow' a prospective plaintiff to 'identify himself or herself as having a right to recover based on the description'"); *Astiani v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) (granting certification of a false advertising case involving purchases of Kashi food products, and rejecting argument that the class definition was unascertainable because defendant does not have records of consumer purchases); *Zeisel v. Diamond Foods, Inc.*, No. 10-1192, 2011 U.S. Dist. LEXIS 60608, at *13-17, 19-21 (N.D. Cal. June 7, 2011) (granting certification of a false advertising case involving purchases of walnuts, and rejecting arguments that absent class members were not injured and lacked standing, and the class was unascertainable because defendant did not track consumer purchases); *Ackerman v. Coca-Cola Co.*, No. 09-395, 2013 U.S. Dist. LEXIS 184232, at *61-62 (E.D.N.Y. July 18, 2013) (the class was ascertainable because "[w]hile it may be difficult to locate those individuals, since most will not have kept receipts or other documentation of their purchases, the criteria used to define the class are objective"); *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417-18 (N.D. Ill. 2012) (same).

[4] *See, e.g.*, *Godec v. Bayer Corp.*, No. 10-224, 2011 U.S. Dist. LEXIS 131198, at *22-23 (N.D. Ohio Nov. 11, 2011) (vitamin products); *Pfaff v. Whole Foods Mkt. Group, Inc.*, No. 1:09-cv-02954, 2010 U.S. Dist. LEXIS 104784, at *16-17 (N.D. Ohio Sept. 29, 2010) (cases of wine and grocery items); *Lackowski v. Twinlab Corp.*, No. 00-75058, 2001 U.S. Dist. LEXIS 25634 (E.D. Mich. Dec. 28, 2001) (dietary supplements); *Gasperoni v. Metabolife*, No. 00-71255, 2000 U.S. Dist. LEXIS 20879, at *25 (E.D. Mich. Sept. 27, 2000) (dietary supplements).

criteria that allows a prospective class member to identify himself or herself as having a right to recover or opt out based on the description. *Young*, 693 F.3d at 538.

Additionally, beyond ignoring the Sixth Circuit's test for ascertainability, to accept Defendant's argument that the proposed classes are not ascertainable would require dispensing with the Sixth Circuit's admonition underlying its ascertainability analysis:

> It is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies. We reject Defendants' attacks on administrative feasibility… . *Id.* at 540.

In fact, because certification is appropriate in situations where direct notice is not possible, it is well-established that notice by publication or posting notice at retailers satisfies due process.[5] Further,

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[5] *See Galvan v. KDI Distribution Inc.*, No. 08-999, 2011 U.S. Dist. LEXIS 127602, at *11-13 (C.D. Cal. Oct. 25, 2011) ("while Krossland cannot directly identify the class members, it can [] identif[y] the retailers who sold its cards…[n]otice can be distributed through the same channels Krossland uses to advertise its products: posting class notice at retail stores where Krossland cards are sold, notifying past purchasers to identify themselves in order to participate"); *Bandow v. FDIC*, No. 1:08-CV-02771, 2008 U.S. Dist. LEXIS 105656, at *7 (N.D. Ohio Dec. 22, 2008) (finding publication notice satisfied due process where potential class members were unknown); *Jordan*

claim forms and affidavits reviewed by class action claims administrators for indicia of fraud are routinely accepted methods of proving class membership and amount awarded.[6] If needed, the Court has a number of management tools available to address distribution issues, including using a special master to review individual claims. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001).

Accordingly, the Court finds that the proposed classes here—all consumers who purchased the product within the relevant time period and in the relevant states—are "defined by classic categories of objective criteria," and Plaintiffs therefore satisfy the

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v. Global Natural Resources, Inc., 102 F.R.D. 45, 51 (S.D. Ohio 1984) (same); *Mirfashi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) ("When individual notice is infeasible, notice by publication in a newspaper of national circulation…is an acceptable substitute"); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning").

[6] *See Hilao v. Estate of Marcos*, 103 F.3d 767, 786-87 (9th Cir. 1996); Alba Conte & Herbert B. Newberg, *3 Newberg on Class Actions*, §10:12 (4th ed. 2002) ("A simple statement or affidavit may be sufficient where claims are small…"); *Ramos v. Philip Morris Cos., Inc.*, 743 So. 2d 24, 29-30 (Fla. Dist. Ct. App. 1999) (an affidavit alleges facts "sufficient to support class membership"); *Boundas*, 280 F.R.D. at 417-18 ("anybody claiming class membership [who does not have written proof] will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process if Boundas prevails at trial"); *Forcellati*, 2014 U.S. Dist. LEXIS 50600 at *19-20.

implied prerequisite of ascertainability. *Young*, 693 F.3d at 539.

B. Fed. R. Civ. P. 23(a)

This case also satisfies the four requirements for class certification under Rule 23(a)—*i.e.*, numerosity, commonality, typicality, and adequacy of representatives.

1. Numerosity

Fed. R. Civ. P. 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." The plaintiff is not required to "establish that it is impossible to join all members of the proposed class[,]" but simply that joinder "would be difficult and inconvenient." *Day v. NLO*, 144 F.R.D. 330, 333 (S.D. Ohio 1992).

While no strict numerical test exists, "thousands" of products sold will satisfy the numerosity requirement. *In re Whirlpool*, 722 F.3d at 852; *see also Pfaff*, 2010 U.S. Dist. LEXIS 104784 at *9-10 (rejecting argument that receipts are needed to prove numerosity). Between 2009 and 2013, Defendant sold over 9.5 million (9,500,000) packages of Align. (Doc. 110-16 at 15-21). Moreover, California, Florida, Illinois, and North Carolina were among the top ten states in terms of online sales of Align. (Doc. 137-2 at 53 and 57). The numerosity requirement is readily satisfied.

2. Commonality

Fed. R. Civ. P. 23(a)(2) is satisfied where there are "questions of law or fact common to the class," an element which is known as "commonality." Commonality is determined by whether the issues

raised have "the capacity [in] a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Sprague v. GMC*, 133 F.3d 388, 398 (6th Cir. 1998) (test is whether there is a "common issue the resolution of which will advance the litigation"). "To demonstrate commonality, plaintiffs must show that class members have suffered the same injury." *In re Whirlpool*, 722 F.3d at 852. "[T]here need be only one common question to certify a class." *Id.* at 853. "The mere fact that questions peculiar to individual class members could remain does not necessarily defeat a finding a commonality." *Goldson v. Fed. Home Loan Mortg. Corp.*, No. 2:08-cv-844, 2010 U.S Dist. LEXIS 108206, at *21 (S.D. Ohio Sept. 28, 2010).

This prerequisite is readily met in this case. As stated in *Wiener*, a case with similar consumer protection claims of digestive health benefits derived from a "probiotic" food product, "[t]he proposed class members clearly share common legal issues regarding. . . alleged deception and misrepresentations in . . . advertising and promotion of the Products." 255 F.R.D. at 664-65.[7] Here,

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[7] *See also Fitzpatrick v. General Mills, Inc.*, 635 F.3d 687, 696 (S.D. Fla. 2010) ("Whether General Mills' claim that YoPlus aids in the promotion of digestive health is 'deceptive' is a mixed question of law and fact common to every class member"); *Nelson v. Mead Johnson Nutrition Co.*, 270 F.R.D. 689, 693 (S.D. Fla. 2010) (common questions included "whether Defendant's representations about Enfamil® LIPIL® were true"); *Johns*, 280 F.R.D. at 557 ("the 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

determining whether Align provides any digestive health benefit is a common question that will advance the litigation. (*See also* Doc. 85 at ¶ 47) (listing other common issues).

3. Typicality

Fed. R. Civ. P. 23(a)(3) requires that "the claims … of the representative parties be typical of the claims … of the class." Although they are separate and distinct requirements, commonality and typicality "tend to merge" and are often discussed together. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

A proposed class representative's claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and [the] claims are based on the same legal theory." *Little Caesar Entpr., Inc. v. Smith*, 172 F.R.D. 236, 243 (E.D. Mich. 1997); *see also Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561-62 (8th Cir. 1982) (quoting C. Wright & A. Miller, *Federal Practice & Procedure* § 1764 at n.21.1 (Supp. 1982)) ("The burden of showing typicality is not an onerous one. It does, however, require something more than general conclusory allegations that unnamed [plaintiffs] have been [wronged]").

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consumer"); *Johnson*, 275 F.R.D. at 287 (common questions included "whether General Mills communicated a representation [] that YoPlus promoted digestive health" and "if the representation was material, whether it was truthful"); *Godec*, 2011 U.S. Dist. LEXIS 131198 at *16 ("whether the prostate-health message on the packaging gave rise to an express warranty is a common question that can be resolved with common evidence").

"Typical does not mean identical, and the typicality requirement is liberally construed." *Gaspar v. Linvatex Corp.*, 167 F.R.D. 51, 57 (N.D. Ill. 1996). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). The requirement of typicality focuses on the conduct of a defendant and whether a proposed class representative has been injured by the same kind of conduct alleged against the defendant as other members of the proposed class. *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 491 (S.D. Ill. 1999) ("The Court should concentrate on the defendants' alleged conduct and the plaintiffs' legal theory to satisfy Rule 23(a)(3)"). This is why a finding that commonality exists generally results in a finding that typicality also exists. *Violette v. P.A. Days, Inc.*, 214 F.R.D. 207, 214 (S.D. Ohio 2003).

Typicality "is generally considered to be satisfied 'if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.'" *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561-62 (8th Cir. 1982). Here, Plaintiffs and the proposed classes assert the same claims that arise from the same course of conduct—Defendant's representations about the digestive health benefits of Align. (Doc. 110-16 at 25-27 (the Align packaging "said that it aids in your digestive system, so I believed what it said on there. I trusted [] their advertising."); 3-28; 45-48). Defendant advertised to all that the proprietary probiotic bacteria in Align provides proven digestive

health benefits. The question is not whether each class member was satisfied with the product, but rather whether the purchaser received the product that was advertised. Moreover, as the purported digestive health benefits communicated to consumers from Defendant via various channels (including print, television, and internet advertising, word of mouth, and doctor recommendations) are undisputedly the only reason any consumer would have purchased Align, exactly how each class member received that message is irrelevant. For each member within the proposed classes to recover under the claims at issue, each must prove the same elements as the named Plaintiffs.

4. Adequacy of Representatives

Fed. R. Civ. P. 23(a)(4) requires the Court to determine whether "the representative parties will fairly and adequately protect the interests of the class." This requirement calls for a two pronged inquiry: "(1) the representatives must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Fed. R. Civ. P. 23(a)(4) tests "the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent." *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977). These two requirements are met here.

a. Dino Rikos

Defendant alleges that Mr. Rikos has an irreconcilable conflict of interest with the relevant proposed classes because he filed an action for injunctive relief in California state court after Defendant successfully moved to dismiss his request for injunctive relief from this lawsuit for lack of Article III standing. (Doc. 127 at 52-53; Doc. 28 at 12-13). However, by pursuing the injunctive remedies in state court, Mr. Rikos is protecting the interests of absent class members who otherwise would not receive the full relief to which they are entitled to under the statutes if their allegations are true. *See Crawford v. Bell*, 599 F.2d 890 (9th Cir. 1979); *accord, McNeil v. Guthrie*, 945 F.2d 1163, 1166 n.4 (10th Cir. 1991) ("class members may bring individual actions for equitable relief when their claims are not being litigated within the boundaries of a class action"); *Rivera v. Bowen*, 664 F. Supp. 708, 710 (S.D.N.Y. 1987) ("it would be improper to foreclose the parties from pursuing separate claims where such claims are not encompassed and litigable within the original action") (*citing Crawford*, 599 F.2d at 890).

Moreover, Mr. Rikos has sufficiently demonstrated his willingness to vigorously pursue this action. Defendant claims Mr. Rikos has credibility issues that create a conflict of interest between him and the relevant proposed class members, citing his failure to identify other lawsuits he is or has been party to on interrogatory responses, failure to disclose at his deposition that his discovery verifications were signed by his son, and what Defendant describes as "inconsistent testimony" and insufficient production

during discovery. (Doc. 127 at 20). However, "[o]nly when attacks on the credibility of the representative party are so sharp as to jeopardize the interests of absent class members should such attacks render a putative class representative inadequate." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 431 (6th Cir. 2012) (finding the plaintiff adequate despite many "dubious" statements and omissions in that plaintiff's deposition testimony); *In re Colonial Partnership Litig.*, No. H-90-829, 1993 U.S. Dist. LEXIS 10884, at *19-21 (D. Conn. Feb. 10, 1993). The standard for finding a person inadequate because of a lack of credibility is a high one:

> [F]ew plaintiffs come to court with halos above their heads; fewer still escape with those halos untarnished. For an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiff's credibility that a fact finder might reasonably focus on plaintiff's credibility, to the detriment of the absent class members' claims.

CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 728 (7th Cir. 2011).

Here, Plaintiffs assert that Mr. Rikos' interrogatory responses were the result of confusion on the part of Mr. Rikos and counsel's error in not listing another similar class action (an error that they allege was harmless because Defendant's counsel was fully aware of it and discussed it with Plaintiffs' counsel). (Doc. 137 at 26). Further, Plaintiffs assert that the interrogatory responses were timely corrected with supplemental responses

and that when these issues came up in his deposition, Mr. Rikos candidly admitted that he had made a "mistake," that he had forgotten about these other cases, and that his discovery responses "should be corrected." (*Id.* at 23-24). Finally, Plaintiffs assert that although it is true that Mr. Rikos improperly had his son—only after reviewing the attached responses to satisfy himself as to their veracity, and only after giving full authority—sign discovery response verifications on his behalf, he did so hoping to better fulfill his duties as a class representative by promptly returning the verifications to his lawyers, not to shirk them. (*Id.* at 29-34).

The Court finds that Mr. Rikos is an adequate class representative as his credibility issues do not rise to the level necessary under *Gooch* to create a representational conflict of interest. 672 F.3d at 431.

b. Tracey Burns

Defendant challenges Ms. Burns's adequacy as a representative because her partner—to whom she is not married—and her partner's sister and sister's husband work in the support staff at the firm she retained to represent her in this case. (Doc. 127 at 80). An issue arises in this context when the class representative has a financial interest in the outcome of the action beyond being a member of the class, such as when the class representative is a partner in the law firm that is counsel of record. Ms. Burns, or even her partner or partner's sister or brother-in-law, are not lawyers, are not partners at the relevant firm, and have no financial interest in any potential award of attorneys' fees. (Doc.137-2 at 37-39); *cf. Fischer v. International Tel & Tel Corp.*, 72 F.R.D.

170 (E.D.N.Y.1976) (plaintiff adequate even though class counsel is his son where there was no indication that the plaintiff would have any financial interest in any fee recovered by son); *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985) *cert. denied*, 106 S. Ct. 1798 (1986) (plaintiffs who are brothers of class counsel, sister of chauffeur of class counsel, and mother-in-law of class counsel are adequate where depositions revealed that the plaintiffs were "zealous" class representatives); *Lewis v. Goldsmith*, 95 F.R.D. 15 (D.N.J. 1982) (nephew of class counsel adequate).

The Court finds Ms. Burns is an adequate class representative.

c. Leo Jarzembrowski

Defendant makes a similar attack against Mr. Jarzembowski. (Doc. 127 at 61-63). Mr. Jarzembowski's girlfriend is a part time member of a cleaning crew who works a couple of hours a day cleaning the office of the O'Brien Law Firm. (Doc. 137 at 28). Neither Mr. Jarzembowski nor his girlfriend is a lawyer. (Doc. 137-2 at 42-43). Neither Mr. Jarzembowski nor his girlfriend is related in any way to counsel, nor does either socialize with counsel. (*Id.* at 47-48). Mr. Jarzembowski's girlfriend simply overheard counsel talking about Align—which she knew her boyfriend had taken. On her own, she mentioned it to Mr. Jarzembowski. (*Id.* at 44-45). Mr. Jarzembowski's girlfriend has no financial interest in the outcome of this lawsuit. (*Id.* at 46-47).

The Court finds that Mr. Jarzembowski is an adequate class representative.

d. Proposed Class Counsel

Fed. R. Civ. P. 23(g) complements Fed. R. Civ. P. 23(a)(4)'s adequate representation requirement by focusing on class counsel. Under Fed. R. Civ. P. 23(g), the Court must determine that counsel possesses the abilities to fairly and adequately represent the interests of the class. For class counsel, the adequacy requirement is met if they "are qualified, experienced and generally able to conduct the litigation." *Beattie*, 511 F.3d at 562-63. Defendant does not challenge proposed class counsel Timothy Blood's well-demonstrated adequacy by this standard, but rather argues that proposed class counsel have created a conflict of interest by filing an injunctive relief-only action against Defendant on behalf of Plaintiff Rikos in state court. (Doc. 127 at 63-64). But Counsel filed the California state court action in order to protect the interests of the proposed California class, and then only after the Court granted (without prejudice) Defendant's motion to dismiss the California injunctive relief claims from this action for lack of Article III standing. (Doc. 28 at 12-13). For the reasons discussed above with regard to Mr. Rikos, the filing of this complementary action does not create a conflict of interest for purposes of representational adequacy.

Based on careful consideration of the relevant factors, the Court grants Plaintiffs' motion for the appointment of Timothy Blood, Esq. as class counsel. Additionally, the proposed class representatives are adequate and satisfy the requirements of Fed. R. Civ. P. 23(a)(4).

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

When the prerequisites of Rule 23(a) are satisfied, an action may be maintained as a class action when it qualifies under any one of three conditions set forth in Rule 23(b). Plaintiffs seek class certification under Federal Rule of Civil Procedure 23(b)(3). Under this class type, certification is appropriate if: (i) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (ii) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Beattie*, 511 F.3d at 564-67.

1. Predominance of Common Questions

"Predominance is a test readily met in certain cases alleging consumer or securities fraud . . . ." *Amchem*, 521 U.S. at 625. This requirement is satisfied when the questions common to the class are "at the heart of the litigation." *Powers v. Hamilton Cnty. Public Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007); *In re Whirlpool*, 722 F.3d at 858 ("the predominance inquiry must focus on common questions that can be proved through evidence common to the class"). An issue "central to the validity of each one of the claims" in a class action, if it can be resolved "in one stroke," can justify class treatment. *Butler*, 727 F.3d at 801. The predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem*, 521 U.S. at 623. "[T]he fact that a defense may arise and may affect class members differently does not compel a finding that individual issues predominate over common

ones." *Beattie*, 511 F.3d at 564. The requirement demands only predominance of common questions, not exclusivity or unanimity of them. *In re Whirlpool*, 722 F.3d at 858 ("[a] plaintiff class need not prove that each element of a claim can be established by classwide proof"); *Butler*, 727 F.3d at 801 ("predominance requires a qualitative assessment too; it is not bean counting").

Here, the predominating common issues shared by Plaintiffs and each class member are whether Defendant represented through its advertising and labeling that Align promotes digestive health and whether the advertising message is truthful or not deceptive. The resolution of these questions does not ***rise or fall on*** the individualized conduct of class members, but on Defendant's conduct and ***the objective medical science about whether Align works***. These questions are binary: either the advertising message was made or it was not, and ***the digestive health claim is either true or not***. Accordingly, it is "patently true" that "proof that certain representations were made and, whether made truly or falsely, [can] be established without resort to the testimony of individual class members." *Amato v. General Motors Corp.*, 11 Ohio App. 3d 124, 126 (1982).[8] "[T]his is not a case like *Amchem* [] in

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[8] *See also In re Whirlpool*, 722 F.3d at 859 (upholding predominance "following *Amgen's* lead" because "[e]vidence will either prove or disprove as to all class members whether the alleged design defects caused the collection of biofilm, promoting mold growth, and whether Whirlpool failed to warn consumers adequately of the propensity for mold growth in the [washing machines]"); *Nelson*, 270 F.R.D. at 697 ("The class members, however, need not submit individualized proof to establish

which different class members were exposed to different products such that the uncommon issue of causation predominated over the lesser shared issues." *Daffin*, 458 F.3d at 554.

a. Reliance

Reliance is not an element of the causes of action brought under the California Unfair Competition Law ("UCL"), the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA"), the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), nor the New Hampshire Consumer Protection Act ("CPA"). If Defendant's advertisements concerning the digestive health benefits of Align are "likely to deceive" a reasonable consumer, it is liable under these laws without proof of individual reliance, deception or damages. *In re Tobacco II Cases*, 46 Cal. 4th 298. 312 (2009) (UCL); *Fitzpatrick*, 635 F.3d at 1282-83 (FDUPTA); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996) (ICFA); *Mulligan v. Choice Mortg. Corp. USA*, No. 96-596, 1998 U.S. Dist. LEXIS 13248, at *34 (D.N.H. Aug. 11, 1998) (New Hampshire CPA). Similarly, reliance is not an element of the breach of warranty claim. *Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227 (2010) ("breach of express warranty

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causation … individual class members should be able to submit identical proof to establish that Defendant's representations about Enfamil® LIPIL® are not true"); *Fitzpatrick*, 263 F.R.D. at 701 (the predominant issue whether Yo-Plus provided digestive health benefits was a binary one about science); *Johns*, 280 F.R.D. at 557 ("these predominant questions are binary—advertisements were either misleading or not, and Bayer's prostate health claim is either true or false").

arises in the context of contract formation in which reliance plays no role").

Where individual reliance is required, if a material misrepresentation was made to the class members who acted consistent with a belief that the representation was true, the claims may be presented on a class basis. *Klay*, 382 F.3d at 1259 (plaintiff may prove reliance "through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)").[9] "Materiality of the alleged misrepresentation generally is judged by a 'reasonable man' standard." *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 157 (2010) (citing *Engalla v. Permanente Med. Group, Inc.*, 15 Cal. 4th 951, 977 (1997)); *Nevarez v. O'Connor Chevrolet*, 426 F. Supp. 2d 806, 817 (N.D. Ill. 2006) ("The test for materiality is an objective one—whether a reasonable person could be expected to rely on the information"); *Amato*, 11 Ohio App. 3d at 127-28 (affirming certification and approving use of circumstantial evidence to satisfy reliance requirement); *Patterson v. BP AM. Prod. Co.*, 240

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[9] *See also Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355, 363, (1976); *Vasquez*, 4 Cal. 3d at 814-15 ("The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence"); *Caledonia, Inc. v. Trainor*, 123 N.H. 116, 124 (1983) (circumstantial evidence may be used to prove fraud); *In re US FoodServ. Pricing Litig.*, 729 F.3d 108, 119- 20 (2d Cir. 2013) (common evidence in the form of customer payments constitutes circumstantial proof of customer reliance on inflated invoices); *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1292 (2002) (causation/reliance as to each class member is commonly proved by the materiality of the misrepresentation); *Wiener*, 255 F.R.D. at 669-70 (same).

P.3d 456, 465-66 (Colo. Ct. App. 2010) (same, collecting cases).

b. Causation

Where proof of causation is required, such requirements also do not defeat certification. To satisfy the proximate cause requirement of the ICFA, Plaintiffs need only demonstrate "that they receive[d], directly or indirectly, communication or advertising from the defendant." *Baker v. Home Depot USA, Inc.*, No. 11-6768, U.S. Dist. LEXIS 9377, at *9 (N.D. Ill. Jan 24, 2013) (quoting *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 555 (2009)). "[T]o satisfy the FDUPTA's causation requirement, each plaintiff is required to prove only that the deceptive practice would—in theory—deceive an objective reasonable consumer." *Fitzpatrick*, 635 F.3d at 1282. The New Hampshire CPA causation requirement is not akin to proof of reliance; rather, "plaintiffs will have to carry a much less onerous burden, showing only that their injuries … [were] a consequence of [defendant's] allegedly unfair and deceptive practices." *Mulligan v. Choice Mortg. Corp. USA*, No. 96-596, 1998 U.S. Dist. LEXIS 13248, at *34-35 (D.N.H. Aug. 11, 1998). Finally, "relief under any of the [California] UCL's three prongs is available 'without individualized proof of deception, reliance and injury,' so long as the named plaintiffs demonstrate injury and causation." *Guido v. L'Oreal USA, Inc.*, 284 F.R.D. 468, 482 (C.D. Cal. 2012) (quoting *Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1289; *Tobacco II*, 46 Cal. 4th at 326). Given the uniformity and ubiquity of Defendant's advertising message here, none of these state law causation requirements preclude classwide proof or defeat the predominance of common questions.

Common sense and Defendant's own labels and market research show that the only reason one would purchase Align is to obtain the advertised digestive health benefits—there is no other reason. Thus, the representation is material. Reliance is shown by circumstantial evidence that consumers purchased the product for the sole promised benefit. Certification is appropriate because materiality can be shown class-wide through a review of the labels and market research, and reliance can be shown "through legitimate inferences based on the nature of the alleged misrepresentations at issue." *Klay*, 382 F.3d at 1259. Certification is also appropriate "because without the alleged misrepresentations, there is no reason . . . to suggest that purchasers would have selected the Products over other [P&G] products or similar, generally less expensive, products by other brands." *Wiener*, 255 F.R.D. at 670; *see also Fitzpatrick*, 263 F.R.D. at 697 (same). Here, there is no reason to purchase Align but for its promised digestive health benefits.

c. Damages

"Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Beattie*, 511 F.3d at 564; *In re Whirlpool*, 722 F.3d at 860-1 (same); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535-36 (6th Cir. 2008) (same). Here, where "damages could be measured on a classwide basis," predominance is readily met. *In re Whirlpool*, 722 at 860. Align has no value other than its advertised purpose. ***It is a capsule filled with bacteria and inert ingredients. If, as alleged, the bacteria does nothing, then the capsule is worthless*** and

plaintiffs and the class members are entitled to a return of the purchase price paid under both damage and restitution theories.

Defendant argues that an award of damages or restitution in an aggregate sum is not appropriate because an aggregated amount would include payment from consumers who did not suffer injury, relying on *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008). However, in *McLaughlin*, aggregate damages were not appropriate because "[t]he distribution method at issue would involve an initial estimate of the percentage of class members who were defrauded (and who therefore have valid claims)." *Id.* at 231. That is not an issue here, as ***either 0% or 100% of the proposed class members were defrauded***. There is no evidence that some proposed class members knew of the alleged falsity of Defendant's advertising yet purchased Align anyway.

Second, Defendant argues that its own records do not support aggregate damage and restitution amounts based on retail purchases in the five states at issue. (Doc. 127 at 40). However, Defendant's interest in not paying excess damages "would only be implicated if (i) its aggregate liability could not be reliably determined; or (ii) the defendant is entitled to unclaimed portions of the judgment." *Forcellati*, 2014 U.S. Dist. LEXIS 50600 at *15. Here, Defendant's liability amount, based either on total retail sales or a conservative wholesale sales measure for the five states at issue, can be readily determined. As a general matter, a wrongdoer cannot escape liability by stating that its records do not permit calculating damages or restitution with exact

precision.[10] The "principle is an ancient one [] and is not restricted to proof of damage in antitrust suits" that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Accordingly, while the jury "may not render a verdict based on speculation or guesswork" the jury "may make a just and reasonable estimate of the damage based on relevant data…[and] act upon probable and inferential, as well as direct and positive proof." *Id.* at 264; *Broan*, 923 F.2d at 1235-36 (same). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow*, 327 U.S. at 264; *Scrap Metal*, 527 F.3d at 533-34 (same).

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[10] *See Broan Mfg. Co. v. Associated Distributors, Inc.*, 923 F.2d 1232, 1235-36 (6th Cir. 1991) (the rule that remote or speculative damages are not permitted "serves to preclude recovery [] only where the fact of damage is uncertain, i.e., where the damage claimed is not the certain result of the wrong, not where the amount of damage alone is uncertain"); *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004) (approving use of gross receipts for damages purposes because "[t]o the extent the large number of consumers affected by the defendants' deceptive trade practices creates a risk of uncertainty, the defendants must bear that risk"); *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 61 (2005) ("the measure of damages [under North Carolina's UDTPA] is broader than common law actions…In cases where a claim for damages from a defendant's misconduct are shown to a reasonable certainty, the plaintiff should not be required to show an exact dollar amount with mathematical precision"); *Black v. Iovino*, 219 Ill. App. 3d 378, 392 (1991) (same, reviewing ICFA damages award).

Here, Defendant admittedly maintains granular wholesale and retail sales data to which its aggregate liability can be tied. (Doc. 126 at ¶¶ 6-7; Doc. 123-1). Additionally, Defendant tracks its own wholesale sales, and it receives nationwide retail sales data from Costco and The Nielsen Company (which collects retail data for all U.S. retailers except Costco). (Doc. 126 at ¶ 5). Defendant also conducted direct retail sales through its website. (Id. at ¶ 12). For those direct sales, Defendant has the individual customer and sales records, and the fact that only certain states are at issue here poses no problem. Further, granular retail sales data on a state-specific basis is readily available from Nielsen or its major competitor, IRI (whose data also includes Costco's store-level point-of-sales data). (Doc. 137 at 45). For example, IRI can create a report that provides the following information for a rolling four-week sales period for each package count version of Align: net unit quantity; weighted average base price per unit; average price per unit; and average price per unit, and any promotions. (Doc. 137-3 at 136-44). Individual retailers also provide Defendant with periodic retail sales reports. (*Id.* at 145-200). Thus, the fact finder would have a wealth of evidence from which a just and reasonable estimate of damages or restitution could be made (if required). *Bigelow*, 327 U.S. at 264.

Finally, the UCL, CLRA, FDUPTA, ICFA, and New Hampshire CFA also provide for an award of restitution or other equitable remedies. Cal. Bus. & Prof. Code §17203 (UCL); Cal. Civ. Code §1780(a)(3) (CLRA); Fla. Stat. §501.211 (FDUPTA); 815 ILCS 505/10a (ICFA); N.H.R.S.A. 358-A:10 (NHCFA).

Courts have considerable discretion in determining these amounts. *See, e.g., Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 179-80 (2000) (court's discretion "is very broad" under the UCL to fashion an equitable award for "deterrence of and restitution for unfair business practices"); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 700 (2006) (UCL and CLRA); *Martinez v. Rick Case Cards, Inc.*, 278 F. Supp. 2d 1371, 1373-74 (S.D. Fla. 2003) (FDUPTA); 815 ILCS 505/10a (ICFA: "[t]he court, in its discretion may award…any other relief which the court deems proper"); Cal. Civ. Code §1780(a)(5) (CLRA: same).

Defendant also argues that under the laws at issue, Plaintiffs and proposed class members must calculate the difference between the price each proposed class member paid for Align and the value of Align (the out-of-pocket rule), or the difference in value between Align as received and as promised (the benefit of the bargain rule). According to Defendant, because Align provides some value, a full refund would be inappropriate. Plaintiffs, on the other hand, allege that because Align does nothing, it has no value. Whether Defendant or Plaintiffs are correct presents a classwide issue. There is only one reason to take Align, and neither party asserts that proposed class members purchased Align for any reason other than digestive health. In *Khoday v. Symantec Corp.*, No. 11-180, 2014 U.S. Dist. LEXIS 43315, at *102-05 (D. Minn. Mar. 31, 2014), the court granted class certification of California UCL and CLRA claims, finding that plaintiffs set forth a classwide measure of damages because a full refund measure of damages "would likely be appropriate

here, where the products in question have no intrinsic value other than the advertised use." *See also FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) (notwithstanding any de minimis value, purchasers of falsely advertised heat detectors were entitled to full purchase price restitution). Accordingly, the propriety (or not) of the proposed classes' entitlement to full refund damages or restitution can and should be determined in one stroke.

Defendant further argues that the Court cannot reliably calculate individual damage awards because Align has been sold in a variety of sizes and for a variety of prices, and most proposed class members are unlikely to have receipts. (Doc. 127 at 43-45). However, Plaintiffs will be asking the jury for judgment in an aggregate sum, and not separate individual amounts. Defendant's interest is not in the amount a particular proposed class member may receive, but in the aggregate amount awarded against it. *Hilao*, 103 F.3d at 786-87. As stated above, this amount can be reasonably calculated from Defendant's sales records and those of retailers and companies like Nielsen which track retail sales of Align or, if necessary, derived from Defendant's gross revenues—apparently a very conservative measure. And once an aggregate fund is calculated, distributing the fund is a post-trial exercise and a routine matter for claims administrators. *See Davis v. Southern Bell Tel. & Tel. Co.*, No. 89-2839, 1993 U.S. Dist. LEXIS 20033, at *21-*22 (S.D. Fla. Dec. 23, 1993) (calculation of damages is "mechanical . . .

once the fact-finder determines the amount of the overcharge").[11]

d. California's Express Warranty Notice Requirement

Finally, Defendant argues that California's notice requirement for breach of express warranty claims means that individual issues will predominate for a discrete portion of the proposed California class. (Doc. 127 at 45-46). Defendant agrees that notice is not required when a consumer purchases from a third-party retailer, but contends that the fraction of a percent of proposed class members who purchased directly from Defendant's online website from California are required to provide notice, raising individual inquiries for that subset of the proposed class. On the contrary, however, this is a common issue that compels certification. Plaintiffs contend that the notice to be sent by Plaintiff Rikos on behalf of the proposed class is sufficient, while Defendant contends that it is not. The Court need make one ruling, which will apply to all proposed class members falling into this group. *See Cartwright v. Viking Indus.*, No. 07- 2159, 2009 U.S. Dist. LEXIS

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[11] *See also In re Pharm. Industry Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009); *Hilao*, 103 F.3d at 786; *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 699 (S.D. Fla. 2004) ("Assuming the jury renders an aggregate judgment, allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation"); *In re Sugar Industry Antitrust Litig.*, 73 F.R.D. 322, 353-54 (E.D. Pa. 1976) ("Upon the establishment of such aggregate damages as may be assessed against defendants, the problem of allocations among classes and distribution within each class largely becomes a plaintiffs' problem").

83286, at *27-28 (E.D. Cal. Sept. 11, 2009) (granting class certification of express and implied warranty claims and stating "whether plaintiffs and the class were required to give notice [for breach of warranty claims] and/or whether they provided sufficient notice are questions that are likely common to the class").

2. Superiority of Class Action

Fed. R. Civ. P. 23(b)(3) sets forth the factors to determine whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." These factors include: (i) the class members' interest in individually controlling separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the likely difficulties in managing a class action.

The Fed. R. Civ. P. 23(b)(3) "superiority" factors weigh in favor of certification here. First, the value of the claims of individual class members is too small to justify individual litigation. "Use of the class method is warranted particularly because class members are not likely to file individual actions – the cost of litigation would dwarf any potential recovery." *In re Whirlpool*, 722 F.3d at 861. It is far more efficient to litigate this action in one case, rather than many (or more likely, "'zero individual suits' because of litigation costs"). *Id.* Here, there simply is no other available method of adjudication. Second, although this case presents some complexity

concerns, they are not unmanageable. The California UCL and New Hampshire CFA claims are not tried to a jury. *Hodge v. Superior Court*, 145 Cal. App. 4th 278, 284 (2006); *Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363, 368-69 (2008). The question whether Defendant's conduct is unfair or deceptive under the North Carolina UDTPA is also not for the jury. (Doc. 127 at 49). The jury will therefore be instructed on, at most, five claims. The Court will provide to specific instructions to clarify the elements of these claims.

Based on the foregoing, Plaintiffs' class action qualifies for certification under Fed. R. Civ. P. 23(b)(3).

III. CONCLUSION

This case is well suited for class certification because it will simplify and streamline the judicial proceedings for all persons. Accordingly, the Court **GRANTS** Plaintiffs' motion for class certification (Doc. 110), certifies the five proposed classes pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), and hereby appoints Plaintiff Dino Rikos as class representative of the California and Illinois classes, Plaintiff Tracey Burns as class representative of the Florida and North Carolina classes, Plaintiff Leo Jarzembrowski as class representative of the New Hampshire class, and Plaintiffs' counsel Timothy Blood, Esq. as class counsel.

IT IS SO ORDERED.

Date: 6/19/14 *s/ Timothy S. Black*

Timothy S. Black
United States District Judge

APPENDIX E

Federal Rule of Civil Procedure 23 provides:

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), 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 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 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) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

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

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

(4) 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) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. 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).

California Consumers Legal Remedies Act,
Cal. Civ. Code § 1770 provides:

§ 1770. List of proscribed practices

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(1) Passing off goods or services as those of another.

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

(3) Misrepresenting the affiliation, connection, or association with, or certification by, another.

(4) Using deceptive representations or designations of geographic origin in connection with goods or services.

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

(6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(8) Disparaging the goods, services, or business of another by false or misleading representation of fact.

(9) Advertising goods or services with intent not to sell them as advertised.

(10) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

(11) Advertising furniture without clearly indicating that it is unassembled if that is the case.

(12) Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller.

(13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

(14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

(15) Representing that a part, replacement, or repair service is needed when it is not.

(16) Representing that the subject of a transaction has been supplied in accordance with a previous

representation when it has not.

(17) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.

(19) Inserting an unconscionable provision in the contract.

(20) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (A) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (B) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. This subdivision shall not apply to in-store advertising by businesses which are open only to members or cooperative organizations organized pursuant to Division 3 (commencing with Section 12000) of Title 1 of the Corporations Code where more than 50 percent of purchases are made at the specific price set forth in the advertisement.

(21) Selling or leasing goods in violation of Chapter 4 (commencing with Section 1797.8) of Title 1.7.

(22)(A) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering

the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

(B) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient.

(23) The home solicitation, as defined in subdivision (h) of Section 1761, of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of either subsection (h) or (i) of Section 1639 of Title 15 of the United States Code or paragraph (e) of Section 226.32 of Title 12 of the Code of Federal Regulations.

A third party shall not be liable under this subdivision unless (A) there was an agency relationship between the party who engaged in home solicitation and the third party or (B) the third party had actual knowledge of, or participated in, the unfair or deceptive transaction. A third party who is a holder in due course under a home solicitation transaction shall not be liable under this subdivision.

(24)(A) Charging or receiving an unreasonable fee

to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services.

(B) For purposes of this paragraph, the following definitions shall apply:

(i) "Public social services" means those activities and functions of state and local government administered or supervised by the State Department of Health Care Services, the State Department of Public Health, or the State Department of Social Services, and involved in providing aid or services, or both, including health care services, and medical assistance, to those persons who, because of their economic circumstances or social condition, are in need of that aid or those services and may benefit from them.

(ii) "Public social services" also includes activities and functions administered or supervised by the United States Department of Veterans Affairs or the California Department of Veterans Affairs involved in providing aid or services, or both, to veterans, including pension benefits.

(iii) "Unreasonable fee" means a fee that is exorbitant and disproportionate to the services performed. Factors to be considered, when appropriate, in determining the reasonableness of a fee, are based on the circumstances existing at the time of the service and shall include, but not be limited to, all of the following:

(I) The time and effort required.

(II) The novelty and difficulty of the services.

(III) The skill required to perform the services.

(IV) The nature and length of the professional relationship.

(V) The experience, reputation, and ability of the person providing the services.

(C) This paragraph shall not apply to attorneys licensed to practice law in California, who are subject to the California Rules of Professional Conduct and to the mandatory fee arbitration provisions of Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code, when the fees charged or received are for providing representation in administrative agency appeal proceedings or court proceedings for purposes of procuring, maintaining, or securing public social services on behalf of a person or group of persons.

(25)(A) Advertising or promoting any event, presentation, seminar, workshop, or other public gathering regarding veterans' benefits or entitlements that does not include the following statement in the same type size and font as the term "veteran" or any variation of that term:

(i) "I am not authorized to file an initial application for Veterans' Aid and Attendance benefits on your behalf, or to represent you before the Board of Veterans' Appeals within the United States Department of Veterans Affairs in any proceeding on any matter, including an application for such benefits. It would be illegal for me to accept a fee for preparing that application on your behalf." The requirements of this clause do not apply to a

person licensed to act as an agent or attorney in proceedings before the Agency of Original Jurisdiction and the Board of Veterans' Appeals within the United States Department of Veterans Affairs when that person is offering those services at the advertised event.

(ii) The statement in clause (i) shall also be disseminated, both orally and in writing, at the beginning of any event, presentation, seminar, workshop, or public gathering regarding veterans' benefits or entitlements.

(B) Advertising or promoting any event, presentation, seminar, workshop, or other public gathering regarding veterans' benefits or entitlements which is not sponsored by, or affiliated with, the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or any other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries that does not include the following statement, in the same type size and font as the term "veteran" or the variation of that term:

"This event is not sponsored by, or affiliated with, the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or any other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries. None of the insurance products promoted at this sales event are endorsed by those organizations, all of which

offer free advice to veterans about how to qualify and apply for benefits."

(i) The statement in this subparagraph shall be disseminated, both orally and in writing, at the beginning of any event, presentation, seminar, workshop, or public gathering regarding veterans' benefits or entitlements.

(ii) The requirements of this subparagraph shall not apply in a case where the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries have granted written permission to the advertiser or promoter for the use of its name, symbol, or insignia to advertise or promote the event, presentation, seminar, workshop, or other public gathering.

(26) Representing that a product is made in California by using a Made in California label created pursuant to Section 12098.10 of the Government Code, unless the product complies with Section 12098.10 of the Government Code.

(b)(1) It is an unfair or deceptive act or practice for a mortgage broker or lender, directly or indirectly, to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and which is used to finance a home improvement contract or any portion thereof. For purposes of this subdivision, "mortgage broker or lender" includes a finance lender licensed pursuant to the California Finance Lenders

Law (Division 9 (commencing with Section 22000) of the Financial Code), a residential mortgage lender licensed pursuant to the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000) of the Financial Code), or a real estate broker licensed under the Real Estate Law (Division 4 (commencing with Section 10000) of the Business and Professions Code).

(2) This section shall not be construed to either authorize or prohibit a home improvement contractor from referring a consumer to a mortgage broker or lender by this subdivision. However, a home improvement contractor may refer a consumer to a mortgage lender or broker if that referral does not violate Section 7157 of the Business and Professions Code or any other provision of law. A mortgage lender or broker may purchase an executed home improvement contract if that purchase does not violate Section 7157 of the Business and Professions Code or any other provision of law. Nothing in this paragraph shall have any effect on the application of Chapter 1 (commencing with Section 1801) of Title 2 to a home improvement transaction or the financing thereof.

California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 provides:

§ 17200 Unfair competition; prohibited activities

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by

Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204 provides:

§ 501.204 Unlawful acts and practices

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2015.

Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/2 provides:

505/2. Unlawful practices; construction with Federal Trade Commission Act

§ 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged

thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

New Hampshire Consumer Protection Act, N.H.R.S.A. 358-A:2 provides:

358-A:2 Acts Unlawful

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:

I. Passing off goods or services as those of another;

II. Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

III. Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

IV. Using deceptive representations or designations of geographic origin in connection with goods or services;

V. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that such person does not have;

VI. Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

VII. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

VIII. Disparaging the goods, services, or business of another by false or misleading representation of fact;

IX. Advertising goods or services with intent not to sell them as advertised;

X. Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

X-a. Failing to disclose the legal name, street address, and telephone number of the business under RSA 361-B:2-a;

XI. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or

XII. Conducting or advertising a going out of business sale:

(a) Which lasts for more than 60 days;

(b) Within 2 years of a going out of business sale conducted by the same person at the same location or at a different location but dealing in similar merchandise;

(c) Which includes any goods, wares, or merchandise purchased or received 90 days prior to commencement of the sale or during the duration of the sale and which are not ordinarily sold in the seller's course of business;

(d) Which includes any goods, wares, or merchandise ordered for the purpose of selling or

disposing of them at such sale and which are not ordinarily sold in the seller's course of business;

(e) Which includes any goods, wares, or merchandise consigned for the purpose of selling or disposing of them at such sale;

(f) Without conspicuously stating in any advertisement for any such sale, the date such sale is to commence or was commenced;

(g) Upon the conclusion of which, that business is continued under the same name or under a different name at the same location; or

(h) In a manner other than the name implies.

XIII. Selling gift certificates having a face value of $100 or less to purchasers which contain expiration dates. Gift certificates having a face value in excess of $100 shall expire when escheated to the state as abandoned property pursuant to RSA 471-C. Dormancy fees, latency fees, or any other administrative fees or service charges that have the effect of reducing the total amount for which the holder may redeem a gift certificate are prohibited. This paragraph shall not apply to season passes.

XIV. Pricing of goods or services in a manner that tends to create or maintain a monopoly, or otherwise harm competition.

XV. Failure of a facility, as defined in RSA 161-M:2, or person to comply with the provisions of RSA 161-M regarding the senior citizens bill of rights.

XVI. Failing to deliver home heating fuel in accordance with a prepaid contract.

North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 provides:

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.