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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NARGUESS NOOHI,
individually, and on behalf of
other members of the general
public similarly situated,

Plaintiff-Appellee,

v.

JOHNSON & JOHNSON
CONSUMER INC.,

Defendant-Appellant.

No. 23-55190

D.C. No. 2:20-cv-
03575-TJH-JEM

OPINION

Appeal from the United States District Court for the
Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued April 8, 2024

Submission Deferred April 10, 2024

Resubmitted July 18, 2025

Pasadena, California

Filed July 25, 2025

Before: Marsha S. Berzon and Salvador Mendoza,
Jr., Circuit Judges, and Susan R. Bolton,* District
Judge.

Opinion by Judge Berzon

* The Honorable Susan R. Bolton, United States District Judge
for the District of Arizona, sitting by designation.

SUMMARY**

Class Certification

The panel affirmed the district court's order granting class certification in Narguess Noohi's putative class action against Johnson & Johnson Consumer Inc. ("JJCI"), alleging violations of California deceptive marketing and consumer protection laws.

Noohi purchased JJCI's Neutrogena Oil-Free Face Moisturizer for Sensitive Skin, which she alleged that, despite the name, contained oils and oil-based ingredients. The district court certified a class of California purchasers of the product.

First, JJCI challenged the district court's reliance on the proposed damages model of Noohi's economic expert, Dr. Wade Roberts, who described his proposed process for measuring class members' damages by calculating the economic value to consumers of the "oil-free" statement. The panel held that the district court did not abuse its discretion in finding that Dr. Roberts' model could reliably measure damages on a classwide basis and adequately for present purposes matched Noohi's theory of harm. However, JJCI must be given the opportunity to test the admissibility and reliability of Dr. Roberts' model once it has been fully executed.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Second, JJCI argued that the district court incorrectly determined that the elements of materiality and reliance were susceptible to common proof. The panel held that materiality, and therefore an inference of reliance, can be established by reference to an objective, reasonable consumer standard, and so in this case may be proven in a way common to the class. Although the inference of reliance is rebuttable, the district court did not abuse its discretion in determining that JJCI failed to rebut that inference.

Accordingly, the panel affirmed the district court's grant of class certification.

COUNSEL

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OPINION

BERZON, Circuit Judge:

Johnson & Johnson Consumer Inc. (“JJCI”) markets and sells a cosmetic product named “Neutrogena Oil-Free Face Moisturizer for Sensitive Skin” (“the Product”).¹ In search of an oil-free skin moisturizer, Narguess Noohi purchased the Product. Noohi alleges that, despite the name, Neutrogena Oil-Free Face Moisturizer for Sensitive Skin contains oils and oil-based ingredients. After discovering that alleged deception, Noohi brought this putative consumer class action against JJCI, alleging violations of California deceptive marketing and consumer protection laws. The district court certified a class of California purchasers of the Product. JJCI now appeals that grant of class certification on two grounds.

First, JJCI challenges the district court’s reliance on the proposed damages model of Noohi’s economic expert. JJCI maintains that the district court held Noohi to only a “prima facie” standard with regard to the damages model and unduly rejected its evidentiary challenges to the expert’s testimony. The result, JJCI contends, was that the approved model was too underdeveloped and preliminary to support

¹ The parties refer to the Product as “Neutrogena Oil-Free Face Moisturizer for Sensitive Skin.” That wording does not appear on the front of the bottle or the box it comes in. The back of the box includes the label “Neutrogena® Oil-Free Moisture for Sensitive Skin.” The largest, most prominently placed text on the front of the box and bottle reads simply “oil-free moisture.” “Sensitive skin” appears in smaller text below, and “ultra-gentle facial moisturizer” appears in even smaller text below that.

the district court's finding that common questions predominated as to injury. JJCI further contends that the model does not match Noohi's theory of harm. We reject JJCI's challenges to the damages model. In doing so, we rely on this Court's recent holding that "class action plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial." *Lytle v. Nutramax Lab's, Inc.*, 114 F.4th 1011, 1019 (9th Cir. 2024). We also conclude that the district court did not abuse its discretion in finding the proposed damages model fit Noohi's theory of harm and was sufficient for purposes of class certification.

Second, JJCI argues that the district court incorrectly determined that the elements of materiality and reliance were susceptible to common proof. We disagree. Materiality, and therefore an inference of reliance, can be established by reference to an objective, reasonable consumer standard, and so in this case may be proven in a way common to the class. Although the inference of reliance is rebuttable, the district court did not abuse its discretion in determining that JJCI failed to rebut that inference.

For these reasons, discussed more fully below, we affirm the district court's grant of class certification.

I. BACKGROUND

JJCI develops, markets, and sells Neutrogena Oil-Free Face Moisturizer for Sensitive Skin. Plaintiff-

Appellee Narguess Noohi purchased this Product because she wanted an oil-free moisturizer for her skin. Noohi alleges that, despite the title “oil-free,” the Product contains two ingredients—ethylhexyl palmitate and soybean sterols—that are oils or oil-based compounds. Noohi further alleges that she would not have purchased the Product had she known it contained oils.

In her operative complaint, Noohi asserted four claims against JJCI: (1) violation of California’s False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (2) violation of California’s Unfair Competition Law (“UCL”), *id.* §§ 17200 *et seq.*; (3) violation of California’s Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et seq.*; and (4) common law fraud. Noohi moved to certify a class under Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) as to her three statutory claims.

In support of her motion for class certification, Noohi submitted declarations and reports from two experts—Dr. Michael Hickner, a professor of materials science and engineering, and Dr. Wade Roberts, an econometrics expert. In a declaration, Dr. Hickner explained the meaning and properties of “oil.” Dr. Hickner opined that, although “oil” lacks a standard scientific definition, the term generally refers to a “naturally-derived, chemically synthesized, or petrochemically-refined slippery . . . substance” that is hydrophobic—meaning that it does not mix with water—and more viscous than water, but less dense. Dr. Hickner stated that, based on their chemical structures and physical properties, ethylhexyl palmitate and soybean sterols are oils with

oil-like physical properties.

In an expert report, Dr. Roberts described his proposed process for measuring class members' damages by calculating the economic value to consumers of the "oil-free" statement. Dr. Roberts described a two-step process. First, Dr. Roberts would conduct qualitative market research designed to uncover consumers' understanding of and response to the "oil-free" label. Second, Dr. Roberts would conduct quantitative surveying and market analysis to measure the economic value to consumers of the "oil-free" statement. At the time of class certification, discovery was still ongoing, and Dr. Roberts had not yet fully developed or executed his proposed damages model.

In opposition to class certification, JJCI submitted declarations from its own experts contesting Dr. Hickner's classification of the ingredients as oils and raised evidentiary objections based on Dr. Hickner's qualifications and methodology. JJCI also submitted declarations from its own economic experts contesting the design of Dr. Roberts' damages model and raised evidentiary objections based on Dr. Roberts' qualifications and proposed methodology.

After considering JJCI's experts' opinions and its evidentiary objections, the district court found both Dr. Hickner and Dr. Roberts qualified and their opinions sufficiently reliable to be considered for class certification purposes.² The district court rejected

² The district court found that Dr. Hickner's declaration was inadmissible in its current form under *Daubert v. Merrell Down Pharms., Inc.*, 509 U.S. 579 (1993), as Dr. Hickner had failed to

JJCI's evidentiary objections to Noohi's experts' qualifications and their opinions. The district court further found that Noohi satisfied the threshold class certification requirements of Federal Rule of Civil Procedure 23(a) and the specific requirements of both Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3). The district court therefore granted Noohi's motion for class certification, certifying a class defined as "all consumers who purchased Neutrogena Oil-Free Moisture Sensitive Skin in California between April 17, 2016 and November 30, 2022," the date of class certification. JJCI timely sought and obtained permission to file this interlocutory appeal of the district court's class certification order, pursuant to Federal Rule of Civil Procedure 23(f).

II. DISCUSSION

Before it can certify a class, a district court must conduct a "rigorous analysis" to ensure that the requirements of Federal Rule of Civil Procedure 23 are satisfied. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F. 4th 651, 664 (9th Cir. 2022) (en banc) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). "[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23."

demonstrate that his conclusions were based on past research, peer reviewed, or otherwise supported by established scientific methods. The district court nevertheless found Dr. Hickner's opinion sufficient for purposes of class certification because it was likely that his opinion could be presented in an admissible form at trial and would be useful to the trier of fact in determining whether the Product was deceptive.

Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 275 (2014).

The crux of the dispute here is whether Federal Rule of Civil Procedure 23(b)(3)’s requirement that “questions of law or fact common to class members predominate over any questions affecting only individual members” has been adequately met. Rule 23(b)(3)’s predominance requirement “presupposes satisfaction of the commonality requirement of [Rule] 23(a)(2), which itself tests ‘the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.’”³ *Lytte*, 114 F.4th at 1023 (quoting *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015)). “But the predominance inquiry goes further and ‘asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.’” *Id.* (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)).

Importantly, the inquiry at the class certification stage differs from that at summary judgment. “A court, when asked to certify a class, is merely to decide a suitable method of adjudicating the case and

³ Federal Rule of Civil Procedure 23(b)(3) provides:

A class action may be maintained if Rule 23(a) is satisfied and if . . . 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.

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

should not ‘turn class certification into a mini-trial’ on the merits.” *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015) (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011)). “In determining whether the ‘common question’ prerequisite is met, a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial.” *Olean*, 31 F.4th at 666–67. “With respect to the predominance inquiry specifically, a district court must evaluate ‘the method or methods by which plaintiffs propose to use the class-wide evidence to prove the common question in one stroke.’” *Lytle*, 114 F.4th at 1023 (alteration omitted) (quoting *Olean*, 31 F.4th at 666).

“We review the decision to certify a class and ‘any particular underlying Rule 23 determination involving a discretionary determination’ for an abuse of discretion.” *Olean*, 31 F.4th at 663 (quoting *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010)). We review de novo “the district court’s determination of underlying legal questions” and review for clear error “its determination of underlying factual questions.” *Id.* “A district court applying the correct legal standard abuses its discretion only if ‘it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors.’” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018) (quoting *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir.

2013)). “We review evidentiary rulings for an abuse of discretion.” *Lytle*, 114 F.4th at 1023–24.

A.

JJCI’s first argument on appeal is that Dr. Roberts’ proposed damages model was too underdeveloped at the time of class certification to be admissible or reliable under *Daubert* and Federal Rule of Evidence 702. JJCI further maintains that the district court, in rejecting its evidentiary challenges to the damages model and finding that the model demonstrated that damages were capable of measurement on a classwide basis, failed to engage in the “rigorous analysis” required under Rule 23. We disagree.

This Court’s recent decision in *Lytle*, in which the defendants raised objections similar to those put forward by JJCI, describes the appropriate inquiry into a damages model at class certification. As an initial matter, *Lytle* holds that “there is no categorical prohibition on a district court relying on an unexecuted damages model to certify a class.” 114 F.4th at 1029. *Lytle* further makes clear “there is no requirement that the evidence relied upon by Plaintiffs to support class certification be presented in an admissible form at the class certification stage.” *Id.* at 1024–25. Instead, “an inquiry into the evidence’s ultimate admissibility should go to the weight that evidence is given at the class certification stage.” *Id.* at 1025 (quoting *Sali*, 909 F.3d at 1006). But “[n]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong,

is a basis for declining to certify a class which apparently satisfies’ Rule 23.” *Id.* (alteration in original) (quoting *Sali*, 909 F.3d at 1004–05).

Additionally, evaluation of an unexecuted damages model at class certification “requires determining whether the expert’s methodology is reliable, so that a limited *Daubert* analysis may be necessary, but the more full-blown *Daubert* assessment of the results of the application of the model would be premature.” *Id.* at 1031. Instead, “the court considers only if expert evidence is useful in evaluating whether class certification requirements have been met.” *Id.* As *Lytle* emphasizes, in applying this standard to an unexecuted damages model, “the ultimate inquiry is whether a proposed model is likely to provide common answers at trial.” *Id.* at 1032 n.8.

Here, as in *Lytle*, the district court’s application of *Daubert* at the class certification stage was not an abuse of discretion.⁴ The district court correctly

⁴ Noohi argues that JJCI did not challenge Dr. Roberts’ expert testimony under *Daubert* before the district court and so may not raise a *Daubert* challenge now. We do not agree. In the district court, JJCI filed “Defendant [JJCI’s] Evidentiary Objections to Plaintiff’s Experts Dr. Hickner and Dr. Roberts in Support of Opposition to Class Certification,” in which it argued that Dr. Roberts’ analysis did not “survive[] scrutiny under *Daubert*” and “should be excluded.” JJCI did not request a *Daubert* hearing and none was held. But the district court did consider JJCI’s evidentiary objections under the *Daubert* standard to the extent appropriate at class certification, noting that JJCI’s critiques did not establish that Dr. Roberts’ model was “inadequate.” See *Lytle*, 114 F.4th 1024–25, 1031. As the district court’s consideration of JJCI’s evidentiary objections constituted a discretionary determination, we review that determination for an abuse of discretion. See *Olean*, 31 F.4th at 663.

recognized that the Plaintiffs were required to “show that damages are capable of measurement on a class-wide basis.” The court then considered and explained how Dr. Roberts proposed to do so, while noting that Noohi “need not show the actual amount of damages incurred” at the time of class certification. In determining that Dr. Roberts’ model was reliable and capable of measuring damages on a classwide basis, the district court found Dr. Roberts qualified as an expert in econometrics and relied on the fact that other courts have approved similar damages models in other CLRA cases.

JJCI contends that Dr. Roberts’ survey question design and selection of the final survey population was incomplete and preliminary, and when further developed and executed, may bias the results of his model. The contention that Dr. Roberts’ model was not sufficiently developed to support the district court’s approval of class certification is unpersuasive. To be sure, “[m]erely gesturing at a model or describing a general method will not suffice Rather, plaintiffs—or their expert—must chart out a path to obtain all necessary data and demonstrate that the proposed method will be viable as applied to the facts of a given case.” *Lytle*, 114 F.4th at 1032.

Dr. Roberts did so here. Dr. Roberts is qualified as an expert in econometrics with experience in survey design and execution. His expert report explains how, through a combination of qualitative and quantitative surveying, he will measure classwide damages. Like the expert in *Lytle*, see 114 F.4th at 1032, Dr. Roberts had not yet finally worded the questions or executed the survey, but he had designed the survey

methodology and identified target respondent populations.

Lytte held that there was no abuse of discretion where the district court relied on an expert who presented a model but “had not yet collected” data, over the defendant’s objection that “the precise wording of a questionnaire is critical.” *Id.* at 1032–33. Similarly, the district court in this case did not abuse its discretion in finding that JJCI’s challenges to Dr. Roberts’ opinion evidence were “not ripe” at the class certification stage. As the *Lytte* panel explained, “[t]he speculative possibility that [Dr. Roberts] might slip up in executing his model, standing alone, is insufficient to defeat class certification.” *Id.* at 1033.

JJCI further argues that Dr. Roberts’ proposed damages model is not consistent with Noohi’s theory of harm, thus contravening *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). We are not persuaded.

Comcast requires that plaintiffs “be able to show that their damages stemmed from the defendant’s actions that created the legal liability.” *Levy v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (citing *Comcast*, 569 U.S. at 38). Noohi alleges that JJCI misled consumers, in violation of the CLRA, UCL, and FAL, by labeling the Product “oil-free.” Noohi’s theory of harm is that class members paid more for the Product than they would have absent the misleading title “oil-free.” Under that theory of harm, the amount of overpayment attributable to the challenged term—the “price premium”—is the standard measure of damages under the CLRA and of

restitution under the FAL and UCL.⁵ *See, e.g., Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988–89 (9th Cir. 2015); *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817–818 (9th Cir. 2019); *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130–31 (2009).

Dr. Roberts proposed to measure that overpayment. The quantitative portion of Dr. Roberts’ analysis would involve a “Van Westendorp price elasticity test.” As Dr. Roberts described in his expert report, survey participants—a representative sample of consumers whose selection will be informed in part by the qualitative survey and JJCI’s internal data—will be shown the Product and asked at what prices they would find the Product “too inexpensive to be considered, a good value, expensive but still worth considering, and finally, too expensive to be considered.” Next, Dr. Roberts will introduce information “challenging the ‘oil-free’ claim.” For example, Dr. Roberts proposed informing the survey participants that some of the Product’s ingredients contained extracts of soybean and palm oil. After sharing that information, Dr. Roberts will again ask the survey participants the same pricing questions.

Using the difference between participants’ two “good value” prices—before and after the “exposure” to information challenging the “oil-free” label—Dr. Roberts will use regression analysis to determine the percent of the product’s overall price associated with

⁵ Plaintiffs may seek damages under the CLRA. Under the FAL and UCL, plaintiffs are limited to equitable relief, including restitution. *See Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 695 (2006).

the phrase “oil-free.” That coefficient will then be multiplied by the Product’s actual market price from the class period to calculate the class members’ “damages (financial losses) directly measurable from changes in the perceived value of the product.” As the district court found, courts have approved of similar “benefit-of-the-bargain” damages models in deceptive marketing cases under California law. *See Nguyen*, 932 F.3d at 818 (collecting cases).

Dr. Roberts also proposed to measure “softer” kinds of harms consumers might experience, such as changes to “overall consumer satisfaction, brand loyalty, willingness to recommend [the Product], and repurchase intent.” To measure these less “concrete” damages, Dr. Roberts proposed to ask the survey participants questions about their attitudes towards and impressions of the Product before and after the “exposure.” Dr. Roberts will then use “multivariate statistic[al]” analysis to quantify the changes in respondents’ perceptions of the Product.

Dr. Roberts’ proposal to quantify “soft” damages will include damages beyond those reflecting Noohi’s theory of overpayment. According to Dr. Roberts’ own description of his methodology, the damages associated with changes in a decline in consumers’ satisfaction, brand loyalty, willingness to recommend the product, and repurchase intent would be calculated in addition to the price premium measured via the Van Westendorp pricing exercise. Including an economic value associated with those attributes in the ultimate damages calculation would inflate damages beyond the price premium. But that fact alone does not mean that Dr. Roberts’ model violates

Comcast.

The concern in *Comcast* was not only that the damages model there proposed to measure damages not associated with the plaintiffs' theory of harm, but also that the model was incapable of separating out those damages from damages tied to the plaintiff's theory. 569 U.S. at 36–37. That problem—key to the Court's holding in *Comcast*—is not present here. The price premium measurement will be informed by different survey questions than those associated with the “softer” damages and will be calculated separately from those harms. No extra work is needed to, in the words of *Comcast*, “bridge the difference[]” between the cognizable and non-cognizable damage measurements. *Id.* at 38. Dr. Roberts need only calculate the price premium without including his separate measurement of the “softer” damages to produce a measure of damages consistent with the theory of the class claims.

JJCI further takes issue with Dr. Roberts' particular proposed methodology for measuring the price premium. Rather than comparing what consumers are willing to pay before and after they learn that the Product is not “oil-free,” JJCI argues, Dr. Roberts should compare “what consumers paid for ‘Neutrogena's Oil-Free Face Moisturizer for Sensitive Skin’ and what they would have been willing to pay for ‘Neutrogena's Face Moisturizer for Sensitive Skin,’ holding everything else about the product's performance and packaging (other than the ‘oil-free’ claim) constant.” Otherwise, JJCI maintains, Dr. Roberts' model will improperly include the “emotional value” that consumers associate with learning that

the “Product’s label contains a lie.”

JJCI’s contention relies on an improper understanding of the measure of the price premium under California consumer protection law. California law does not prescribe any specific means of measuring a price premium for purposes of actual damages or restitution. In fact, “[c]lass wide damages calculations under the UCL, FAL, and CLRA are particularly forgiving.” *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017), *rev’d on other grounds*, 586 U.S. 188 (2019). “California law ‘requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.’” *Id.* (quoting *Pulaski*, 802 F.3d at 989).

There is no talismanic means of measuring damages for deceptive marketing claims under California consumer protection law. For example, courts have approved damages models that use conjoint analysis, which asks survey respondents to select from a range of similar products that vary in characteristics like price, labeling, and design. *See Lytle*, 114 F.4th at 1033 (collecting cases). Courts have also deemed “contingent valuation analysis” a “reliable survey based methodology to determine price premium damages.” *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 17-CV-2335, 2019 WL 3006465, *3 (S.D. Cal. July 10, 2019) (collecting cases). That approach, similar to Dr. Roberts’ proposed methodology, varies the features of a single product by presenting new information about the product and asks survey participants to “directly report what they

are willing to pay for it.” *Id.*

To be sure, a poorly conducted survey might produce responses that inflate damages. For instance, poorly worded survey questions might induce bias in respondents, *see Lytle*, 114 F.4th at 1033, or survey conditions might not accurately replicate the conditions faced by consumers in stores, *see Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1107–08 (N.D. Cal. 2018). But Dr. Roberts recognized those risks. In his deposition, Dr. Roberts stated that leading or otherwise poorly framed prompts—for example, telling survey participants “you were lied to”—could lead to skewed responses. Dr. Roberts also emphasized the need to conduct the pricing survey in a “neutral” manner. Should Dr. Roberts’ execution of the survey fall short of that mark, JJCI may explore that failure at summary judgment, in a renewed *Daubert* motion, or during cross-examination at trial. *See, e.g., Lytle*, 114 F.4th at 1033–34; *Hadley*, 324 F. Supp. 3d at 1108. At the class certification stage, the key inquiry under *Comcast* is simply whether Noohi has “demonstrated the nexus between [her] legal theory . . . and [her] damages model.” *Nguyen*, 932 F.3d at 821. As explained, Dr. Roberts’ proposed damages model was designed to measure a price premium associated with the misleading label at the heart of Noohi’s claims. Whether the proposed calculation of the price premium will prove accurate is a “merits inquir[y] unrelated to class certification.” *Id.*

In sum, the district court did not abuse its discretion in finding that Dr. Roberts’ model could reliably measure damages on a classwide basis and

adequately for present purposes matched Noohi's theory of harm. That said, we reiterate *Lytle's* warning that a "plaintiff may not avoid ultimate scrutiny of the admissibility of their experts' final opinions simply by declining to develop those opinions in advance of class certification." 114 F.4th at 1034. Accordingly, JJCI must be given the opportunity to test the admissibility and reliability of Dr. Roberts' model once it has been fully executed.

B.

JJCI's second argument on appeal is that the district court abused its discretion in finding that common issues predominate with respect to the elements of materiality and reliance. Because materiality and reliance are substantive components of Noohi's claims, answering whether they present common issues necessarily requires some overlap with the merits. We consider such merits questions "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 & Tr. Funds*, 568 U.S. 455, 466 (2013).

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The FAL prohibits "untrue or misleading" statements in the course of business. *Id.* § 17500. The UCL and FAL are "'broad' and 'sweeping' to 'protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" *Pulaski*, 802 F.3d at 985 (quoting *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th

310, 320 (2011)). Accordingly, to state a claim under the UCL or the FAL “based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.” *Id.* (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009)). Whether a statement is likely to deceive members of the public is decided by reference to an objective “reasonable consumer” standard. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016).

The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices.” Cal. Civ. Code § 770. To state a claim under the CLRA, “a plaintiff must show (1) the defendant engaged in deceptive conduct and (2) the deception caused [the] plaintiff harm.” *Lytle*, 114 F.4th at 1034. “[U]nder the CLRA, ‘[c]ausation, on a classwide basis, may be established by *materiality*. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class.” *Id.* (second alteration in original) (quoting *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011)). Materiality under the CLRA is determined using a reasonable consumer standard: a misrepresentation is material “if a reasonable [consumer] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.” *Stearns*, 655 F.3d at 1022 (quoting *Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 157 (2010)).

“Because materiality (and, hence, in this case reliance) may be proved by reference to an objective, reasonable consumer standard, reliance under the CLRA is generally susceptible to common proof.”

Lytle, 114 F.4th at 1034. The same is true as to whether a statement is likely to deceive “members of *the public*” under the FAL and UCL. *Pulaski*, 902 F.3d at 985 (emphasis added) (quoting *In re Tobacco II Cases*, 46 Cal. 4th at 312). Accordingly, deceptive marketing claims under these California consumer protection statutes are generally “ideal for class certification.” *Id.* (quoting *Bradach v. Pharmavite, LLC*, 735 F. App’x 251, 255 (9th Cir. 2018)).

There is an important caveat to this reasoning: “while materiality can support an inference of reliance, that does not necessarily mean that the inference will hold as to the entire class, such that common questions predominate.” *Lytle*, 114 F.4th at 1034–35. “If the misrepresentation or omission is not material as to all class members, the issue of reliance ‘would vary from consumer to consumer’ and the class should not be certified.” *Stearns*, 655 F.3d at 1022–23 (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th at 129).

JJCI contends that the district court ignored the caveat to the inference of reliance and found materiality and reliance to be “automatically common questions in false-advertising cases under California law.” The district court here did not explicitly mention and apply the caveat to the inference of reliance. Nevertheless, our review of the district court’s decision and the record at class certification confirms that the district court did not abuse its discretion in finding that the materiality and reliance elements of Noohi’s claims could be resolved on a classwide basis and that common issues therefore predominate.

In granting class certification, the district court

relied on the fact that materiality, and therefore reliance, can be shown by reference to a reasonable consumer standard, avoiding the need for individualized inquiries. The district court also relied on the undisputed evidence of classwide exposure to the “oil-free” language, specifically the fact that the “oil-free” term appears in the Product’s name prominently displayed on the front of the packaging. In determining whether a statement is materially misleading under California law, “the primary evidence . . . is the advertising itself.” *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 679 (2006) (citation omitted). It is hard to imagine that consumers would purchase a product labeled “Oil-Free Moisture” without regard to whether the product was free from oil. If, somehow, the evidence later shows that a reasonable consumer would not have found the product’s name to be material to their purchase decision, “the failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate.” *Amgen*, 568 U.S. at 468.

Given the objective standard for materiality and the undisputed evidence of classwide exposure, Noohi is entitled to the inference that reliance can be shown via common proof. *See In re Vioxx Class Cases*, 180 Cal. App. 4th at 129.

JJCI’s arguments for why it has rebutted that inference are not persuasive. JJCI first maintains that materiality is not subject to common proof here because the understanding of the phrase “oil-free” may differ across the class. In JJCI’s telling,

consumers might interpret “oil-free” as meaning that the Product does not contain oils, does not contain ingredients derived from oils, or does not perform in a way consumers consider “oily.” Because the materiality of the phrase “oil-free” depends on what meaning consumers attach to it, JJCI argues materiality cannot be determined on a classwide basis. This argument fails for two reasons.

First, JJCI did not offer persuasive evidence to the district court that the meaning of “oil-free” in fact varies across the class. Instead, relying on Noohi’s testimony as to her motivations for purchasing the Product and the expert report of a dermatologist as to the dermatologic uses of oil-free products, JJCI contends—without any empirical evidence—that “oil-free’ *can* be interpreted in multiple ways by consumers” and that consumers generally “understand and seek out ‘oil-free’ products for a multitude of reasons.” Beyond that *ipse dixit* argument, JJCI presents no evidence that materiality or reliance actually varies across the class.

Second, even if JJCI had presented evidence that the understanding of the phrase “oil-free” varies across the class, JJCI has not demonstrated why that fact would undermine the commonality of materiality based on a reasonable consumer standard, or rebut the inference of reliance. In *Lytle*, this Court discussed *Stearns*, 655 F.3d 1017, *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, and *Fairbanks v. Farmers New World Life Insurance Co.*, 197 Cal. App. 4th 544 (2011), three cases in which courts found materiality differed across a class and so defeated the inference of reliance and class certification. *See Lytle*,

114 F.4th at 1037–38. JJCI relies on all three cases here. *Lytle* determined that the “common theme unifying each of these cases is that a sizable portion of the class either were not misled by the statements or would not have found the misrepresentations to be material had they known the truth.” *Id.* at 1038.

For example, in *Fairbanks*, the plaintiffs alleged that the defendant’s marketing of life insurance policies was misleading because the defendant marketed the policies as “permanent” when in fact the policies were not permanent and were “systematically underfunded.” 197 Cal. App. 4th at 553. The court found that the materiality of the “permanent” policy claim was not subject to common proof because “many, if not most” policy purchasers did not intend for the policy to be permanent or had no expectation one way or the other. *Id.* at 907. For those purchasers, the fact that the policy was marketed as permanent was immaterial to their decision to buy it. *Id.*

In *In re Vioxx Class Cases*, the plaintiffs alleged Merck “hid ‘an increased risk of death,’ associated with [the anti-inflammatory drug] Vioxx.” 180 Cal. App. 4th at 133. The court found class treatment inappropriate because of “overwhelming evidence” that Vioxx did not increase the risk of death for all patients, and that some patients would “still take Vioxx today” if it was prescribed and they were told of the risks. 180 Cal. App. 4th at 103, 133–34. The key to the courts’ decisions in *Fairbanks* and *Vioxx* was that the class at issue was shown to include a substantial number of individuals for whom the allegedly deceptive statements would not have affected their purchase decision and so were not

material.

JJCI's contention, in contrast, is not that the "oil-free" title did not affect the purchase decision of—and so was immaterial to—a portion of the class, but that it affected the purchase decision of class members—and so was material—for different reasons. That is, JJCI does not suggest, let alone point to evidence demonstrating that, a consumer who thought "oil-free" meant "without oils" was any more or less likely to be affected in their purchase decision than someone who thought it meant "without oil derivatives" or not tactilely "oily."

So understood, JJCI's argument, even if true, does not raise the same concerns regarding the susceptibility of materiality to common proof as does a showing that a contested statement was not material at all to some class members. The baseline inquiry is whether the statement was material to a reasonable person. An affirmative answer to that question gives rise to an inference of reliance. A showing that for some portion of a class that statement was not in fact material upsets that inference. But a showing that a statement was material to different class members in different ways does not.

Courts addressing CLRA, UCL, and FAL claims have consistently held that a plaintiff need not establish at the class certification stage that class members share a uniform understanding of the contested term. *See, e.g., Lytle v. Nutramax Lab's, Inc.*, No. ED CV 19-0835, 2022 WL 1600047, at *15 (C.D. Cal. May 6, 2022); *Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 402 n.12 (N.D. Cal. 2021); *Fitzhenry-*

Russell v. Dr. Pepper Snapple Grp., Inc., 326 F.R.D. 592, 613 (N.D. Cal. 2018); *Elkies v. Johnson & Johnson Servs., Inc.*, No. CV 17-7320, 2018 WL 11223465, at *4 (C.D. Cal. Oct. 18, 2018).⁶ For example, the district court in Lytle (which we affirmed) rejected the argument that the plaintiff there had to show the class shared a common understanding of the term “Joint Health Supplement” at the class certification stage. Lytle, 2022 WL 1600047, at *15. Similarly, the district court in Bailey found “no controlling authority” to support the contention that class members had to share a common definition of the term “rapid release.” Bailey, 338 F.R.D. at 402 n.12.

In sum, the district court’s decision that materiality, and so the inference of reliance therefrom, are subject to common proof even if the class understood “oil-fee” in slightly different ways was not an abuse of discretion.

⁶ JJCI cites *In re 5-Hour Energy Mktg. & Sales Prac. Litig.*, No. ML 13-2438, 2017 WL 2559615, at *8–9 (C.D. Cal. June 7, 2017), in support of its argument that the lack of a common definition for an allegedly deceptive term undermines predominance as to materiality. *In re 5-Hour Energy* is neither controlling nor persuasive. The plaintiffs in *In re 5-Hour Energy* alleged that the term at issue there, “energy,” was material based on a narrow definition of the term as “caloric energy.” *In re 5-Hour Energy*, 2017 WL 2559615, at *9. The district court determined that evidence showed that a reasonable consumer would not share the plaintiffs’ particular understanding of the inherently ambiguous term—the only understanding under which the plaintiffs argued the term was material. *Id.* JJCI has not suggested that a portion of the class here—or a hypothetical reasonable consumer—would understand “oil-free” in a way that would make that phrase immaterial to their purchase decision.

JJCI further contends that it rebutted the inference of reliance by pointing to its positive customer reviews and internal purchasing data demonstrating that 30% of the Products' purchasers were repeat buyers. The existence of repeat purchasers does not defeat the inference of reliance. There is no indication that the repeat purchasers knew that the Product was not oil-free and purchased it anyway. *Cf. In re Vioxx Class Cases*, 180 Cal. App. 4th at 133–34. The existence of positive reviews or other product attributes that purchasers found desirable is similarly insufficient to defeat materiality or the inference of reliance. To establish reliance under the CLRA, UCL, and FAL, a misrepresentation need not be “the *sole* or even the *decisive* cause of the injury-producing conduct.” *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1020 (9th Cir. 2020) (quoting *Kwikset*, 51 Cal. 4th at 327).

For all these reasons, the district court did not abuse its discretion in finding that common issues predominate with respect to materiality and reliance.⁷

⁷ JJCI argues that should we find materiality susceptible to common proof, we must decide whether *Stearns*' holding that UCL plaintiffs need not show reliance as to absent class members is good law in light of the Supreme Court's holding in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), that all class members must have standing to recover damages. We need not decide that point here. Our holding is that Noohi has demonstrated that reliance is susceptible to common proof as to the entire class. We do not rely on the contested portion of *Stearns* to conclude that class certification was appropriate.

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CONCLUSION

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

AFFIRMED.

APPENDIX B

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

<p>NARGUESS NOOHI, Plaintiff,</p> <p>v.</p> <p>JOHNSON & JOHNSON CONSUMER, INC., Defendant.</p>	<p>CV 20-03575 TJH (JEMx)</p> <p>ORDER</p> <p>[67]</p>
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The Court has considered Plaintiff Narguess Noohi’s motion for class certification, together with the moving and opposing papers.

In her Second Amended Complaint [“SAC”], Noohi alleged that, on March 23, 2020, she purchased Neutrogena Oil-Free Face Moisturizer for Sensitive Skin [the “Product”], manufactured by Defendant Johnson & Johnson Consumer, Inc. [“Johnson & Johnson”]. Noohi alleged that she purchased the Product because of a representation on the packaging that the Product was oil-free. Later, Noohi learned that the Product contained ethylhexyl palmitate and soybean sterols, which, allegedly, are oils or byproducts of oils.

The SAC alleged four claims: (1) Common law fraud; (2) Violation of California’s False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.* [“FAL”]; (3) Violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* [“UCL”]; and

(4) Violation of California's Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.* ["CLRA"].

Noohi, now, moves to certify this putative class action on behalf of all consumers who purchased the Product in California between April 17, 2016, and the date of this Order, as to her FAL, UCL, and CLRA claims. Noohi does not seek to certify her common law fraud claim.

To certify a class action, Noohi bears the burden of establishing that the proposed class satisfies all four threshold requirements of Fed. R. Civ. P. 23(a): (1) Numerosity of class members; (2) Commonality of issues of fact and law; (3) Typicality of her own claims; and (4) Adequacy of herself and class counsel to fairly and adequately pursue the action. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010). Noohi, also, bears the burden of establishing at least one of the requirements of Fed. R. Civ. P. 23(b). *See Rodriguez*. Because Noohi seeks certification pursuant to both Rule 23(b)(2) and Rule 23(b)(3), she must satisfy both. *See Rodriguez*.

Numerosity

Johnson & Johnson did not dispute that the putative class is sufficiently numerous, nor is there any indication otherwise. Consequently, numerosity is satisfied.

Typicality

Typicality is satisfied if the class representative has the same or similar injury as the class, has been injured by the same course of conduct as other class

members, and the action is based on conduct not unique to the parties. *A.B. v. Haw. State Dep't of Educ.*, 30 F.4th 828, 839 (9th Cir. 2022). Noohi's injury is typical of the putative class because she, allegedly, sought an oil-free moisturizer and purchased the Product believing, based on its packaging, that it was oil-free.

Johnson & Johnson presented undisputed evidence that Noohi purchased the Product because her diet, at the time, required her to use oil-free moisturizers. However, Noohi's subjective reason for seeking an oil-free moisturizer is not relevant, even if it is idiosyncratic, because her CLRA, UCL, and FAL claims depend upon a showing that the Product was objectively deceptive to a reasonable consumer. *See Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 157 (2010); *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). Consequently, typicality is satisfied.

Adequacy

Adequacy of representation is satisfied when the proposed named class representative and the proposed class counsel are free of conflicts of interest and are able to vigorously prosecute the class claims. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

There were no arguments that Noohi is not an adequate representative. However, Johnson & Johnson argued that Noohi's counsel, Todd M. Friedman, and his firm, have a conflict of interest due to their representation of the plaintiff in a putative nationwide class action pending in the Northern District of Illinois, *Flaherty v. Johnson & Johnson*

Consumer, Inc., No. CV 20-07255 (N.D. Ill.). *Flaherty* is based on allegedly deceptive oil-free packaging language for Johnson & Johnson products other than the Product.

Friedman would not be adequate counsel, here, if he represented another class against the same defendant and there was a significant risk that his representation of both classes would limit his ability to adequately represent either of the classes, *Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1047 (N.D. Cal. 2014), including in a circumstance where the litigation interests of one class could be at odds with the interests of the other class, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999).

Johnson & Johnson speculated that Flaherty, herself, might object to a settlement reached between Noohi and Johnson & Johnson, here, and that Friedman might be tempted to allocate more effort or resources to *Flaherty* than to the instant case if *Flaherty* were to be certified. First, there is no evidence that Flaherty, who is alleged to be an Illinois resident, could claim membership in Noohi's class of California purchasers. Second, there is no evidence that an actual conflict has developed. Speculative conflicts do not warrant disqualification. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015). If an actual conflict develops, the Court can, then, revisit this issue. *See Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982).

Consequently, for now, adequacy is satisfied.

Commonality

Commonality is satisfied “if there are questions of

fact and law which are common to the class.” Fed. R. Civ. P. 23(a)(2). A common question is one that is capable of class-wide resolution. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (*en banc*). As opposed to a common question, “an individual question is one where members of a proposed class will need to present evidence that varies from member to member.” *Olean*, 31 F.4th at 663.

To succeed on her CLRA claim, Noohi must show that (1) Johnson & Johnson made a deceptive representation and (2) that deception caused harm to the putative class. *See In re Vioxx Class Cases*, 180 Cal. App.4th 116, 129 (2009). Causation is established on a class-wide basis upon a showing that the representation was material, *i.e.*, it would be important to a reasonable consumer in deciding to purchase the Product. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011), *abrogated on other grounds by Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Thus, there are at least two questions related to the CLRA claim that are capable of class-wide resolution: (1) Whether Johnson & Johnson’s oil-free packaging language was deceptive; and (2) Whether that deception would be important to a reasonable consumer.

Noohi’s UCL and FAL claims both require proof that a reasonable person would likely be deceived by the alleged misrepresentation. *See Freeman*, 68 F.3d at 289. To show likelihood of deception on a class-wide basis, Noohi must establish that every member of the putative class was exposed to the alleged misrepresentation. *See Mazza v. Am. Honda Motor*

Co., 666 F.3d 581, 596 (9th Cir. 2012), *overruled on other grounds by Olean*, 31 F.4th at 682 n.34 (9th Cir. 2022). Thus, there are at least two questions related to the UCL and FAL claims that are capable of class-wide resolution: (1) Whether the oil-free packaging language would be likely to deceive a reasonable consumer; and (2) Whether every member of the putative class was exposed to the packaging language.

Consequently, commonality is satisfied for all three of the proposed class claims.

Rule 23(b)(2)

Rule 23(b)(2) requires Noohi to show that Johnson & Johnson's alleged actions applied generally to the entire putative class, such that class-wide injunctive relief is appropriate. Fed. R. Civ. P. 23(b)(2). Johnson & Johnson did not dispute that Noohi met that burden, nor is there any indication otherwise.

Additionally, Noohi must show that at least one member of the putative class has standing to pursue injunctive relief. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). This Court held, in ruling on Johnson & Johnson's earlier motion to strike, that Noohi had standing to seek prospective injunctive relief because she alleged that she would like to purchase the Product again, but that her inability to rely on the Product's packaging language prevented her from doing so. *See Davidson v. Kimberly-Clark Corp.*, 873 F.3d 956, 969-70 (9th Cir. 2017). Evidence provided by both parties, here, is consistent with Noohi's earlier allegations and, indeed, only adds support to the Court's previous

conclusion that Noohi faces the type of “threat of imminent or actual harm” required for standing. *See Davidson*, 873 F.3d at 969-70.

Consequently, Rule 23(b)(2) is satisfied.

Rule 23(b)(3) Predominance

Rule 23(b)(3) requires Noohi to establish that common questions predominate, here, over individualized issues. *See Fed. R. Civ. P. 23(b)(3)*. The Court must resolve whether the common questions, identified above, are not overwhelmed by inquiries that must be evaluated on an individual basis. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457 (2016).

To satisfy predominance, the common questions that will arise for each of Noohi’s claims must relate to the central issue of each claim. *Olean*, 31 F.4th at 665. Here, it is clear that resolution of the common questions bear directly on the resolution of the key elements of Noohi’s claims. *See Olean*, 31 F.4th at 665.

Additionally, “the court must make a rigorous assessment of the available evidence and the method or methods by which [Noohi] propose[s] to use the class-wide evidence to prove the common question in one stroke.” *Olean*, 31 F.4th at 666. If “each class member could have relied on [Noohi’s evidence and methods] to establish liability if he or she had brought an individual action,” predominance will be satisfied. *Tyson*, 577 U.S. at 455. However, Noohi is not required to show, at this stage, that the class will, actually, prevail on the merits of those questions. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013).

Finally, because Noohi's CLRA claim requires proof of damages, she must show, for that claim, "that damages are capable of measurement on a class-wide basis." *See Comcast*, 569 U.S. at 34.

CLRA Claim

First, the Court must determine whether Noohi can resolve the two common questions relating to her CLRA claim in one stroke. *See Olean*, 31 F.4th at 666.

Deception

Noohi intends to demonstrate that the oil-free language was deceptive through the testimony of her expert, Dr. Michael A. Hickner, a professor of materials science and engineering. In a declaration, Hickner explained that the word oil lacks a universally agreed upon definition, but usually refers to substances that are generally hydrophobic, more viscous than water, and less dense than water. According to Hickner, two compounds that Noohi alleged were ingredients in the Product – ethelhexyl palmitate and soy sterols – have the properties of oil, as does dimethicone, which was not mentioned in the SAC.

Johnson & Johnson challenged the admissibility of Hickner's declaration on two main grounds: (1) That Hickner's conclusions are not reliable because they lack sufficient scientific support; and (1) That Hickner failed to establish his expertise.

A court "evaluating challenged expert testimony in support of class certification ... should evaluate admissibility under the standard set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)."

Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018). Under *Daubert*, an expert's testimony must be scientifically reliable and the expert must have sufficient expertise to assist the trier of fact in deciding a material factual issue. *Daubert*, 509 U.S. at 592. At the class certification stage, the evidence need not be admissible, provided that it "likely could [be] presented in an admissible form at trial," so the *Daubert* inquiry, at this juncture, only "go[es] to the weight that evidence is given[.]" *Sali*, 909 F.3d at 1004, 1006.

To be reliable, Hickner's conclusions must be based on preexisting research, be peer reviewed, or, failing those, Hickner must "point to some objective source – a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like – to show that [he has] followed the scientific method." *Daubert v. Merrell Dow Pharms., Inc. (Daubert II)*, 43 F.3d 1311, 1319 (9th Cir. 1995). Because Hickner's declaration did not satisfy any of those criteria, it is not admissible at this procedural juncture. Consequently, the Court's inquiry, now, is whether that current inadmissibility bears negatively on Hickner's ability to introduce scientific conclusions that could prove, or disprove, deception on a class-wide basis. *See Sali*, 909 F.3d at 1006. There is no indication, here, that Hickner will not be able to present his conclusions in an admissible manner at summary judgment or trial.

Johnson & Johnson offered declarations of its own experts to counter Hickner's declaration. "The determination whether expert evidence is capable of resolving a class-wide question in one stroke may

include weighing conflicting expert testimony and resolving expert disputes.” *Olean*, 31 F.4th at 666. However, neither of Johnson & Johnson’s experts demonstrated that Hickner’s conclusions are, for example, scientifically unsound or otherwise unsupported, such that they would be useless for the purpose of proving deception. *See Olean*, 31 F.4th at 667. Rather, the crux of Johnson & Johnson’s argument, and that of its experts, was that its experts used a more appropriate definition of oil-free that better reflected consumer expectations, and that, based on that definition, consumers who purchased the Product got what they expected. However, that argument did not speak to the predominance question, *i.e.*, whether a reasonable fact finder could rely on Hickner’s definition to resolve whether the Product’s labeling was deceptive. *Olean*, 31 F.4th at 679.

With regard to expertise, Johnson & Johnson argued that Hickner lacked expertise in the field of skincare products, an industry with its own shared understanding of the term oil-free. That critique, however, did not go to Hickner’s qualifications as a chemist, but, again, to Johnson & Johnson’s theory of the case. To decide whether that theory should prevail, at this stage, would “put the cart before the horse by requiring plaintiffs to show at certification that they will prevail on the merits.” *Olean*, 31 F.4th at 667. Hickner’s chemistry expertise is sufficiently relevant to the task of assisting the fact finder in determining whether the Product’s packaging language was deceptive. *See Daubert II*, 43 F.3d at 1319. Whether it is sufficient to prove that the

packaging language was, indeed, deceptive is a question for a later stage of litigation. *Amgen*, 568 U.S. at 459.

Thus, Noohi has demonstrated that she will be able to resolve the common question of deception on a class-wide basis, in one stroke. *See Olean*, 31 F.4th at 666.

Materiality

Because materiality is objective, Noohi need not ultimately prove that the allegedly deceptive packaging language played a role in each class member's decision to purchase the Product, but only that it would have been important to a reasonable consumer. *See Steroid Cases*, 181 Cal. App. 4th at 157. Indeed, CLRA claims are "ideal for class certification because they will not require the [C]ourt to investigate class members' individual interaction with the product." *Bradach v. Pharmavite, LLC*, 735 F. App'x 251, 255 (9th Cir. 2018). In other words, it does not matter, here, *how* Noohi will prove that the packaging language was important to a reasonable person, because any individual class member could rely on that same evidence in their own, individual case. *See Olean*, 31 F.4th at 667. Thus, to establish that she can resolve materiality with common proof, Noohi need only show that she can resolve whether exposure to the deception occurred on a class-wide basis.

Noohi intends to demonstrate that putative class members were uniformly exposed to the oil-free packaging language by pointing to the Product's packaging, which prominently displayed the

language as part of the Product's name and was unavoidable. Johnson & Johnson did not dispute that the packaging language was visible to consumers who purchased the Product. Accordingly, the Court can infer class-wide exposure to the packaging language. *See Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 400 (N.D. Cal. 2021).

Thus, Noohi has demonstrated that she will be able to resolve materiality on a class-wide basis, in one stroke. *See Olean*, 31 F.4th at 666.

Damages

To show that damages are capable of measurement on a class-wide basis, Noohi must establish that “the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs’ legal theory.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017). She need not show the actual amount of damages incurred; just that “a valid method has been proposed for calculating those damages.” *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019). Further, CRLA “requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.” *Nguyen*, 932 F.3d at 818.

Noohi intends to calculate class-wide damages via a two-phase, market-based study that would measure, *inter alia*, changes in consumers’ likelihood of recommending or repurchasing the Product after they are told that the Product’s oil-free claim is false. Her econometrics expert, Dr. Wade Roberts, will, then, convert that change into a price premium to

approximate damages. Numerous courts have approved damage models in other CLRA cases that, like Noohi's model, endeavor to calculate the difference in value of a product with an alleged misrepresentation and without it, as a means of calculating damages. *See Nguyen*, 932 F.3d at 818.

Further, because Rule 23 "permit[s] the certification of a class that potentially includes more than a *de minimis* number of uninjured class members," Noohi's method is sufficient, at this juncture, even though it may show that *no* class members were actually harmed by the allegedly deceptive packaging language. *See Olean*, 31 F.4th at 669. The only question, here, is whether her proposal is *capable* of showing that putative class members incurred damages, not whether her proposal shows, now, that damages were, actually, suffered. *See Olean*, 31 F.4th at 669.

Johnson & Johnson, in its separately-filed evidentiary objections, challenged Roberts' opinions on several admissibility grounds. The Court disregarded those objections that lacked an evidentiary basis. The remaining objections failed to rebut Noohi's *prima facie* case that Roberts is qualified to deliver his econometric analysis, that his analysis will, ultimately, be useful to the fact finder, and that, ultimately, Noohi can support her damages calculations with admissible evidence when she needs to do so. *See Sali*, 909 F.3d at 1006.

Further, Johnson & Johnson challenged various aspects of Noohi's proposal. Johnson & Johnson's own experts argued that Noohi's damages model will not be useful because of, *inter alia*, the subset of

consumers she seeks to survey, the model's failure to consider supply side factors in calculating the price premium, and the preliminary and tentative nature of many specifics of her method. Those critiques do not establish that Noohi's proposed methodology is inadequate, but, rather, take issue with how her model might be executed and the conclusions that it might deliver. As such, those critiques are not yet ripe. Johnson & Johnson will have an opportunity – at summary judgment or trial – to demonstrate that Noohi's method failed to establish that class members were damaged. *See Tyson*, 577 U.S. at 457.

Consequently, Noohi established, at this juncture, that the class's CLRA damages are capable of measurement on a class-wide basis. *See Just Film*, 847 F.3d at 1120.

UCL and FAL Claims

The Court identified, above, two common issues that are central to Noohi's UCL and FAL claims: (1) Whether the oil-free packaging language is likely to deceive an objective reasonable consumer; and (2) Whether every member of the putative class was exposed to the packaging language. As discussed above for CLRA claim, those issues are, likewise, susceptible to common proof on a class-wide basis for the UCL and FAL claims.

Consequently, Noohi has demonstrated that, for each claim that she seeks to certify, there are common questions, susceptible to class-wide proof, which predominate over individual questions. *See Olean*, 31 F.4th at 666.

Therefore, Noohi has satisfied the predominance

requirement of Rule 23(b)(3).

Rule 23(b)(3) Superiority

Rule 23(b)(3) requires Noohi to establish that class adjudication is superior to other available methods of adjudication. Here, class adjudication is superior because if each of the putative class members were to file an individual action, the Court's resources would be drained, and no individual plaintiff would likely recover more than a few dollars. *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). Consequently, superiority is satisfied.

Accordingly,

It is Ordered that the motion for class certification be, and hereby is, **Granted**.

It is further Ordered that the class shall be defined as all consumers who purchased Neutrogena Oil-Free Moisture Sensitive Skin in California between April 17, 2016 and November 30, 2022.

It is further Ordered that Plaintiff Narguess Noohi be, and hereby is, **Appointed** as the named class representative.

It is further Ordered that Todd M. Friedman of Law Offices of Todd M. Friedman PC be, and hereby is, **Appointed** as class counsel.

Date: November 30, 2022

 /s/
Terry J. Hatter, Jr.
Senior United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NARGUESS NOOHI,
individually, and on behalf of
other members of the general
public similarly situated,

Plaintiff-Appellee,

v.

JOHNSON & JOHNSON
CONSUMER INC.,

Defendant-Appellant.

FILED

SEP 3 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 23-55190

D.C. No. 2:20-cv-
03575-TJH-JEM

Central District
of California, Los
Angeles

ORDER

Before: BERZON and MENDOZA, Circuit Judges,
and BOLTON,* District Judge

Judge Mendoza has voted to deny the petition for rehearing en banc, and Judge Berzon and Judge Bolton so recommend. The full court was advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. The petition for rehearing en banc, Dkt. No. 78, is DENIED.

* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX D

Relevant Statutory Provisions

Federal Rules of Civil Procedure

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

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impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

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

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

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

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

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

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

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

order whether to certify the action as a class action.

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

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

(2) *Notice.*

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

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

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;

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

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

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

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

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

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

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

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

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

(d) CONDUCTING THE ACTION.

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

(A) determine the course of proceedings or

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prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

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

(i) any step in the action;

(ii) the proposed extent of the judgment; or

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

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

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

(E) deal with similar procedural matters.

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

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a

proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

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

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

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

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

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

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

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

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

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

appeal;

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

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

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

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

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

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

(5) *Class-Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

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

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

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

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

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class

counsel, the court:

(A) must consider:

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

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

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

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

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

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

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

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

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

best able to represent the interests of the class.

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

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

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

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

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

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

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

Federal Rules of Evidence

Rule 702. Testimony by Expert Witnesses

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

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

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

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

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