No. _____

# In The Supreme Court of the United States

NISSAN NORTH AMERICA, INC.,

*Petitioner,*

v.

SHERIDA JOHNSON ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


AMIR NASSIHI
ANDREW CHANG
SHOOK, HARDY & BACON L.L.P.
555 Mission St.
San Francisco, Cal. 94105

CHRISTOPHER R. WRAY
*Counsel of Record*
HOLLY PAULING SMITH
SHOOK HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, Mo. 64108
(816) 559-2014
cwray@shb.com

*Counsel for Petitioner*

## QUESTIONS PRESENTED

This case presents two important and recurring questions at the intersection of Article III standing and class action law. In its decision below, the Ninth Circuit exacerbated circuit splits on both questions. This petition offers an ideal vehicle for resolving them.

The questions presented are:

1. Whether a federal court may certify a Rule 23(b)(3) class when almost no one in the class has suffered—or will suffer—an Article III injury.

2. Whether a federal court may circumvent Article III and Rule 23(b)(3) by characterizing a remote risk of harm as an "overpayment."

## PARTIES TO THE PROCEEDING

Petitioner (defendant-appellant below) is Nissan North America, Inc.

Respondents (plaintiffs-appellees below) are Sherida Johnson, Subrina Seenarain, Linda Spry, and Lisa Sullivan.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Nissan North America, Inc.'s parent corporation is Nissan Motor Co., Ltd., a publicly held company. Renault S.A., a publicly held company, owns 10% or more of Nissan Motor Co., Ltd.

## STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

*Johnson v. Nissan North America, Inc.*, No. 3:17-cv-00517-WHO (N.D. Cal.) (certifying class on July 21, 2022).

*Johnson v. Nissan North America, Inc.*, No. 22-80075 (9th Cir.) (granting Rule 23(f) interlocutory appeal on Oct. 22, 2022).

*Johnson v. Nissan North America, Inc.*, No. 22-16644 (9th Cir.) (judgment entered on November 14, 2024, and petition for rehearing and rehearing *en banc* denied on January 14, 2025).

There are no additional proceedings in any court that are directly related to this case.

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## INTRODUCTION

"Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). And under Rule 23(b)(3), a federal court may not certify a "damages class that includes both injured and uninjured members." *Lab. Corp. of Am. Holdings v. Davis*, 2025 WL 1583302, at *1 (U.S. June 5, 2025) (Kavanaugh, J., dissenting) ("*Labcorp*"). In its decision below, the Ninth Circuit took the wrong side of two independent circuit splits on the intersection between Article III and Rule 23(b)(3).

The named Plaintiffs each allege that their panoramic sunroofs ("PSRs") shattered because of a latent defect in the design of certain Nissan vehicles. But they seek relief on behalf of a class that does not share their experience. The overwhelming majority of the class members have had no shattering incidents. And the unrebutted evidence shows that over 99.8% of the class members will *never* experience an incident with their PSRs for any reason, let alone one traceable to the alleged defect. The Plaintiffs nonetheless sought to certify a class based on the circular theory that they "overpaid" for their vehicles *because of* the infinitesimally small risk of a future injury—relying on yet-to-be-tested expert opinion that the design defect may (or may not) economically affect all buyers of the Nissan vehicles.

Even though Rule 23 requires a fact-based certification inquiry, the district court certified a class

without any meaningful consideration of the evidence. The court held—and the Ninth Circuit affirmed—that the Plaintiffs' overpayment allegation established standing for all absent class members, despite the fact that 5.5 years of discovery failed to substantiate this allegation. The result is that Nissan must now defend a four-state class trial comprised of hundreds of thousands of absent class members who have never experienced—and will never experience—a broken panoramic sunroof.

This situation has arisen because the Ninth Circuit holds two flawed, and mutually reinforcing, positions about class certification: first, that a court may certify a class regardless of how few class members will ever suffer a cognizable injury; and second, that an alleged "overpayment" theory can end-run the requirement that Article III injuries must be either present or imminent. Both of these holdings give rise to a split in circuit authority.

This Court recently granted review of another Ninth Circuit decision that contributed to the same circuit split. In *Labcorp*, after hearing oral argument, the Court dismissed the writ of certiorari as improvidently granted because of a potential mootness question. *See* 2025 WL 1583302, at *1 (Kavanaugh, J., dissenting). This case poses a question nearly identical to the one in *Labcorp*—but it does so cleanly. It is an excellent vehicle for the Court to resolve longstanding, recurring disputes in Article III jurisprudence and class action law.

## OPINIONS BELOW

The Ninth Circuit's opinion (App. 1a) is unreported, but is available at 2024 WL 4784367. The district court's order (App. 7a) is also unreported, but is available at 2022 WL 2869528.

## JURISDICTION

The Ninth Circuit issued its opinion and judgment on November 14, 2024. Nissan's petition for rehearing and rehearing *en banc* was denied on January 14, 2025. App. 72a. On April 8, 2025, Justice Kagan extended the time to file a petition for writ of certiorari to June 13, 2025. *See* No. 24A950. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in relevant part at App. 74a–75a.

## STATEMENT OF THE CASE

### A. The District Court Certifies A Class That Consists Almost Entirely Of Uninjured Individuals.

Nissan manufactures automobiles. Like most automakers, Nissan on some models offers optional PSRs made from tempered safety glass. Nissan uses tempered glass because the tempering process makes the glass considerably stronger than the alternative, laminated glass. Also, if tempered glass breaks, it fractures into small fragments with relatively dull edges, unlike laminated glass, which breaks into

larger, more dangerous shards. Like all items made of glass, PSRs sometimes break; but only very rarely and, even then, for a wide variety of reasons. The Plaintiffs in this case allege that Nissan's PSRs break because of a common defect, and that this defect harmed every member of their proposed class because—due to the *risk* that the PSRs will shatter—the class members "overpaid" for their automobiles.

Before turning to the specifics of Plaintiffs' allegations, it is worth noting how this litigation has developed. This action is one of several similar class-action lawsuits against automakers that offer tempered-glass PSRs, but this is the only one that has survived summary judgment and had a class certified. *See, e.g., Lohr v. Nissan N. Am., Inc.*, 2022 WL 1449680 (W.D. Wash. May 9, 2022) (granting summary judgment); *Beaty v. Ford Motor Co.*, 2021 WL 3109661 (W.D. Wash. July 22, 2021) (denying class certification); *Anderson v. Ford Motor Co.,* 2020 WL 1853321 (W.D. Mo. Feb. 14, 2020) (granting summary judgment); *Kondash v. Kia Motors Am., Inc.*, 2020 WL 5816228 (S.D. Ohio Sept. 30, 2020) (denying class certification). The district court in this case had subject-matter jurisdiction over Plaintiffs' claims pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d).

This was also the fourth PSR-related action that Plaintiffs' counsel brought against Nissan. Two earlier ones in the Second and Third Circuit were voluntarily dismissed. *Seenarain v. Nissan N. Am., Inc.*, No. 1:16-cv-05499 (E.D.N.Y.); *Gunsenhouser v.*

*Nissan N. Am., Inc.*, No. 1:16-cv-05499 (D.N.J.). Another, *Lohr v. Nissan*, was brought in the Western District of Washington. There, the district court granted summary judgment to Nissan, bypassing the Ninth Circuit's Article III and Rule 23 jurisprudence by focusing on Washington state law. The court explained that: "It is for the Plaintiffs to demonstrate at this stage in litigation that they suffered some damages—it is circular logic to say they suffered injury because they overpaid for their vehicles where the cost failed to include the risk of injury—that injury being the risk of overpaying." *Lohr*, 2022 WL 1449680, at *5.

The expert evidence in *Lohr* was identical to this case—all experts submitted the same reports captioned for both cases and were deposed together. The *Lohr* district court rejected their promise to offer proof of injury in the future, noting that "[t]he Court is essentially left with just Plaintiffs' word that their experts will conclude that Plaintiffs overpaid after conducting a classwide survey," adding that "[n]ot only is this speculative, Nissan was able to get Plaintiffs' expert stating on the record that the survey could conclude Plaintiffs did not overpay for their vehicles." *Id.* Though the *Lohr* plaintiffs initially appealed, they successfully moved to dismiss their own appeal (over Nissan's objection). *Lohr v. Nissan N. Am., Inc.*, No. 22-35473, 2022 WL 17591499, at *1 (9th Cir. Sept. 26, 2022).

Meanwhile, the National Highway Traffic Safety Administration ("NHTSA") opened an industrywide

investigation into PSRs (including Nissan's PSRs), and ultimately closed that investigation in 2021, finding insufficient evidence that a safety defect existed. As part of its investigation, NHTSA surveyed break rates for vehicles industrywide to identify any models with elevated rates. Not a single Nissan vehicle with a panoramic sunroof was identified as having a high breakage rate. *See* App. 10a.

Despite all these developments, the named Plaintiffs here continued to rely on the same, repeatedly rejected theory of injury. The Plaintiffs are a handful of the very few Nissan automobile owners whose PSRs broke. They attribute that event to an alleged—but unidentified—design defect in Nissan's PSRs, and allege Nissan somehow knew about this unidentified defect at the time the vehicles were purchased but did not disclose it to them. The uncontroverted evidence shows that fewer than 0.2% of Nissan's PSRs break—from *any* cause, including when a tree falls on them, when there is a rollover accident, or when they are hit by a hard rock—during the life of the vehicle. App. 10a. The percentage of PSR fractures traceable to Plaintiffs' alleged *defect* would be even lower than 0.2%; indeed, it could be entirely nonexistent. *Id.*

Nonetheless, Plaintiffs contend that each and every PSR purchaser was necessarily and uniformly harmed by Nissan's failure to disclose the alleged "defect." Their position is that *every* member of the class overpaid for their vehicles because some unknown portion of the 0.2% *may* have had their

sunroofs break due to the unspecified defect. They based this position primarily on their pleading allegations and on the opinion of an economics expert who had not completed the proposed consumer survey that would supposedly show an overpayment. But Plaintiffs' economic expert admitted that the damages model may ultimately show no damages. App. 21a.

Nissan had submitted evidence which illustrated that negative publicity about PSRs resulted in no impact on the resale market for the vehicles at issue. In other words, Nissan affirmatively demonstrated that no overpayment occurred. But the district court did not analyze it, instead allowing Plaintiffs' theorized overpayment model to prevail.

Over Nissan's Article III and Rule 23(b)(3) objections (detailed below), the district court certified four state classes (from California, Colorado, Florida, and New York). App. 8a. The classes generally cover everyone in those states who purchased Nissan vehicles for personal use within the statute-of-limitations period, though the certification order did not provide precise class definitions. App. 8a, 70a. In certifying the class, the district court viewed the Plaintiffs' alleged injury entirely through the lens of how it had been *characterized*. It reasoned that, "for purposes of the consumer protection statutes," injury occurred when consumers "paid more than they would had the [alleged defect] been disclosed." App. 68a.

### B. The Ninth Circuit Affirms, Evading The Article III Issues By Adopting Plaintiffs' "Overpayment" Theory Of Injury.

The Ninth Circuit granted interlocutory review under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). Nissan argued again that the class had been improperly certified because almost all of the class members lack Article III standing. The Ninth Circuit affirmed in an unpublished opinion, providing the following analysis of the injury issue:

> Nissan contends that the district court erred by certifying a class in which the vast majority of class members have never had—nor ever will have—a broken panoramic sunroof. Nissan misconstrues Plaintiffs' theory of liability. Plaintiffs allege that class members paid more for panoramic sunroofs at the point of sale than they would have had Nissan properly disclosed the material design defect that causes its sunroofs to spontaneously shatter under normal driving conditions. Plaintiffs' benefit-of-the-bargain theory of injury thus affects the entire class. Although Nissan argues otherwise, we apply Rule 23, not Article III standing, to analyze purported dissimilarities between class representatives and unnamed class members. Regardless, Plaintiffs' claim—

> that class members spent money that, absent Nissan's actions, they would not have spent—is a quintessential injury-in-fact.

App. 5a (quotes, brackets, and citations omitted).

## REASONS FOR GRANTING THE PETITION

This Court has long held that a named plaintiff in a putative class action must have Article III standing, and that nothing in Rule 23 may abridge that constitutional requirement. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976) ("That a suit may be a class action * * * adds nothing to the question of standing * * * ."). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[A] plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 594 U.S. at 423 (citing *Lujan*, 504 U.S. at 560–61).

In *TransUnion*, this Court reaffirmed that in a Rule 23 class action, "[e]very class member must have Article III standing in order to recover individual damages," because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 594 U.S. at 431 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). But

*TransUnion* expressly left open "the distinct question whether every class member must demonstrate standing *before* a court certifies a class," or only afterward to recover damages. *Id*. at 431 n.4.

This open—and urgent—question has fractured the circuits. The Court should grant certiorari to decide whether a Rule 23(b)(3) class can be certified when, as here, almost *no one* in the class has suffered or will suffer an Article III injury. This case also implicates a related question that has produced a division in authority. The Court should grant review to decide whether a federal court may circumvent Article III and Rule 23(b)(3) by *characterizing* a remote risk of harm as an "overpayment"—the Ninth Circuit's approach here.

### A. The Court Should Grant Review To Decide Whether A Class May Be Certified When the Vast Majority Of Its Members Lack Standing.

#### 1. The Ninth Circuit Deepened A Split On The Question Presented.

This Court is familiar with the circuit split at the heart of this case. The Second, Fourth, and Eighth Circuits have held that a putative class may not be certified if it includes any uninjured members. *See, e.g., Alig v. Rocket Mortg.*, 126 F.4th 965, 968 (4th Cir. Jan. 23, 2025) ("every class member must have Article III standing," including "proof that the challenged conduct caused each of them a concrete harm");

*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"); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 988 n.3 (8th Cir. 2021) ("[A] class cannot be certified where it is defined in such a way to include individuals who lack standing.").

The D.C. and First Circuits, by contrast, have allowed classes to be certified even though they might include a *de minimis* number of uninjured class members at the time of certification. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–25 (D.C. Cir. 2019) ("5% to 6% constitutes the outer limits of a de minimis number" of uninjured class members) (cleaned up); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 47 (1st Cir. 2018) (putting the de minimis amount at "around 10%").

Two other circuits have been more permissive, allowing class certification even if a "significant" number of absent class members may be unharmed. The Seventh Circuit has held that there is a problem only if a "great many" of the class members are unharmed. *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) ("There is no precise measure for 'a great many.'"). The Eleventh Circuit has held that certification is foreclosed only where a "large portion" of members lack injury. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267–67 (11th Cir. 2019).

Before this case, the Ninth Circuit had embraced something akin to the third approach. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc) ("[W]e reject the dissent's argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members."). But here, the Ninth Circuit exacerbated the split further. At best, the Ninth Circuit pushed the third approach to an extreme, affirming the certification of a class where a *de minimis* number of class members will ever *have* an injury in fact. At worst, the Ninth Circuit turned a three-way split into a four-way split: a class may be certified simply because the named Plaintiffs *pleaded* (but did not offer evidence of) a class-wide injury.

This Court recently granted a writ of certiorari and heard oral argument on the question of "[w]hether a federal court may certify a damages class pursuant to Federal Rule of Civil Procedure 23 when the class includes both injured and uninjured class members." *Labcorp*, 2025 WL 1583302, at *1 (Kavanaugh, J., dissenting). But the Court dismissed the case as improvidently granted because of a "threshold mootness question." *Id.* at *1. This case presents a good vehicle to resolve the issue that evaded review in *Labcorp*—which, as the Court has acknowledged, is more than cert-worthy.

### 2. The Ninth Circuit's Decision Warrants Immediate Correction.

The Court should grant review and adopt the approach of the Second, Fourth, and Eighth Circuits—it should hold that a class may not be certified if it includes *any* uninjured members. But even if the Court were to adopt the approach of the D.C. and First Circuits ("*de minimis*" number uninjured class members do not preclude class certification) or that of the Seventh and Eleventh Circuits ("significant" number does not preclude class certification), the Ninth Circuit's decision should be reversed. Under that decision, a class may be certified no matter *how* many uninjured class members it includes. This rule is not just wrong—it is grossly unfair to defendants in putative class actions.

Justice Kavanaugh put it well in his *Labcorp* dissent: "when a damages class includes both injured and uninjured members, common questions do not predominate." 2025 WL 1583302, at *2. Simply put, "if there are members of a class that aren't even injured, they can't share the same injury with the other class members." *Id.* at *3. "The Ninth Circuit's [case law] is incorrect under Rule 23 and this Court's precedents, and it will generate serious real-world consequences." *Id.* As Justice Kavanaugh explained:

> Classes that are overinflated with *uninjured* members raise the stakes for businesses that are the

> targets of class actions. Overbroad and incorrectly certified classes threaten massive liability * * * . That reality in turn can coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial. * * * Importantly, the coerced settlements substantially raise the costs of doing business. And companies in turn pass on those costs to consumers in the form of higher prices; to retirement account holders in the form of lower returns; and to workers in the form of lower salaries and lesser benefits. So overbroad and incorrectly certified classes can ultimately harm consumers, retirees, and workers, among others.

*Id.*

All of this is correct. Even if damages are not awarded to uninjured class members at the *end* of the case, the problem exerts enormous—and unfair—pressure on defendants *throughout* the case. A defendant facing a certified class swollen by uninjured members must prepare to litigate claims that—though destined to fail at some unspecified point—nonetheless drive up the costs of discovery, expert analysis, and trial preparation. In addition, the mere presence of uninjured class members increases the *perceived* exposure, magnifying the pressure to settle for sums far exceeding the value of

valid claims. This distortion is coercive, because such "a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

The Court should grant review to decide whether a class action can be certified if it consists almost entirely of uninjured plaintiffs. And as discussed next, the Court should decide the related question implicated by the Ninth Circuit's decision—whether the Article III and Rule 23(b)(3) issues can be elided through an "overpayment" theory of injury.

### B. The Court Should Grant Review To Decide Whether This Class Was Properly Certified Based On An "Overpayment" Theory Of Harm.

The Plaintiffs' view is that everyone in the class was harmed because (i) they face an infinitesimally low risk of future injury as a result of the alleged design defect; and (ii) they would have paid less for their vehicles if they had been aware of the defect at the time of purchase. The Ninth Circuit adopted this theory, thereby allowing it to circumvent the issue of whether the class members will ever suffer a *real-world* or *concrete* injury. This holding, too, cries out for the Court's consideration.

The Ninth Circuit's decision implicates its own circuit split. One line of authority, like the decision here, allows overpayment claims to proceed with no rigorous analysis. *See also Nguyen v. Nissan N. Am.,*

*Inc.*, 932 F.3d 811, 822 (9th Cir. 2019) ("Plaintiff does not seek damages for the faulty performance of the clutch system; such a theory of liability would * * * require individualized analysis that might defeat predominance. Instead, Plaintiff's theory is that the allegedly defective clutch is itself the injury, regardless of whether the faulty clutch caused performance issues."); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010).

By contrast, other courts of appeals have rejected the argument that plaintiffs may show Article III standing without a showing of injury, even in the context of overpayment theories like these Plaintiffs advocate. *See, e.g., Rocket Mortg.*, 126 F.4th at 974 (rejecting standing as too tenuous where "they lack evidence that the class members' appraisals were actually inflated"); *Johannesohn v. Polaris Indus. Inc.*, 9 F.4th 981 (8th Cir. 2021) (no Article III standing in consumer-protection class action alleging "inflated purchase price" because "plaintiffs claiming economic injury do not have Article III standing in product defect cases unless they show a manifest defect"); *Rivera v. Wyeth-Ayerst Lab.*, 283 F.3d 315, 320 (5th Cir. 2002) (rejecting "benefit of the bargain" Article III theory for implied-warranty and state consumer-protection claims where plaintiff "paid for an effective pain killer, and she received just that"); *see also In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices and Liab. Litig.*, 903 F.3d 278, 285 (3d Cir. 2018) ("[A] plaintiff must do more than offer conclusory assertions of economic

injury in order to establish standing. [They] must allege facts that would permit a factfinder to value the purported injury at something more than zero dollars without resorting to mere conjecture.").

The majority position aligns with this Court's precedents on future Article III harm: "allegations of *possible* future injury are not sufficient" to establish standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up) (emphasis in original). "An allegation of future injury may suffice" for Article III standing only "if the threatened injury is *certainly impending*, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (emphasis added). The Ninth Circuit had previously considered whether an overpayment theory can be used in an omission case to be an open question, yet it permitted it here. *Cf. Bowen v. Energizer Holdings*, 118 F.4th 1134, 1145 n.10 (9th Cir. 2024) (recognizing open question in this Circuit whether an "overpayment theory of economic injury" is viable in a "case that does not involve misrepresentations"); *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 707 (9th Cir. 2020) (describing "overpayment theory of economic injury in a case that does not involve misrepresentations" as "novel").

Here, the Plaintiffs obtained class certification without showing either a substantial risk that either the alleged defect or the alleged economic injury will ever manifest, let alone that such outcomes are certainly impending. Although allegations of "overpayment" may be sufficient at the pleading

stage, by the time the case progresses to class certification, the plaintiffs should be ready to demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* 504 U.S. at 561. At class certification, the plaintiffs must produce factual evidence—not just allegations—that standing exists. *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011) ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.") (emphasis in original); *Flynn v. FCA US LLC*, 39 F.4th 946, 952, n.1 (7th Cir. 2022) ("The plaintiffs cast their argument in the form of a truism: they maintained that consumers would pay less for an 'unsafe' car than they would a 'safe' car. But it was their burden to produce evidence in response to a factual challenge to standing.").

The Ninth Circuit based its decision on the incorrect belief that evidentiary challenges to the existence of a common product defect, including its effect on the value of the product, need not be resolved because federal courts "do not reach merits questions" when reviewing class-certification decisions. App. 2a. The Sixth Circuit has rejected a nearly identical rationale in a case involving PSR claims. *In re Kondash*, 2021 WL 12285809, at *1 (6th Cir. Mar. 11, 2021) (unpublished) ("Although the reason for denying class certification (the lack of a common [PSR] defect) might overlap with a merits issue

(whether a defect exists), this sort of overlap occurs frequently and does not by itself invariably signal an abuse of discretion."). Rightly so, because this Court has repeatedly stressed that "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 564 U.S. at 350. Rule 23's "rigorous analysis" will therefore "[f]requently * * * entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351; *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (rejecting the view that merits have "no place in the class certification inquiry" because it "flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim" (cleaned up)).

One reason for the Ninth Circuit's confusion is that this Court has never expressly held that the class certification inquiry is governed by the Federal Rules of Evidence. This has resulted in yet another divergence in circuit authority. The First, Third, Fifth, Seventh, and Eleventh Circuits have each held that expert evidence must undergo a full Rule 702 analysis. *In re Asacol,* 907 F.3d at 53; *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021); *Am. Honda Motor Co. v. Allen,* 600 F.3d 813, 815–16 (7th Cir. 2010); *Sher v. Raytheon Co.*, 419 F. App'x 887, 889 (11th Cir. 2011). The Eighth and Ninth Circuits, however, do not impose the same requirement; they have held that, because class certification is "tentative, preliminary, and limited," a full Rule 702 inquiry is unnecessary. *In re Zurn Pex*

*Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (cleaned up); *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1003 (9th Cir. 2018).

The Ninth Circuit has further extended this logic to hold that a proposed expert need not actually perform their work before certification, a holding the panel relied on here. App. 4a–5a. Shortly before this decision was handed down, the Ninth Circuit decided *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1033–34 (9th Cir. 2024), resolving a deep split within the Ninth Circuit about whether these surveys need to be performed before certifying a class, or whether the court may rely on the promise of the survey being performed later. The Ninth Circuit concluded that a survey sketch was all that was necessary, because Rule 23 only requires assessing whether damages are *capable* of being measured classwide, not whether classwide damages exist. App. 5a. But by allowing incomplete damages models even in cases where the promised model is the sole basis for classwide standing, the Ninth Circuit is completely eschewing any required showing of actual harm by absent class members for both Rule 23 and Article III purposes, on the grounds that doing so would be a "merits" question beyond the scope of the "preliminary" Rule 23 inquiry. The Ninth Circuit here relied heavily on *Lytle*, but that decision itself creates an environment where unperformed conjoint surveys, which are already a frequently-used type of damages model (if not the most frequently used) in consumer class actions, will become the norm.

Compounding the lack of evidence of overpayment because of a failure to perform the promised survey is the panel's assumption that Plaintiffs' overpayment theory "affects the entire class," without analyzing the evidentiary challenges affecting that assumption. App. 5a (citing *Nguyen*, 932 F.3d at 822, and *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010)). The Ninth Circuit wrongly applied the outdated and overruled *Wolin* and *Nguyen* line of cases in finding that a plaintiff at the class certification stage need not prove all class members suffered or will suffer a manifestation of the alleged defect.

*Wolin* relied on a single case decided half a century ago, before the *TransUnion* jurisprudence. *Wolin*, 617 F.3d at 1173 (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)). *Blackie* held that "neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class." *Blackie*, 524 F.2d at 901 (citing only *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)). But *Eisen* had held that an inquiry into the merits at the certification stage for purposes of shifting class notice costs was not permitted, and that holding—the only support for *Blackie*'s ruling and so the only support for *Wolin*—has since been overruled, as this Court has expressly recognized. *See Wal-Mart*, 564 U.S. at 351 n.6 (2011) (calling *Eisen* "the purest dictum" and stating that it "is contradicted by our

other cases"). *Wolin* is irreconcilable with *Wal-Mart* and so has effectively been overruled. Thus, this issue warrants review not only because of the circuit split, but also because it constitutes a "departure by a lower court" that "call[s] for an exercise of the [Supreme Court's] supervisory power." SUP. CT. R. 10(a).

Because of that legal error, the district court and the Ninth Circuit looked primarily to how Plaintiffs' injury had been characterized for pleading purposes and by their damage experts. This say-so approach to standing ignored the factual and economic reality. The only way an inflated purchase price (meaning an overpayment) could exist is if either a particular buyer's PSR will inevitably shatter (Alternative A), or the risk of shattering exceeds some baseline level expected of every vehicle with glass parts (Alternative B). There is no evidence that Alternative A is true: it is uncontroverted that fewer than 0.2% of the class vehicle PSRs shatter for any reason. And Alternative B is not true either: Plaintiffs have never put forward any evidence showing that any PSRs have fractured because of the alleged defect; when pressed, they disavowed that the underlying risk of fracture is relevant to the case at all.

Plaintiffs' own damages expert admitted in deposition that the consumer survey, once it is eventually conducted, could show no damages whatsoever. The district court acknowledged this, but said it did not matter, holding that "[i]f an assessment of empirical damages is properly designed then there

is *always* a chance shows that there were no damages." App. 20a–21a (emphasis in original).

Thus, as a practical matter, Plaintiffs were only required to *plead*—not *proffer facts* showing—that they (and the class members) had standing. The Ninth Circuit elided this distinction simply because "Plaintiffs *allege[d]* that class members paid more for panoramic sunroofs at the point of sale than they would have had Nissan properly disclosed" the alleged defect. App. 5a (emphasis added). This alleged "benefit-of-the-bargain theory of injury," the court reasoned, "thus affects the entire class." *Id.*

The Ninth Circuit acknowledged that Nissan had disputed Plaintiffs' allegations of injury, but waved away those disputes on the theory that the court "appl[ies] Rule 23, not Article III standing, to analyze purported dissimilarities between class representatives and unnamed class members." App. 5a. In its view, the courts are not supposed to "reach merits questions" when reviewing class-certification decisions, and it therefore ignored Nissan's evidence-based arguments. App. 2a–3a.

Relying on this combination of the Ninth Circuit's standing analysis and lax application of the Rules of Evidence, plaintiffs in any case can improperly plead their way to certification by wording their allegations to characterize injury from alleged defects as economic only, and then refrain from presenting any economic evidence at certification. *See Nguyen,* 932 F.3d at 819 (asserting that "characterization is

crucial" for certification inquiry). But doing so upends the constitutional order and turns class-action law on its head. In class actions, plaintiffs are supposed to show that they have "*in fact*" met Rule 23's requirements, not that they have correctly characterized their allegations to avoid further inquiry. *Wal-Mart,* 564 U.S. at 350.

### C. This Case Is A Clean Vehicle To Resolve These Splits, Which Undermine National Uniformity In Class Action Jurisprudence.

The Ninth Circuit's approach to class certification allows class certification based on pleading—but not proving—injury, and it looks past whether there are uninjured class members for purposes of Article III. Not only does this deepen the aforementioned circuit splits, the Ninth Circuit's approach invites inconsistency in the administration of class actions nationwide. This divergence introduces instability into the federal class-action regime, particularly in product-defect cases, where class counsel will increasingly rely on untested theories of economic harm and unperformed damages models to support certification of overbroad classes without regard for whether the product is, in fact, defective. Permitting plaintiffs to plead their way to certification—substituting generalized allegations of diminished value for evidence of actual, individualized injury—sidesteps the evidentiary rigor that certification demands, permitting classes to proceed based on conjecture rather than proof. Defendants will no

longer be afforded the meaningful protections that Rule 23 and Article III are meant to provide.

Moreover, without this Court's intervention, the Ninth Circuit's approach will continue to distort the federal class-action mechanism into a tool of settlement leverage rather than adjudication. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). Standing is not to be "dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). When it is, it "raise[s] the stakes for businesses that are the targets of class actions," and can "threaten massive liability." *Labcorp*, 2025 WL 1583302, at *3 (Kavanaugh, J., dissenting).

This case presents a clean vehicle to resolve the division among the circuits and to restore the coherence and constitutional grounding of federal class actions. The Court should take this opportunity to clarify that Article III injury is required for all members of a class certified pursuant to Federal Rule of Civil Procedure 23, rather than allowing the split created by the Ninth Circuit's ruling to deepen. The Court should also hold that at class certification, overpayment theories can only proceed if there is evidence of overpayment by all class members.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

AMIR NASSIHI
ANDREW CHANG
SHOOK, HARDY & BACON L.L.P.
555 Mission St.
San Francisco, Cal. 94105

CHRISTOPHER R. WRAY
*Counsel of Record*
HOLLY PAULING SMITH
SHOOK HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, Mo. 64108
(816) 559-2014
cwray@shb.com

June 13, 2025

# APPENDIX

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**APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 14, 2024**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-16644

SHERIDA JOHNSON, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED; *et al.*,

*Plaintiffs-Appellees,*

v.

NISSAN NORTH AMERICA, INC.,

*Defendant-Appellant.*

Filed November 14, 2024

Argued and Submitted October 21, 2024
San Francisco, California

**MEMORANDUM***

NOT FOR PUBLICATION

Appeal from the United States District Court
for the Northern District of California
D.C. No. 3:17-cv-00517-WHO
William Horsley Orrick, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*Appendix A*

Before: WARDLAW and SANCHEZ, Circuit Judges, and LYNN,** District Judge.

In this interlocutory appeal pursuant to Federal Rule of Civil Procedure 23(f), Defendant Nissan North America, Inc. ("Nissan") appeals the district court's order certifying state-based classes. Plaintiffs allege that Nissan failed to disclose an alleged defect in the design of panoramic sunroofs utilized across several of Nissan's vehicle models in violation of implied warranty and consumer protection laws of several states.[1] We review for abuse of discretion the decision to certify a class and any underlying Rule 23 decisions involving a discretionary determination. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC,* 31 F.4th 651, 663 (9th Cir. 2022) (en banc), *cert. denied sub nom.* 143 S. Ct. 424, 214 L. Ed. 233 (2022) (cleaned up). In doing so, we do not reach merits questions and confine our review to the district court's certification decision.[2] *See Stockwell v. City & Cnty. of San Francisco,* 749 F.3d 1107, 1113 (9th Cir. 2014). We have jurisdiction under 28 U.S.C. § 1292(e) and Rule 23(f), and we affirm.

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** The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

1. The district court granted class certification as to state law claims arising in California, Colorado, New York, and Florida

2. The posture of this interlocutory appeal of a class certification order accordingly requires us to apply a different standard of review than the one to be applied in our companion case *Sonneveldt v. Mazda Motor of Am., Inc.,* 23-55325 (9th Cir. submitted Oct. 21, 2024), which involves an appeal from an order granting summary judgment. *See Lytle v. Nutramax Lab'ys, Inc.,* 114 F.4th 1011, 1023 (9th Cir. 2024) (stating that "class certification is different from summary judgment").

*Appendix A*

1. The district court did not abuse its discretion in finding several common questions of law and fact which predominate over individual inquiries. *See* Fed. R. Civ. P. 23(a)(1), (b)(3). The district court cited (i) "the nature of the alleged defect"; (ii) "Nissan's knowledge (or lack thereof) about the alleged defect"; (iii) "whether a reasonable consumer would find the omission of the defect material"; (iv) "whether the vehicles violated the implied warranty of merchantability"; and (v) the "extent to which Nissan's nondisclosure constituted concealment." The district court correctly concluded that these common questions can be answered in a way that necessarily holds across the whole class and that the resolution of these questions predominates over any individual inquiries. *See Olean,* 31 F.4th at 664 (inquiring "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." (quoting *Tyson Foods, Inc. v. Bouaphakeo,* 577 U.S. 442, 444 (2016))).

Nissan argues that there is no admissible evidence of an alleged common design defect that increases the panoramic sunroofs' likelihood of spontaneously shattering. Yet, as our cases explain, proof of a defect is not required to establish class certification because that is a merits inquiry. *See Wolin v. Jaguar Land Rover N. Am., LLC,* 617 F.3d 1168, 1173 (9th Cir. 2010) ("proof of the manifestation of a defect is not a prerequisite to class certification" in cases about defective car designs (internal citation omitted)); *Nguyen v. Nissan N. Am., Inc.,* 932 F.3d 811, 821 (9th Cir. 2019) (stating same); *see also Lytle,* 114 F.4th at 1023 (in predominance inquiry, "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." (quoting *Olean,* 31 F.4th at 666-67)). Because our present review is limited to questions pertaining to class certification, the only relevant inquiry is whether Plaintiffs' claims are susceptible to common proof, which they are for the reasons discussed above.

2. The district court did not abuse its discretion in finding that the materiality and reliance elements of the Plaintiffs' consumer protection claims raised common issues supporting class certification. *See* Fed. R. Civ. P. 23(a)(2).Because Plaintiffs can prove materiality and reliance with an objective, reasonable consumer standard, we have recognized that both elements of consumer protection laws are "generally susceptible to common proof." *Lytle,* 114 F.4th at 1034. After finding sufficient evidence of objective materiality, the district court did not abuse its discretion by inferring that Plaintiffs will be able to show causation classwide. *See Lytle,* 114 F.4th at 1034 (explaining that under the California consumer protection law, "causation, on a classwide basis, may be established by materiality, [and] [i]f the trial court finds the material misrepresentations have been made to the entire class, an inference of reliance arises as to the class" (cleaned up)).

3. The district court did not abuse its discretion in accepting Plaintiffs' unperformed damages model to support class certification. We have held that class plaintiffs may "rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof so long as the district court finds, by a preponderance of the evidence, that the model will be able to reliably

calculate damages in a manner common to the class at trial." *Lytle,* 114 F.4th at 1024. The district court made such a finding here.[3]

4. Nissan contends that the district court erred by certifying a class in which the "vast majority" of class members "have never had—nor ever will have—a broken [panoramic sunroof]." Nissan misconstrues Plaintiffs' theory of liability. Plaintiffs allege that class members paid more for panoramic sunroofs at the point of sale than they would have had Nissan properly disclosed the material design defect that causes its sunroofs to spontaneously shatter under normal driving conditions. Plaintiffs' benefit-of-the-bargain theory of injury thus affects the entire class. *See Nguyen,* 932 F.3d at 822 (finding an identical theory cognizable and capable of satisfying the predominance requirement); *see also Wolin,* 617 F.3d at 1173 (finding same). Although Nissan argues otherwise, we apply Rule 23, not Article III standing, to analyze purported dissimilarities between class representatives and unnamed class members. *See Melendres v. Arpaio,* 784 F.3d 1254, 1262 (9th Cir. 2015). Regardless, Plaintiffs' claim—that class members "spent money that, absent [Nissan's] actions, they would not have spent"—is a "quintessential injury-in-fact." *Maya v. Centex Corp.,* 658 F.3d 1060, 1069 (9th Cir. 2011) (internal quotations omitted).

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3. The district court also correctly rejected Nissan's methodological challenges to the Plaintiffs' damages model because they go to the weight of the evidence rather than its admissibility.

5. The district court did not abuse its discretion in allowing named Plaintiffs to represent the owners of vehicle models that named Plaintiffs do not own. As the district court correctly noted, even if the class encompasses other vehicle models, the class vehicles all share the same panoramic sunroof design. It is undisputed that the panoramic sunroofs in all the class vehicles come from the same two manufacturers and share a "common design concept of tempered glass panels." *See Wolin*, 617 F.3d at 1175 ("Typicality can be satisfied despite different factual circumstances surrounding the manifestation of the defect."). As alleged, all class members who overpaid for the panoramic sunroofs have the same injury by way of the same defective design.[4]

6. Finally, the district court did not violate the Rules Enabling Act, which in the class certification context forbids using the Federal Rules of Civil Procedure to "abridge, enlarge or modify any substantive right" beyond what would otherwise be available in individual litigation. *See* 28 U.S.C. § 2072(b); *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155-56 (9th Cir. 2016). Nissan points to no such expansion of rights or limitation of defenses. Instead, Nissan's arguments merely reflect its dissatisfaction with the district court's rejection of the merits of Nissan's motion to dismiss—claims which Nissan may pursue at later stages of this litigation.

**AFFIRMED.**

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4. The same holds true for lessee class members because Plaintiffs' class-wide damages analysis will measure the amount class members paid "at the time and point of first purchase *or lease*."

## APPENDIX B — ORDER ON MOTIONS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JULY 21, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:17-cv-00517-WHO

SHERIDA JOHNSON, *et al.*,

*Plaintiffs,*

v.

NISSAN NORTH AMERICA, INC.,

*Defendant.*

Filed July 21, 2022

## ORDER ON MOTION FOR SUMMARY JUDGMENT, MOTION FOR CLASS CERTIFICATION, AND *DAUBERT* MOTIONS

Re: Dkt. Nos. 135, 149, 150, 151, 213

The plaintiffs in this putative class action purchased vehicles made by defendant Nissan North America, Inc. ("Nissan"). Those vehicles had a premium feature: large panoramic sunroofs ("PSRs"). According to the plaintiffs, Nissan's PSRs are designed in a way that creates a

propensity to fracture and shatter under ordinary driving conditions. The plaintiffs brought suit against Nissan under California, New York, Colorado, Florida, and Illinois law. They claim that Nissan violated those states' consumer protection statutes by failing to disclose the alleged defect. And they claim that Nissan violated implied warranties of merchantability because the alleged defect rendered the vehicles unfit for ordinary use.

The plaintiffs move to certify state-based classes for these claims; Nissan moves to exclude the plaintiffs' damages and technical experts and for summary judgment. Nissan's *Daubert* motions are denied. Nissan's motion for summary judgment is granted in part to the extent the plaintiffs seek restitution or unjust enrichment for purchases of used cars from entities other than Nissan. It is otherwise denied: there are genuine disputes of material fact about the existence of this alleged defect, whether it would be material to reasonable consumers, whether they would rely on it if it had been properly disclosed, and the handful of other challenges Nissan makes. The motion to certify is granted on the California, New York, Colorado, and Florida classes, though I narrow the proposed class definitions for several of them. Certification of the Illinois class and the plaintiffs' untimely request for certification of an injunctive-relief class are denied.

## BACKGROUND

### I. FACTUAL BACKGROUND

Nissan manufactures automobiles. Some of its models have PSRs. *See, e.g.*, Report of Thomas L. Read, Ph.D.

("Read Rep.") [Dkt. No. 220-7] ¶ 17; *see also id.* ¶¶ 14-46. A sunroof is "panoramic" when it is larger than a one-half-meter squared. *Id.* ¶ 16. Panoramic sunroofs are, consequently, larger than traditional sunroofs. *Id.* ¶¶ 15-16. The PSRs in the Nissan vehicles at issue are made from "tempered glass." Tempered glass is heat-treated then rapidly cooled, which solidifies the surface while leaving the inside fluid. *Id.* ¶ 22. As a result, the core cools and contracts, pulling on the surface, creating compression and stress. *Id.* The PSRs use panels of curved tempered glass. *Id.* ¶ 27. Once the glass is curved, a ceramic print is added to the edge made of "frit" and "polymer binders" so that it can be affixed to the car's frame. *Id.* ¶ 28.

The vehicles at issue here are the Nissan Maxima (from 2009 to 2014 and 2016 to 2020), Nissan Rogue (from 2014 to 2020), Nissan Pathfinder (from 2013 to 2020), Nissan Murano (from 2009 to 2020), Infiniti JX (2013 edition), and Infiniti QX60 (from 2014 to 2020) (collectively, the "Class Vehicles"). *See* Motion for Class Certification ("Cert. Mot.") [Dkt. No. 134-4] 2. Each of the Class Vehicles incorporates the PSR described above. According to the plaintiffs, the PSRs in the Class Vehicles have a "defect." *See*, *e.g.*, *id.* 3. In brief, the plaintiffs and their experts contend that the way the Class Vehicles' PSRs are designed makes them vulnerable to fracturing or shattering under normal—or, in their language, "ordinary and foreseeable"—driving conditions. *See*, *e.g.*, *id.* 3-6. As described below, they assert that this shattering can be dangerous while driving.

Each of the named plaintiffs purchased either a new or used Class Vehicle. The named plaintiffs come from,

respectively, California (Sherida Johnson and Chad Loury), New York (Subrina Seenarain), Colorado (Linda Spry), Florida (Lisa Sullivan), and Illinois (April Ahrens).

According to Nissan, the Class Vehicles' PSRs are not defective. *See*, *e.g.*, Opposition to the Cert. Mot. ("Cert. Oppo.") [Dkt. No. 146-18] 1. The primary focus of the current motions is not Nissan's merits defense, so I only briefly sketch it out. Nissan contends that the National Highway Traffic Safety Administration ("NHTSA") has set regulatory standards for automobiles that dictate how strong sunroof glass must be and how small the pieces must be when they break. *See id.* 2-3. It contends that its PSRs are within the norm for the industry. *Id.* 3. It contends that there have been multiple NHTSA investigations into tempered glass in cars—though none into Nissan—and have never found that PSRs similar to Nissan's were dangerous. *See id.* 3-4. And it contends that only about 0.15% of its PSRs shatter (though that number is from all Nissan vehicles, not the Class Vehicles). *Id.* 1, 4-6.

## II. PROCEDURAL BACKGROUND

The named plaintiffs (and others who have since been dismissed) filed suit February 2017 on behalf of themselves and state-based putative classes. Dkt. No. 1. The case proceeded apace until the parties repeatedly agreed to delay class certification (and related motions). *See* Dkt. Nos. 103, 112, 121, 124, 126, 129. In February 2021, the plaintiffs moved for class certification. In response, in June 2021, Nissan moved to exclude the plaintiffs' expert

witnesses. One of Nissan's arguments was about the California plaintiffs not having filed a statutorily required letter. The parties therefore agreed to delay deciding the motions until the plaintiffs could move for leave to file an amended complaint and for leave to amend their expert reports. I eventually granted the motion to amend the complaint and denied the motions to amend the expert reports. Dkt. No. 192. In response to Nissan's request, I permitted it to file a supplemental opposition to class certification (and the plaintiffs to file a supplemental reply) based on the amended pleadings. The parties then again agreed to extend the class certification and *Daubert* motions. *See* Dkt. No. 194. Finally, in April 2022, Nissan moved for summary judgment. I set the class certification, *Daubert*, and summary judgment motions to be heard together and held a hearing on June 29, 2022.

## LEGAL STANDARD

### I. *DAUBERT* MOTIONS

Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion or otherwise" where: (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 has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. Expert testimony is admissible under Rule 702 if it is both relevant and reliable. *See Daubert v. Merrell Dow Pharms., Inc.*, 509

U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). "[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue." *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007); *see also Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) ("The requirement that the opinion testimony assist the trier of fact goes primarily to relevance.") (internal quotation marks omitted).

Under the reliability requirement, the expert testimony must "ha[ve] a reliable basis in the knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565. To ensure reliability, the court must "assess the [expert's] reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance." *Id.* These factors are "helpful, not definitive," and a court has discretion to decide how to test reliability "based on the particular circumstances of the particular case." *Id.* (internal quotation marks and footnotes omitted). "When evaluating specialized or technical expert opinion testimony, the relevant reliability concerns may focus upon personal knowledge or experience." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006).

The inquiry into the admissibility of expert testimony is "a flexible one" in which "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano*, 598 F.3d at 564. The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements

are satisfied. *Lust by & Through Lust v. Merrell Dow Pharms.*, 89 F.3d 594, 598 (9th Cir. 1996); *see also* Fed. R. Evid. 702 advisory committee's note.

## II. MOTION FOR SUMMARY JUDGMENT

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant. *Id.* at 255. In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues

of fact and is insufficient to defeat summary judgment. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

## III. MOTION FOR CLASS CERTIFICATION

"Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). The party seeking certification has the burden to show, by a preponderance of the evidence, that certain prerequisites have been met. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-50, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011); *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011).

Certification under Rule 23 is a two-step process. The party seeking certification must first satisfy the four threshold requirements of Rule 23(a). Specifically, Rule 23(a) requires a showing that: (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. Fed. R. Civ. P. 23(a).

Next, the party seeking certification must establish that one of the three grounds for certification applies. *See* Fed. R. Civ. P. 23(b). To certify damages classes under

Rule 23(b)(3), a plaintiff must establish 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).

In the process of class-certification analysis, there "may entail some overlap with the merits of the plaintiff's underlying claim." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 465-66, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013) (internal quotation marks omitted). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id.* at 466. "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." *Id.*

## DISCUSSION

### I. PERSONAL JURISDICTION

In its supplemental class certification brief, Nissan argues that I lack personal jurisdiction over it. *See* Supplemental Opposition to the Motion for Class Certification ("Nissan Supp.") [Dkt. No. 216] 1-2. This case has existed for five years; Nissan is raising this issue now, it says, because it ceased being incorporated in California during the course of litigation and is now incorporated in Delaware (with its principal place of business in Tennessee). *See id.* 1-2.

I conclude that general personal jurisdiction still exists over Nissan here. When the case was filed and when Nissan was served, and therefore brought under this court's jurisdiction, personal jurisdiction was proper. *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986), *as amended*, 807 F.2d 1514 (9th Cir. 1987). That is so because general jurisdiction exists in the state in which Nissan is incorporated. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). The only thing that has changed is Nissan's unilateral reincorporation elsewhere. The primary purpose of personal jurisdiction is to protect due-process rights by ensuring that a party has fair notice that it will be subject to a state's jurisdiction. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025, 209 L. Ed. 2d 225 (2021). Because Nissan incorporated in California, it was aware that it could be sued here for any and all of its activities. *See id.* That it later decided to move to Delaware does not in any sense deprive it of due process.

It is true, as Nissan argues, that "a class action, when filed, includes only the claims of the named plaintiff." *Moser v. Benefytt, Inc.*, 8 F.4th 872, 877 (9th Cir. 2021) (internal quotation marks and citation omitted). It is true, too, that non-named class members are not parties to the action until the class is certified. *Id.* But this is not a case, like *Moser* or any of the cases it cited, where a defendant argues at class certification that the court lacks specific jurisdiction over the claims of non-named class members once they are in the case for the first time. I do not question that the non-named class members are not

parties to the action until my certification order issues. But here, crucially, *general* jurisdiction existed in the suit when it was commenced. The question is whether that jurisdiction is *lost* by unilateral reincorporation. General jurisdiction "extends to any and all claims brought against a defendant." *Ford Motor*, 141 S. Ct. at 1024. Specific jurisdiction, in contrast, is linked to specific claims. *Id.* So in cases like *Moser* and those on which it relied, the question is whether, once a non-named class member becomes a party, specific jurisdiction extends to the claims against them. Here, Nissan was subject to general jurisdiction from the outset; the question is whether that jurisdiction evaporated before today. It did not.

Nissan's argument that this court lacks personal jurisdiction over it is rejected.

## II. *DAUBERT* MOTIONS

Nissan moves to exclude the plaintiffs' two technical experts and two damages experts.

### A. Steven Gaskin and Colin Weir

Nissan moves to exclude the testimony of the plaintiffs' damages experts, Steven Gaskin and Colin Weir. *See* Motion to Exclude the Testimony of Steven Gaskin and Colin Weir ("Dam. Exp. Mot.") [Dkt. No. 149]. The motion is denied.

Gaskin and Weir offer a conjoint survey and analysis that, once performed, purports to show the price

difference between what consumers would pay for their vehicle if they knew of the alleged defect and what they actually paid. Conjoint analyses of changing consumer willingness to pay are "often examined in the caselaw." *Zeiger v. WellPet LLC*, 526 F. Supp. 3d 652, 674 (N.D. Cal. 2021) (collecting citations) (Orrick, J.). They are now a "well-recognized economic method used to study and quantify consumer preferences." *In re Macbook Keyboard Litig.*, No. 5:18-CV-02813-EJD, 2021 U.S. Dist. LEXIS 65811, 2021 WL 1250378, at *5 (N.D. Cal. Apr. 5, 2021).

In essence, the survey works by asking consumers questions that cause them to make tradeoffs between different features in a product, or with different information about the product. *See id.* Then, using statistical comparisons, the value of a particular feature (or lack thereof) can be derived. *See id.*

Gaskin's proposed survey does that. *See* Declaration of Steven P. Gaskin ("Gaskin Rep.") [Dkt. No. 135-18]. Consumers will be shown sets of product profiles that have different configurations of features. *See id.* ¶ 15. Then, they make choices between those hypothetical vehicles about whether to buy or not. *Id.* From that, Gaskin can statistically generate the "partial contribution" of a feature to the overall price. *Id.* ¶ 18. And finally, he can determine the change in market price premium for identical vehicles that do and do not have the alleged PSR defect. *Id.* Weir, in turn, opines about the reliability of this methodology and calculates the overall level of damages by multiplying the price premium from the conjoint analysis by the number of vehicles sold. *See generally* Declaration of Colin Weir ("Weir Rep.") [Dkt. No. 135-19].

*Appendix B*

**i. Unperformed Survey**

First, Nissan argues that Gaskin and Weir's opinions are unreliable because the survey has not actually been performed. *See* Dam. Exp. Mot. 6-10. Instead, Gaskin has put forward the survey he plans to perform and Weir has explained why he believes that survey is an appropriate measure of economic damages. *See* Gaskin Rep. ¶¶ 11, 13. For the reasons that follow, I reject Nissan's argument.

When a court assesses the admissibility of expert testimony, it does so to test the opinions' relevance and reliability. And to assess whether an opinion is reliable, *Daubert* instructs that courts examine the methodology underlying the opinions. That is where the analysis begins, but that is also where it ends: "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Here, Gaskin has put forward the methodology he will employ (and Weir has opined about it), so Nissan can raise challenges to it and I can exercise my gatekeeping function. *Daubert* does not require more on these facts. And, to the extent it matters, showing that a damages model is appropriate for purposes of class certification also does not require actually performing it, it just requires showing that it meets the legal requirements for class-based damages. *Cf. Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (discussing how damages *models* must align with theories, not completed calculations).

To be sure, results themselves can sometimes require exclusion on other grounds. Nissan points, for instance,

to a situation in which an expert produces a conjoint showing that consumers should get a full refund when a full refund has not been justified under the substantive governing law, *see*, *e.g.*, *Zeiger*, 526 F. Supp. 3d at 675, or when the survey results in "economically impossible" damages. But if there is some reason that the results themselves are inadmissible here—or if they reveal a flaw in the survey apparent only once they exist—Nissan may move to exclude them *in limine*. The plaintiffs have made a tactical choice to not perform the survey yet. That may come with benefits to them—it saves expenses that may not have to be spent if the parties ultimately reach a settlement, for instance. But that choice also comes with the risk that the results will come back, be challenged, and be excluded closer to trial when there is less or no time to perform another analysis. That tactical choice was the plaintiffs' to make.[1]

Nissan also responds that "there is no evidence the survey will even show classwide damages." Dam. Exp. Mot. 7. At times, it frames this as an issue of the survey not yet being performed; at times it appears to tie into other objections. *See*, *e.g.*, *id.* In any event, this does not require exclusion. If an assessment of empirical damages is properly designed then there is *always* a chance it

1. Nor does it matter that Gaskin and Weir have sometimes been excluded by other courts in other cases unless the same reasons for exclusion applied here and were persuasive. *See* Dam Exp. Mot. 7. And, relatedly, it does not matter if in other cases Gaskin and Weir's results have "varied wildly," as Nissan contends. *Id.* 8. The *Daubert* analysis in this case focuses on the particular opinions offered by the experts on these specific facts.

shows that there were no damages. Here, for instance, it might theoretically be the case that consumers would pay functionally the same amount for a vehicle with the defect as without it. (Indeed, that is the core point of Nissan's motion for summary judgment: that there is no defect here and that, that if there is, it is not material and could not engender reasonable reliance.) And that is all the quotations from Gaskin and Weir's depositions that Nissan points to say: a survey of consumers may show they were not damaged. *See id.* 7-8 (quoting depositions of Gaskin and Weir).

Some of Nissan's cases, in contrast, did not exclude similar analyses merely because they were unperformed; they were always excluded for some other reason. *See*, *e.g.*, *Miller v. Fuhu Inc.*, No. 2:14-CV-06119-CAS-AS, 2015 U.S. Dist. LEXIS 162564, 2015 WL 7776794, at *22 (C.D. Cal. Dec. 1, 2015) (excluding a proposed survey for being "relatively undeveloped"). I recognize that a few courts have excluded surveys (including by Gaskin) for being unperformed, *see*, *e.g.*, *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 578 (C.D. Cal. 2014), but they did not attempt to square their decisions with *Daubert*'s holding about focusing on methods rather than conclusions.

**ii. Pretesting**

As part of its argument about the survey being unperformed, Nissan objects to the lack of pretesting. *See* Dam. Exp. Mot. 8-10. To the extent this argument is just a subset of the one advanced above, I reject it. If Nissan's argument is that a pretest must at some point

be performed, Gaskin has committed to doing one. In any event, I previously rejected the argument that a conjoint survey is necessarily unreliable under *Daubert* merely because the pretest was not sufficiently formalized. *Maldonado v. Apple, Inc.*, No. 3:16-CV-04067-WHO, 2021 U.S. Dist. LEXIS 92483, 2021 WL 1947512, at *23 (N.D. Cal. May 14, 2021).

Nissan argues that a conjoint survey cannot be reliable under *Daubert* any time it is not pretested. I reject this argument too. Pretesting, as I have previously said, is a "recommended plus-factor." *Id.*; *see* Shari S. Diamond, "Reference Guide on Survey Research," Reference Manual On Scientific Evidence at 388 (3d ed. 2011). But Nissan cites no scientific authority suggesting it is *required* to make a conjoint survey fundamentally reliable. And many types of surveys in *Daubert* analyses are assessed based on the survey itself, not based on layer after layer of testing the test. *See*, *e.g.*, *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010). I see no reason, and Nissan has pointed to none, that a conjoint survey should be any different as a categorical rule. Nissan's only authority is one case that I have elsewhere explained I do not find persuasive in its *Daubert* analysis of conjoint surveys, including on the issue of pretesting. *See Maldonado*, 2021 U.S. Dist. LEXIS 92483, 2021 WL 1947512, at *21 & n.11 (rejecting analysis s in *MacDougall v. Am. Honda Motor Co.*, 2020 U.S. Dist. LEXIS 166786, 2020 WL 5583534, at *5 (C.D. Cal. Sept. 11, 2020) ("*MacDougall I*"). And, indeed, since I made that ruling, the Ninth Circuit has (in an unpublished opinion) also rejected that court's

analysis of the admissibility of the conjoint analysis. *See Macdougall v. Am. Honda Motor Co.*, No. 20-56060, 2021 U.S. App. LEXIS 37780, 2021 WL 6101256, at *1 (9th Cir. Dec. 21, 2021) ("*MacDougall II*"). In any event, *MacDougall I* gave no principled reason that pretesting is a necessary requirement for conjoint surveys.

### iii. Supply-Side Considerations

Nissan next argues that the conjoint analysis fails to adequately take account of "supply-side considerations." *See* Dam. Exp. Mot. 10-12. I again disagree that this requires exclusion.

Nissan identifies three alleged failures on this front. First, it argues that Gaskin's use of the manufacturer's suggested retail price ("MSRP") improperly assumes that car dealers "would not have changed the price had warnings about the [PSR] been provided." *Id.* 11. This sort of argument has become a regular objection to conjoint analysis: that it improperly assumes that the supply-side of the price equation would remain static even though new information is revealed and consumer demand is changed. *See Maldonado*, 2021 U.S. Dist. LEXIS 92483, 2021 WL 1947512, at *21 (discussing issue and collecting cases). I and many other courts have rejected similar challenges, and I reject this one. The MSRP is an appropriate price for an expert to use in this model: it is a price the expert has decided is reasonably calculated to capture an objective value for the car in the real-world under prevailing market conditions. It is, to be sure, both an oversimplification and an assumption. But it is the sort that is susceptible to

cross-examination. It is quite similar to the use of "real-world" price data that I have previously upheld against *Daubert* challenge. *See id.*

Nissan attempts to side-step *Maldonado* and the bevy of cases taking the same approach by relying on the Ninth Circuit's decision in *Zakaria v. Gerber Prods. Co.*, 755 F. App'x 623 (9th Cir. 2018), which upheld a district court's exclusion of an expert analysis of changing consumer demand for failure to consider how revealing the allegedly withheld information would alter the supply-side of the equation, changing the price level. *Zakaria* is, to start, not binding and held only that the district court *did not abuse its discretion* in excluding the evidence on this basis. But, more importantly, I continue to disagree with the district court's substantive analysis for the reasons I and many other judges have explained. And more recently than *Zakaria*, the Ninth Circuit has gone the other way, albeit also in an unpublished opinion. *MacDougall II*, 2021 U.S. App. LEXIS 37780, 2021 WL 6101256, at *1. I find that analysis more persuasive than the conclusory one in *Zakaria*. In *MacDougall II*, the Ninth Circuit drew its reasoning about an alleged failure to consider supply-side considerations from well-established *Daubert* principles, as opposed to the curt treatment it gave in *Zakaria*. (And, in so doing, I note that that court overturned one of the only two decisions in this circuit taking Nissan's side on this issue—a decision on which the second decision in this circuit depended. *See Maldonado*, 2021 U.S. Dist. LEXIS 92483, 2021 WL 1947512, at *21 n.12.)

Second and relatedly, Nissan argues MSRP is not the price "generally paid" both because automotives are

often sold by negotiation and because of "promotions and incentives" that reduce the price paid. Dam. Exp. Mot. 11. This argument is unconvincing in two distinct ways. The first has already been addressed: the use of MSRP is an appropriate assumption to put into the model and Nissan can cross-examine about it. Second is that the point of a conjoint analysis is to determine the price *differential* between what was paid and what would be paid if the alleged misrepresentation were cured. *See, e.g.*, Gaskin Rep. ¶ 18. So no matter the precise baseline price, what matters is that it is consistent. The jury, or if appropriate the court, can then adjust it based on all of the evidence and argument.

Third, Nissan argues that Gaskin includes non-comparable vehicles, such as those without sunroofs, in the survey. But that choice—which is intended to help measure the value of a sunroof and, so, makes some sense anyway—is just one type of "attribute selection" that goes to weight and not admissibility. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997).

**iv. Miscellaneous Alleged Methodological Errors**

Nissan also identifies several alleged methodological errors in the survey design. *See* Dam. Exp. 13-16. None requires exclusion.

First, Nissan challenges the population that Gaskin intends to survey; it argues that he would improperly survey individuals who (1) purchased cars other than

Nissan models and (2) bought or leased cars without sunroofs. *See id.* 13-14. I conclude that, on these facts, with this particular survey, these criticisms go to weight. In general, purported flaws in survey design and attribute selection will usually go to the weight a jury accords the survey, not whether the jury can be shown it in the first place. *See Fortune Dynamic*, 618 F.3d at 1036; *Wendt*, 125 F.3d at 814. Here, Gaskin explained in his deposition why he included non-Nissan car buyers in the survey: the relevant market for pricing the cars with the alleged defect is *all* similarly situated cars, not just Nissans. *See* Dkt. No. 169-3 at 230:21-24. Nissan has offered no reason that this choice renders the survey unreliable as a matter of law, or why Gaskin is so wrong that the jury cannot be trusted to evaluate the merits of its objections. Nissan's second objection—Gaskin's inclusion of cars without sunroofs—is not persuasive for the same reasons: there is sufficient indication that prices are influenced by cars with and without sunroofs.

Second, Nissan challenges Gaskin's characterization of the defect and hypothetical alternative vehicles. In particular, it objects to the inclusion of a vehicle with a sunroof that "will not spontaneously shatter under normal driving conditions," to the use of "spontaneous" to characterize the alleged defect, and to the vagueness of the characterization of sunroofs with a "very small chance" of shattering. Dam. Exp. Mot. 14 (quoting Gaskin Rep. ¶ 21). All of these are for cross-examination, not exclusion. Courts have generally rejected similar linguistic challenges under *Daubert*. *See*, *e.g.*, *Fortune Dynamic*, 618 F.3d at 1036 (holding that the "format of

questions" and the "manner" of them generally go to weight). These survey conditions stem directly from the plaintiffs' theory of liability. While Nissan is correct that all glass shatters under some set of conditions, Gaskin's survey choice does not improperly ignore that reality: he includes only an option for glass not shattering *under normal driving conditions*. And while "very small chance of shattering" is not precisely defined, that is appropriate because the argument here is that substantive consumer protection law was violated when this alleged truth was not revealed to consumers. Indeed, a jury could reasonably conclude that a qualitative descriptor of "very small chance" is likely more helpful to many consumers than a quantitative one.

Third, Nissan objects that the prices are only of *new* vehicles, ignoring the many people who buy vehicles used. Dam. Exp. Mot. 15. For *Daubert* purposes, this is a quintessential issue of weight, not admissibility. To the extent the argument sounds in concerns about predominance or the suitability of the damages model for class-wide treatment, I address that issue below in the class certification analysis. *See infra* Section IV.C.

Last, Nissan argues that, in the real world, consumers make car buying decisions based on the complex interplay of numerous factors, yet Gaskin "artificially focuses" the survey respondents on the single feature of a sunroof. Dam. Exp. Mot. 15-16. But the point of the conjoint analysis is to take into account a multitude of factors then determine the value *difference* between the product with and without the revealed information, all else held equal.

And, as noted, conjoints have often been approved for that precise purpose. *See*, *e.g.*, *In re Macbook Keyboard Litig.*, 2021 U.S. Dist. LEXIS 65811, 2021 WL 1250378, at *5. This argument too is for the jury.

#### v. Automobiles

Finally, Nissan goes broad: it argues that conjoint surveys are *never* reliable in the context of buying an automobile. Mostly, however, this is just a retread of the final part of the argument just rejected—that buying a car entails a uniquely high number of factors to consider. For the reasons explained, I reject it. *See supra* Section II.A.iv. The other part of this argument appears to be that consumers sometimes buy cars for one or a few idiosyncratic reasons that overwhelm all others—Nissan pulls an example from a publication Gaskin wrote of someone who chooses a car because "they look good while driving it." Dam. Exp. Mot. 17 (quoting Steve Gaskin, *Navigating the Conjoint Analysis Minefield*, VISIONS, at 24 (1st Quarter 2013)). But that could be said for many products, including others that conjoint analyses have been found to be reliable in assessing. If that is so, moreover, it is the job of the conjoint to suss it out and the jury to weigh it. With the example of someone who buys a car *solely* to look "good" in, for instance, presumably the price difference resulting from the sunroof shown in the survey would just be zero.

### B. Neil Hannemann

Nissan moves exclude the opinions of one of the plaintiffs' technical experts, Neil Hannemann. *See*

Motion to Exclude the Testimony of Neil Hannemann ("Hannemann Mot.") [Dkt. No. 150]. It argues that he is unqualified to offer the opinions he does and that those opinions are unreliable. Hannemann's qualifications and methodology are described below as they become relevant. In brief, Hannemann is an automotive engineer who offers opinions about PSRs, their manufacturing, and the alleged defect. *See generally* Report of Neil Hannemann ("Hannemann Rep.") [Dkt. No. 134-7]. To reach this conclusion, he reviewed design documents from Nissan about the PSRs, *see id.* ¶¶ 19-23 & nn.1-16, depositions of individuals, *see*, *e.g.*, *id.* ¶ 19, evidence of the shattering in some of the plaintiffs' vehicles, *see*, *e.g.*, *id.* ¶ 26 n.21, and consumer complaints and a governmental report on the shattering, *see*, *e.g.*, *id.* ¶¶ 32 & nn.25-26.

**i. Qualification**

Nissan first argues that Hannemann is not qualified to opine about glass and PSRs. Hannemann Mot. 4-6. I disagree.

Hannemann is an automotive engineer with roughly 40 years' experience. Hannemann Rep. ¶ 7. He holds a bachelor's degree in mechanical engineering. *Id.* He has been an engineer at multiple car companies, including as chief engineer at Ford. *Id.* ¶ 11. He states that he has worked in all stages of design, analysis, testing, and development of cars. *Id.* ¶ 9. This experience includes working several times with the glazing—that is, glass installation—process and on roof design. *Id.* ¶¶ 7-16.

Nissan argues that Hannemann is not sufficiently well-qualified in the area of glass and PSRs *specifically*, despite his broader experience in automotive engineering. Hannemann Mot. 4-5. The general rule is that "[c]ourts do not prevent experts from testifying merely because, though otherwise qualified, they do not have expertise in some hyperspecialized corner of their field that they are competent to testify in from their more general expertise." *Maldonado*, 2021 U.S. Dist. LEXIS 92483, 2021 WL 1947512, at *17 (citations omitted). Said otherwise, lack of specialization is an issue of weight, not admissibility, "as long as an expert stays within the reasonable confines of his subject area." *Avila v. Willits Env't Remediation Tr.*, 633 F.3d 828, 839 (9th Cir. 2011) (internal quotation marks and citation omitted). But I and other judges have also explained that engineering is a particularly broad field in which qualification for one type of engineering does not necessarily lead to expertise in another. *See Maldonado*, 2021 U.S. Dist. LEXIS 92483, 2021 WL 1947512, at *17 (collecting cases).

Here, Hannemann is sufficiently qualified to offer the particular opinions he does. Hannemann is not testifying about (for example) the chemistry of the glass or the technical specifications of the installation process. Instead, he opines about (1) the basic specifications of the PSRs here, (2) general automotive engineering principles that require that vehicles be able to withstand "foreseeable challenges," (3) the challenges PSRs must withstand, (4) that some accounts of users illustrate the PSR defect, (5) this type of shattering that is rare in his four decades of experience, (6) the shattering events are

a safety hazard, and (7) the defect which could have been sufficiently easily avoided as to constitute a design defect and therefore was unreasonable under the circumstances. *See* Hannemann Rep. ¶¶ 20-41. None of these opinions stem from the hyper-specialized glass-based expertise that Nissan would require. They are properly drawn from Hannemann's long experience as an automotive engineer. And, indeed, that is why the plaintiffs have offered another expert to opine about the more technical issues.

**ii. Reliability**

Nissan also moves to exclude several of the opinions that Hannemann offers as unreliable under *Daubert*. *See* Hannemann Mot. 6-11. I again disagree.

First, Nissan challenges Hannemann's opinion that there is a defect in the vehicles no matter the frequency that they result in shattering. *Id.* One court has excluded Hannemann's opinion for failing to articulate what would be an acceptable shatter rate. *See Kondash v. Kia Motors Am., Inc.*, No. 1:15-CV-506, 2020 WL 5816228, at *9 (S.D. Ohio Sept. 30, 2020). But I see no reason he would have to on these facts.[2] While the quantitative measure of rates of shattering that are acceptable might be one appropriate measure for an alleged defect, so too is the *qualitative* measure of being unable to shatter under normal driving conditions. *Cf. Williams v. Gerber Prods. Co.*, 552 F.3d

2. That court was assessing a specific opinion about expectations of a lower shatter *rate*; the opinion here, as described in-text, is different. *See Kondash*, 2020 U.S. Dist. LEXIS 181733, 2020 WL 5816228, at *9.

934, 938 (9th Cir. 2008) (discussing the reasonable consumer standard). As I explain below in the section on summary judgment, that is an appropriate alleged defect for purposes of the consumer protection laws and fits an implied warranty of merchantability theory as well. *See infra* Section III.B. In other words, it is appropriate, on these facts and under these theories of liability, for an expert to opine that a defect exists when a product cannot perform its expected function under ordinary conditions; a jury is fully capable of evaluating that sort of qualitative statement.[3]

Relatedly, Nissan critiques Hannemann for failing to examine particular failures and having insufficient data. He did, though, examine consumer complaints submitted to the government about the shattering and he examined the design of the windshield at issue. Hannemann Rep. ¶¶ 26, 35. This purported weakness in Hannemann's opinion may go to its weight, but it does not make it unreliable. Another court rejected a *Daubert* challenge to Hannemann on this ground. *See Beaty* v. *Ford Motor Co.*, No. C17-5201 TSZ, 2021 U.S. Dist. LEXIS 137155, 2021 WL 3109661, at *4 (W.D. Wash. July 22, 2021).

Nissan also argues that Hannemann's opinion about the dangerousness of shattering glass is unsupported by actual evidence. Hannemann Mot. 8-9. But that conclusion

3. To Nissan, endorsing this theory means that even "[o]ne failure" is enough to make a product defect. Hannemann Mot. 6-7. That overstates things dramatically. Hannemann's opinion is that there is something in the design that renders the product liable to shatter under ordinary driving conditions.

just requires two uncontroversial premises: (1) shattering glass while driving can reasonably be distracting and (2) distracted driving is dangerous. For the second conclusion, Hannemann relies explicitly on his experience engineering automotives with the understanding that distracted driving is dangerous. *See* Hannemann Rep. ¶ 32 & n.27 (citation omitted). And the jury is more than capable of assessing the first statement, which is relatively commonsensical and, in any case, is one that Hannemann supports with a real consumer complaint. *See id.* ¶ 32 n.25.

Nissan contends that Hannemann's opinions contradict the fact that the government has conducted investigations into the alleged defect and not announced that it found one and that the NHTSA has permitted the use of tempered safety glass in panoramic sunroofs. *See* Hannemann Rep. 9-10. But whether a sunroof adheres to regulatory requirements is a different question than the one here. Reasonable consumers might be misled under California's consumer protection laws even if a product adheres to a regulatory standard. *Cf. Zeiger*, 526 F. Supp. 3d at 681 (so holding with respect to FDA regulations and consumer protection law). Hannemann has reasonably articulated the basis for his opinions; Nissan is free to pair them off against NHTSA's, but balancing those potentially competing conclusions is a matter for the jury.

### C. Thomas Read

Nissan moves to exclude the opinions of Nissan's other technical expert, Dr. Thomas Read. *See* Motion to Exclude the Testimony of Thomas Read ("Read Mot.")

[Dkt. No. 151]. It argues that (1) he is unqualified, (2) his opinions about glass are unreliable, and (3) his opinions about "fractography"—the study of the fracturing of a material—are unreliable. *See generally id.* Read's qualifications and methodology are described below as they become relevant. In brief, he is an expert in materials science and engineering. *See* Read Rep. ¶¶ 5-13. He opines about the design and manufacturing of the PSRs, *see id.* ¶¶ 18-31, the scientific study of failures (shattering and fracture) in glass, *id.* ¶¶ 33-46, his inspection of 19 Nissan PSRs that failed, *id.* ¶¶ 47-49, potential causes of such failure, *id.* ¶¶ 50-52, his opinion that the PSRs in the inspected vehicles suffered from a "common defect"—namely the design choices Nissan made, *id.* ¶¶ 53-59, and alternative design choices available, *id.* ¶¶ 60-69.

**i. Qualification**

Nissan first argues that Read is not qualified to offer opinions about PSRs. Read Mot. 6-7. I disagree. Read has a Ph.D. in materials science and engineering, a Master of Science in materials science, and a Bachelor of Science degree. Read Rep. ¶ 5. He has spent more than 40 years working with glass specifically. *Id.* ¶¶ 6-8. He has done so in a variety of contexts, including in consumers products and electronics. *Id.* He developed glass-related processes for use in space shuttles. *Id.* ¶¶ 7-8. And in preparing to form his opinions here, his report shows that he has studied automotive glass and PSRs in particular. As noted, engineering is a broad field or set of fields, but Read is not just a materials engineer (which would already be relatively specialized) but has focused mainly on glass,

including for use in moving vehicles, for decades. Then, he used that on-point experience to study up about automotive PSRs in particular. He is qualified within the meaning of the Federal Rules of Evidence.[4]

### ii. Reliability of Glass Opinions

Nissan moves to exclude Read's opinions about glass and PSRs as unreliable under *Daubert*. Read Mot. 7-14.[5] It argues that Read's opinion about the cause of the alleged shattering is unreliable. As I explain, some portions of Read's deposition do indeed give me pause (as I indicated in my tentative ruling in advance of the hearing). But, ultimately, I conclude that Read's opinions are sufficiently well explained in his report that any issues on this front will go to weight and are for the jury to assess.

The relevant portion of this opinion is that the defect in the PSRs arises from the "combination" of glass temper, thickness, size, curvature, the way it is connected to the

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4. Nissan argues that Read and Hannemann are "no more qualified than they were in" *Kondash v. Kia Motors Am., Inc.*, No. 1:15-CV-506, 2020 U.S. Dist. LEXIS 181733, 2020 WL 5816228 (S.D. Ohio Sept. 30, 2020). But that court did not exclude them for being unqualified, it excluded several specific opinions for being unreliable. *See*, *e.g.*, 2020 U.S. Dist. LEXIS 181733, [WL], at *11.

5. Some of Nissan's argument is duplicative of or substantially overlaps with its objections to Hannemann's related opinions. Nissan again raises its argument about the lack of an acceptable failure rate, or any failure rate. Mot. 7-8. For the reasons explained, a qualitative opinion about the defect is appropriate. *See supra* Section II.D.

frame, and the frit. *See*, *e.g.*, Read Rep. ¶¶ 2, 54. Nissan argues that there is not a sufficient explanation of how these individual components leads to the conclusion. On the whole of the record, I disagree for *Daubert* purposes. Read's report explains that, in tempered glass, "if even the smallest surface flaw penetrates through the outer compressive layer, the tensile stresses in the core are released and the entire glass panel shatters." *Id.* ¶ 25. It explains that applying the frit "interferes" with the tempering process and "caus[es] sections of the glass to cool at different rates," leading to uneven temper and "weakening" of the glass. *Id.* ¶ 29. It explains that curving the PSRs also creates "anomalies" in air flow during the cooling process that result in an "imbalance" that, again, can cause breakage more easily. *Id.* ¶ 30. It explains at length about how glass can fail progressively when stresses are added and that proper fractography can determine whether a failure was indeed progressive. *See id.* ¶¶ 33-46. It explains that, based on Read's fractographic analysis of Nissan PSRs and his review of consumer complaints, he concludes that the failures were progressive. *Id.* ¶¶ 47-49. Finally, it explains that the various factors discussed can contribute to the stress and lead to a greater chance of progressive facture. *Id.* ¶¶ 52A-53F. All of this together convinces me that there is no "analytical gap between the data and the opinion proffered" that would require exclusion, *GE v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), nor are the opinions unreliable under *Daubert*.

It is true, as alluded to above, that there are statements in Read's deposition to the effect that he cannot pinpoint

the precise effect that any of these individual components (thickness, frit, etc.) had on the weakness of the PSRs. *See*, *e.g.*, Dkt. No. 157-5 at 71:10-19 (testifying that he did not know the "exact influence" or "any influence" the frit had on the glass); *see also* Read Mot. 8 (collecting quotations). Though the issue is not open and shut, I conclude these statements go to the weight of the opinions. Even if Read does not know the *exact* effect that each individual element had to the overall propensity to shatter, he sufficiently opines that each element does have such an effect and that, together, they create a defect. As laid out above, those opinions are sufficiently explained in his report.

Nissan also argues that Read did not "test[] his hypothesis." Read Mot. 8. That objection goes to weight. *Daubert* generally requires *testability* and this is not the sort of opinion that needed to be physically tested, in part because Read was analyzing physical products that had already broken down using established scientific techniques. *Cf. Ramirez v. ITW Food Equip. Grp., LLC*, 686 F. App'x 435, 440 (9th Cir. 2017) ("The reliability of an expert's theory turns on whether it can be tested, not whether he has tested it himself.") (internal quotation marks, citation, and alteration omitted). And while Nissan makes an extensive argument about the merits of its own experts' opinions being based on physical testing, *see* Read Mot. 8-12, that battle of the experts is for the jury.

### iii. Reliability of Fractography Opinions

Nissan moves to exclude Read's opinion that the failures in the glass were "progressive" (rather than

immediate) based on his application of "fractography," which both parties accept is (in general) a reliable method of analyzing the breakage of glass. Read Mot. 14-19. But Nissan's argument is built on a false premise, that *its* expert's opinion about this is correct. Although Nissan takes several shots at certain steps Read performed to analyze 19 shattered sunroofs, its substantive reason for thinking he erred is that its own expert found that only three of them showed progressive failure while Read concluded that all did. *See id.* 15-16. And the reason that Nissan offers to invalidate Read's finding is that its own expert relied on so-called "tertiary Wallner lines." *Id.* A Wallner line, the parties appear to agree, are lines that form in the glass and curve in the direction it cracks. And a tertiary Wallner line, it appears, comes from shock waves of impact, rather than other things that might cause the crack. This is for cross-examination. Read opines that he correctly applied fractography and has explained his reasoning. Whether the presence of tertiary Wallner lines defeats those opinions is for the jury.

### D. Conclusion

Nissan's *Daubert* motions are DENIED.

## III. MOTION FOR SUMMARY JUDGMENT

Nissan moves for summary judgment on the individual claims. *See* Motion for Summary Judgment ("SJ Mot.") [Dkt. No. 212-2]. The plaintiffs bring two broad types of claims under the laws of each of the states at issue: claims under consumer protection statutes and under

statutes creating an implied warranty of merchantability. *See generally* Fifth Amended Complaint [Dkt. No. 208]. The plaintiffs also bring claims in the nature of unjust enrichment, which sometimes are listed as stand-alone claims and sometimes are the remedy for violation of the substantive laws. *See generally id.*

**A. Existence of Defect**

Nissan first argues that it is entitled to summary judgment because the plaintiffs cannot prove that there is a "defect" in the PSRs. SJ Mot. 11-13. Indeed, Nissan argues that the plaintiffs have not even clearly identified what alleged defect is at issue. *Id.* 11. And in its supplemental brief, it argues that the amended pleadings still do not align with the theory the plaintiffs put forward for class certification. *See* Nissan Supp. 3-4. I disagree.

One preliminary point needs making. The claims at issue are not products liability claims. They are either consumer protection claims or warranty-of-merchantability claims. So the plaintiffs are under no obligation to establish that there is necessarily a defect in the sense that products liability law uses that term—such as, for instance, "design defect" under California law. *See, e.g.*, *McCabe v. Am. Honda Motor Co.*, 100 Cal. App. 4th 1111, 1120, 123 Cal.Rptr.2d 303 (2002) (discussing products liability defects). Instead, a "defect" is relevant to the consumer protection claims only to the extent that it shows it is something that Nissan was obligated to disclose or misrepresented. *Cf. Lassen v. Nissan N. Am., Inc.*, 211 F. Supp. 3d 1267, 1287 (C.D. Cal. 2016) (discussing some

differences between the two types of bodies of law). To this extent, I reject both parties' occasional use of products-liability defects theories like the consumer expectations test or the risk-benefit test. The consumer protection statutes at issue have their own legal tests, which generally are based on whether reasonable consumers would be misled. The merchantability statutes likewise impose their own legal test, generally based on whether a product is fit for ordinary use.

On the merits of Nissan's argument, I first disagree with it that the plaintiffs have not articulated what the alleged "defect" is. *See* SJ Mot. 11-13 (making this argument). The plaintiffs allege that PSRs in specified models of Nissan vehicles have a propensity to shatter (due to progressive damage) under normal driving conditions.[6] *See*, *e.g.*, Dkt. No. 134-4 at 1 (first page of motion for class certification arguing that the defect is PSRs that are "unable to withstand the stresses . . . present under ordinary driving conditions"). I take Nissan's point that, at various times, language like "design defect" or "manufacturing defect" has been tossed around. But the alleged "defect" has been clear for a long time, and has been at least clear enough that both parties were able to produce extensive expert reports on the subject and for Nissan to be able to confidently assert that its PSRs are not defective in this way.

6. Here, I take "normal" and "ordinary" to be essentially interchangeable; I also do not intend to create any difference from "normal and foreseeable" or a similar formulation.

I also disagree with Nissan that it is entitled to summary judgment on the existence of this defect. *See* SJ Mor. 11-13. Both of the plaintiffs' experts have opined that the PSRs fail under normal driving conditions, which is sufficient to survive summary judgment on its own. *See generally* Read Rep., Hannemann Rep.; *see also supra* Section II.B—C (discussing those experts' opinion). As explained above, I deny Nissan's motions to exclude those opinions. *See supra* Section II.B—C. Still more, the plaintiffs have introduced evidence that consumers filed complaints about this issue, introduced reports about the shatterings, and introduced the named plaintiffs' descriptions of the events. *See*, *e.g.*, Opposition to the SJ Mot. ("SJ Oppo.") [Dkt. No. 218-3], Exs. 25, 35-40; *see also*, *e.g.*, Hannemann Rep. ¶¶ 32 & nn.25-26. In a similar case, the Ninth Circuit recently reversed a district court's grant of summary judgment based *solely* on this type of non-expert evidence. *Beaty v. Ford Motor Co.*, 854 F. App'x 845, 848 (9th Cir. 2021). Although that opinion is unpublished and non-binding, I find it persuasive as it is a straightforward application of standard summary-judgment principles. *See id.*

Based on this evidence, there is a genuine dispute of material fact about whether the alleged defect exists.

**B. Materiality**

Nissan argues that the plaintiffs cannot show that any alleged omission of this information was material, which it must be to be actionable under the consumer protection statutes. SJ Mot. 13-17. I again disagree.

*Appendix B*

Under each of the state consumer protection statutes at issue here, the alleged misrepresentation (including a misrepresentation by omission) must be material. Each state uses the same nucleus of a legal test: they ask whether the information is material to or likely to mislead a "reasonable consumer." *See Gerber*, 552 F.3d at 938 (California); *Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995) (New York); *Mazella v. Coca-Cola Co.*, 548 F. Supp. 3d 349, 356 (S.D.N.Y. 2021) (same); *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 983 (11th Cir. 2016) (Florida); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 505, 675 N.E.2d 584, 221 Ill. Dec. 389 (1996) (Illinois, discussing objective standard); *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 148 & n.11 (Colo. 2003) (Colorado, relying on other consumer protection materiality standards that include reasonableness). Although there are some differences in broader materiality standards, the parties focus only on this aspect, except for one issue explicitly discussed below.

Here, a jury could find that a reasonable consumer would consider the alleged defect material. It is reasonable to believe that consumers, as a general matter, expect sunroofs not to shatter under normal driving conditions. The evidence offered by the plaintiffs, if credited, would allow the jury to find that certain Nissan models had PSRs that shattered under normal driving conditions. *Cf. Beaty*, 854 F. App'x at 849-50 (reversing summary-judgment determination on materiality and finding that "a reasonable juror could find that even a small risk that a PSR might explode without warning is a material fact").

This is likely to be material to a reasonable consumer both for its own sake (as it requires replacing a car part) but also because overhead glass shattering while driving is an obvious safety issue. Not only might it cause damage on its own, the sound and shower of glass might cause a driver to drive dangerously or lose control due to alarm.

To resist this, Nissan argues that the risk of shattering is "minuscule." SJ Mot. 14. That, however, is a matter for the jury. A reasonable jury could find that Nissan still should have disclosed the risk—at least because any consumer might fall within that group, even if it is small. I recognize that another court has concluded that reasonable consumers would not think this a material risk in light of it being a mere possibility and the reality that "[a]ll objects made of glass shatter." *Anderson v. Ford Motor Co.*, 2020 U.S. Dist. LEXIS 66549, 2020 WL 1853321, at *3 (W.D. Mo. Feb. 14, 2020). In my view, though, this reasoning points in the opposite direction: these are the sort of contextual, fact-laden, and contested considerations that a jury, not a judge, must consider. I, again, instead agree with the Ninth Circuit that this is a triable issue of fact. *Beaty*, 854 F. App'x at 849.

Last, Nissan argues that the plaintiffs have not shown that there is a safety risk. SJ Mot. 16-17. For the reasons explained, I would disagree even without expert evidence, based solely on what should really be uncontroversial common sense. But there is also expert evidence on this point: Hannemann's report states that glass suddenly raining down from overhead while operating a motor vehicle accompanied by a loud noise is a plausible safety risk. *See* Hannemann Rep. ¶ 32.

**C. Reliance**

Nissan argues that it is entitled to summary judgment because the plaintiffs cannot demonstrate the reliance required under the consumer protection statutes. SJ Mot. 17-21.

The parties appear to agree that each of the consumer protection statutes at issue requires reliance, so I assume for present purposes that they do. *See id.*; SJ Oppo. 17-18 (arguing that reliance standards are met). I also assume for present purposes, based again on the parties' shared understanding, that the principle for reliance on an omission under California law is essentially the same across all statutes. *See* SJ Mot. 18-19 (relying on cases applying California law); SJ Oppo. 17-18 (same). Under that standard, "[t]o prove reliance on an omission, a plaintiff must show that the defendant's nondisclosure was an immediate cause of the plaintiff's injury-producing conduct." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015). But the cause need only have been a "substantial factor." *Id.* The plaintiff can demonstrate reliance "simply by proving that, had the omitted information been disclosed, one would have been aware of it and behaved differently." *Id.* (internal quotation marks and citation omitted). And, so long as the omission is material, plaintiffs are entitled to a presumption or inference of reliance. *Id.*

The plaintiffs have put forward sufficient evidence from which a jury could infer reliance to defeat Nissan's motion for summary judgment. Each of the named

plaintiffs has submitted a declaration that, had they known of the alleged defect, they would not have purchased their vehicles. *See* SJ Oppo. 20 (collecting citations). Johnson, for instance, avers that she conducted significant research before purchasing a vehicle and that the sunroof feature was important to her. *See id.*, Ex. 36 at 41:23-46:15, 64:24-65:18. And a jury could reasonably find that, if Nissan adequately disclosed the defect, the named plaintiffs would have known of it. *Cf., e.g.*, *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 875 (N.D. Cal. 2018) (Chen, J.); *Baranco v. Ford Motor Co.*, 294 F. Supp. 3d 950, 967 (N.D. Cal. 2018) (Chen, J.). Certainly, the information could be disclosed in Nissan's direct advertising materials and/or in materials provided to consumers by Nissan at time of purchase. But even for those named plaintiffs that purchased the cars used, a jury could find the information would have reached them. At the very least, it is reasonable to infer (as I must at this stage) that used car dealers would disclose potential safety hazards when properly informed by Nissan.[7] Nor does it matter, as Nissan argues, *see* SJ Mot. 20, that various plaintiffs admitted that they did not read particular Nissan literature or view ads; the question on an omissions claim like this is not whether a plaintiff viewed a particular communication, but whether a jury could find that the information would have been relied on if disclosed. *Daniel*, 806 F.3d at 1225. This is, in short, still a nondisclosure case and Nissan's attempt to transform it into a misleading affirmative statement case and dismiss it on that basis is unconvincing.

7. Nissan appears to attempt to renew its argument that the alleged fraudulent omission was not adequately *pleaded*. I rejected that argument at the pleadings stage. Dkt. No. 207.

### D. CLRA and UCL Claims

Nissan contends that it is entitled to summary judgment on the claims for violation of two of the California consumer protection statutes at issue, the Consumers Legal Remedies Act ("CLRA") and the Unfair Competition Law ("UCL"). *See* SJ Mot. 21-22.

#### i. CLRA Venue

The CLRA requires a plaintiff in a damages action to file an affidavit showing that the action has been commenced in the proper county. Cal. Civ. Code § 1780(d). It provides that the action can be commenced "in the county in which the person against whom it is brought resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred." *Id.* Both parties treat this requirement as applying in federal court, so I assume without deciding that it does. Nissan argues that summary judgment is appropriate for Johnson's CLRA claim (the only one in the case) because venue is improper here. *See id.*

Nissan reasons that it is not incorporated in California, it does not have its principal place of business in California, the transaction of Johnson's vehicle occurred in Riverside County, and Nissan "is [not] doing business" in this county—which are the only ways to render a place the right CLRA venue. *See* Cal. Civ. Code § 1780(d). The plaintiffs reply that Nissan *is* "doing business" in this county because there are Nissan dealerships within this

county, for which they have submitted evidence of. *See* SJ Oppo. 22 (collecting citations).

Neither party has presented any authority on whether a car company "do[es] business" in a county within the meaning of the statute by having dealerships there. Dealerships are independently owned (and there is no evidence on the record that Nissan owns these ones). *See*, *e.g.*, *Watson v. Ford Motor Co.*, No. 18-CV-00928-SI, 2018 U.S. Dist. LEXIS 138324, 2018 WL 3869563, at *4 (N.D. Cal. Aug. 15, 2018) (discussing relationship between dealerships and manufacturers). But a car manufacturer's relationship with a dealer is not like the relationship between two disinterested and unrelated businesses carrying out a normal, arms-length commercial transaction. Among other things, dealers use car makers' trademarks and trade dress and exclusively sell their products. They are tightly bound up together. In the absence of any guidance from the California courts, I agree with the plaintiffs that Nissan "is doing business" in this county by transacting with dealers here for these reasons.[8]

8. Nissan was previously a California corporation earlier in this case. I am highly skeptical that it could leave the venue that way and render it improper for CLRA purposes if the venue were correct when suit began. But here, the CLRA notice letter was only served on Nissan after it left the state due to the plaintiffs' error, so the claim was only properly alleged against Nissan at that point. In any event, the plaintiffs do not assert this as a basis for proper venue.

### ii. Restitution/Unjust Enrichment

Nissan seeks summary judgment on the UCL claims and the CLRA claim to the extent that they seek restitution or unjust enrichment because, according to it, the California named plaintiffs "bought used vehicles and so cannot show Nissan received any money from those sales that could be 'restored' to Plaintiffs" as required for a restitution claim. SJ Mot. 22. The plaintiffs' response misunderstands the issue; they cite my earlier determinations in this case that, to have an actionable CLRA claim, there need be no direct transaction between the plaintiffs and Nissan. *See* SJ Oppo. 21-23 (citing Dkt. Nos. 192, 55). Nissan's argument here is different; it is that restitution seeks to restore something unjustly gained by the defendant to the plaintiff, which cannot occur on facts like these. *See*, *e.g.*, *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d 1306, 1323-25 (C.D. Cal. 2013). Due to this reality and the plaintiffs' lack of a responsive theory that overcomes it, I will grant summary judgment to Nissan to the extent that the plaintiffs seek restitution for used cars purchased from entities other than Nissan.[9]

## E. Implied Warranty Claims

Nissan argues that it is entitled to summary judgment on the implied warranty of merchantability claims brought under California and New York law. *See* SJ Mot. 22-24.

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9. For clarity, I do not determine that sales by a used-car seller could *never* be actionable under a restitution theory against the manufacturer. The plaintiffs have simply not advanced one that succeeds.

I disagree. The core of Nissan's argument is that the plaintiffs have no evidence to show, as they must, that the vehicle was not fit for ordinary purpose. *See id.* A jury, however, could find that an appreciable chance of the sunroof shattering under normal driving conditions renders a vehicle not fit for ordinary purpose. The reasons are fundamentally the same as those discussed above about the potential safety risks of the shattering for purposes of the consumer protection laws. *See supra* Section II.A—B. To be sure, consumer protection and merchantability statutes are not the same. But, here, the reason the vehicles were allegedly not fit for ordinary purpose is essentially the same as the alleged defect for consumer protection purposes.

**F. Restitution/Unjust Enrichment**

As discussed above, Nissan argued that the CLRA and UCL claims could not be actionable under an unjust enrichment or restitution theory when it comes to used vehicles bought from other entities. *See supra* Section III.D.ii. Nissan argues here that *any* restitution or unjust enrichment theory cannot be actionable. Some of its reasons are just rehashes of substantive arguments already addressed, like not having evidence of a defect, *see* SJ Mot. 24, which I reject to that extent.

As explained, though, I agree with Nissan that the plaintiffs have advanced no actionable restitution or unjust enrichment theory for the purchase of used cars from entities other than Nissan. *See supra* Section III.D.ii. When a consumer purchased a used vehicle, there is

no evidence that *Nissan* received a benefit from that transaction; while Nissan received money from the *initial* sale, the consumer who later bought the used cars is not the person would not have paid that money. It is unclear if Nissan intended its restitution argument to sweep broader than this. *See* SJ Mot. 24 (making a one-sentence argument about repairs). If the argument *was* intended to be broader or different than this, it is insufficiently developed to grant summary judgment on. Summary judgment is granted to this limited extent.

### G. Adequate Remedy at Law

Nissan's motion and supplemental brief argue that the plaintiffs have an adequate remedy at law, so they cannot receive any equitable remedies (such as equitable restitution). SJ Mot. 25; Nissan Supp. 9-10. This issue will not be addressed now. The full extent of the plaintiffs' remedies at law will be clear at the end of the trial, not before. At that point, we will take up what equitable remedies, if any, are warranted. I recognize that some courts have dismissed equitable claims at earlier junctions in the case, but that risks depriving the plaintiffs of remedies to which they may be entitled.

### H. Conclusion

Nissan's motion for summary judgment is GRANTED IN PART to the extent the plaintiffs' claims seek restitution or unjust enrichment for the purchase of used cars from entities other than Nissan. It is otherwise DENIED.

## IV. MOTION FOR CLASS CERTIFICATION

The plaintiffs move to certify several Rule 23(b)(3) damages classes of consumers who purchased class vehicles—one class for vehicles purchased in each of California, Colorado Florida, Illinois, and New York. *See* Motion for Class Certification ("Cert. Mot.") [Dkt. No. 134-4]. In the alternative, they move to certify Rule 23(c)(4) issues classes under for those matters that I determine are not appropriate for class treatment.[10]

### A. Rule 23(a)

First, I examine the Rule 23(a) requirements. Nissan does not dispute numerosity or commonality, but it argues that the named plaintiffs are not typical or adequate. *See* Opposition to the Cert. Mot. ("Cert. Oppo.") [Dkt. No. 146-18] 31-34.

#### i. Numerosity

FRCP 23(a) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. (a)(1). "[C]ourts canvassing the precedent have concluded that the numerosity requirement is usually satisfied where the class comprises 40 or more members,

10. In their supplemental reply, the plaintiffs argued for the first time that a 12(b)(2) injunctive relief class should be certified. *See* Dkt. No. 227 at 8. They never sought certification of an injunctive-relief class in their motion or even mentioned it in their briefing, which were focused entirely on damages classes. They have forfeited the opportunity to do so.

and generally not satisfied when the class comprises 21 or fewer members." *Twegbe v. Pharmaca Integrative Pharmacy, Inc.*, No. CV 12-5080 CRB, 2013 U.S. Dist. LEXIS 100067, 2013 WL 3802807, at *2 (N.D. Cal. July 17, 2013).

This requirement is satisfied. The plaintiffs have introduced evidence that there are more than 300,000 class vehicles that were leased or sold in the relevant states just until the model year 2020, let alone those since then. *See* Cert. Mot. 10 (collecting citations). Nissan does not dispute this.

**ii. Commonality**

FRCP 23(a) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. (a)(2). Satisfying the commonality test "only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012).

There are common questions of law and fact. They include the factual issues of the nature of the alleged defect (which the plaintiffs assert is common to all class vehicles), Nissan's knowledge (or lack thereof) about the alleged defect, whether a reasonable consumer would find the omission of the defect material, whether the vehicles violated the implied warranty of merchantability, and the extent to which Nissan's nondisclosure constituted concealment. Nissan does not dispute that this requirement is satisfied.

**iii. Typicality**

Rule 23 also requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" and "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3)-(4). The "test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

The plaintiffs here are typical of the class within the meaning of Rule 23. Each made a purchase of their car in the state whose class they are representing. There were no disclosures to any of them of the alleged defect. Each of them purchased the vehicle, therefore, at the price they would pay without knowledge of the defect. And, as noted, the consumer protection statutes use an objective reasonable person standard and the warranty statutes use an objective fitness standard.

Nissan says that the plaintiffs are not typical of the class because they face "unique defenses." *Hanon*, 976 F.2d at 508. Nissan's first proffered unique defense is on causation: it contends that it has introduced evidence that "most" of the named plaintiffs' PSRs broke due to "external impacts." Cert. Oppo. 32. This does not render the named plaintiffs atypical. Their theory is that the PSRs were *designed* such that they may not necessarily hold up under normal driving conditions. The harm under

the consumer protection statutes is the *nondisclosure* of that issue. The harm under the merchantability statutes is that they were not fit for ordinary use at sale. So Nissan's ground for atypicality is doubly irrelevant: first, it fits fine with the plaintiffs' theory if external impacts cause that shattering, what matters is the design; second, the shattering is not the harm for which the plaintiffs seek recompense, it is the nondisclosure or lack of fitness for ordinary use.

Nissan next argues that the New York named plaintiff (Seenarain) was not in privity with Nissan because he purchased his car from a dealership and that, under New York law, privity is required for an implied warranty claim. Cert. Oppo. 32. The plaintiffs do not dispute that, as a general matter, privity is required under New York law and a purchase from a dealership does not render a plaintiff in privity with Nissan; I accordingly assume without deciding that both are true. Instead, the plaintiffs' point to a "thing of danger" exception to the privity requirement that some federal district courts have read into New York law for products that create safety hazards. *See Hubbard v. GMC*, No. 95 CIV. 4362, 1996 U.S. Dist. LEXIS 6974, 1996 WL 274018, at *5 (S.D.N.Y. May 22, 1996); *see also Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 540 (D. Md. 2011); *Wade v. Tiffin Motorhomes, Inc.*, 686 F.Supp.2d 174, 190-91 (S.D.N.Y.2009). At least one federal district court has explicitly rejected the existence of this exception. *See Dixon v. Ford Motor Co.*, No. 14-CV-6135 JMA ARL, 2015 U.S. Dist. LEXIS 146263, 2015 WL 6437612, at *4 (E.D.N.Y. Sept. 30, 2015).

Neither party has pointed to, and I have not found, any decisions from the New York state courts that would help resolve this split. I agree with the weight of the federal authority that New York law does absolve parties of the privity requirement when the alleged violation of the implied warranty constitutes a safety hazard. That finding, as courts taking this view have explained, better aligns with broader legal principles and helps effectuate the goals of the statutes. It flowed from a decision of New York's high court carving out a safety exception to the privity requirement for products-liability suits. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). As other courts have explained, the rationale for doing so applies equally well to consumer protection's privity requirement. *See*, *e.g.*, *Doll*, 814 F. Supp. 2d at 540.

Nissan contends that several named plaintiffs (Seenarain and Spry) engaged in spoliation by, respectively, selling their vehicle and "agreeing to have [the vehicle] totaled" after an accident after litigation had begun. Cert. Oppo. 32-33. On these facts, I do not believe there was spoliation, so this does not render these plaintiffs atypical. Spoliation occurs when evidence is destroyed and there is a party at fault, there is prejudice to the opposing party, and there is a lesser sanction available than a finding of spoliation. *See*, *e.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 992 (N.D. Cal. 2012) (Koh, J.). But here, both of these named plaintiffs had the shattering occur followed by Nissan dealerships *repairing* their PSRs; accordingly, even if they had kept their vehicles it would not have assisted Nissan because the shattered PSRs were no longer in them to inspect.

Nissan's motion also raised issues about the California plaintiffs' (Johnson and Loury) entitlement to bring a CLRA claim. Cert. Oppo. 33. The filing of an amended complaint and the motions that followed it have resolved those issues.

Nissan asserts that the plaintiffs cannot be typical for purposes of restitution if they bought a car used from an entity other than Nissan because they cannot show that the money went to Nissan. Cert. Oppo. 33-34. I have, however, granted Nissan summary judgment on any claims predicated on this theory, so the issue of certification for it is moot. *See supra* Section III.F.

Nissan also contends that the Florida named plaintiff (Sullivan) is not typical because Florida consumer protection law requires a "manifestation" of a defect and Sullivan's PSR did not shatter. Cert. Oppo. 34-35. Nissan's argument, however, rests on one decision of one division of the Florida Court of Appeal, *Kia Motors America Corp. v. Butler*, 985 So. 2d 1133 (Fla. Dist. Ct. App. 2008). Courts after *Butler* have disagreed with it. *See*, *e.g.*, *Davidson v. Apple, Inc.*, No. 16-CV-04942-LHK, 2018 U.S. Dist. LEXIS 137707, 2018 WL 2325426, at *19 (N.D. Cal. May 8, 2018); *In re GM LLC Ignition Switch Litig.*, 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at *25 (S.D.N.Y. July 15, 2016). There is no manifestation requirement in the plain text of the statute, the state court added it largely out of a general policy concern. As far as I am aware, no other state court has adopted it and similar state consumer protection laws do not impose it. I agree with the post-*Butler* courts that have not found a manifestation requirement in Florida law.

**iv. Adequacy**

As noted, Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). That determination has two parts: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 566 (9th Cir. 2019) (internal quotation marks and citation omitted).

The plaintiffs are adequate representatives. As noted above, they are typical of the class and I perceive no conflicts of interest. They have now prosecuted the action for five years, including sitting for depositions.

Nissan's only counterargument is that the plaintiffs are inadequate representatives because they have engaged in claim-splitting. Cert. Oppo. 34. According to Nissan, the plaintiffs "have carefully trimmed their claims to exclude any potential complicating facts . . . that might predominate over common facts" and that "[c]ourts disapprove" of this practice. *Id.* Nissan misunderstands the doctrine and the basis of courts' concern. In the class-action context, there is always a worry that the named plaintiffs will place their own interests above the class's interests. One manifestation of this self-interested behavior is "claim-splitting," where named plaintiffs forgo some claims for relief that would be good for the class to focus on the ones best for their *individual* interests while attempting to bind the whole class to the outcome of the

action. *See*, *e.g.*, *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 531-32 (N.D. Cal. 2010) (Illston, J.). But here, that is not even what Nissan *argues* has occurred; Nissan just contends that the plaintiffs have pursued claims and issues that have the best chance of getting certified while leaving behind potential claims and issues that would not. So long as the named plaintiffs' interest in doing so is aligned with the class's interest, that does not render them inadequate representatives.

**B. Rule 23(b)(3)**

Because Rule 23(a) is satisfied, I turn to whether certification is appropriate under Rule 23(b)(3). A Federal Rule of Civil Procedure 23(b)(3) class can be certified 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."

The Rule provides that the following factors are "pertinent" to the predominance and superiority inquiry: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry

tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

**i. Generally, Common Issues Predominate**

Here, common issues predominate over individualized ones (except as stated below).

Start with the consumer protection claims. The core question under each state's law there will be whether Nissan had a duty to disclose the existence of the alleged defect. *See Gerber*, 552 F.3d at 938 (California); *Oswego*, 85 N.Y.2d at 26 (New York); *Mazella*, 548 F. Supp. 3d at 356 (same); *Carriuolo*, 823 F.3d at 983 (Florida); *Connick*, 174 Ill. 2d at 505 (Illinois); *Rhino Linings*, 62 P.3d at 148 (Colorado). That, in turn, will be determined using the objective reasonable consumer test—an analysis that is particularly well-suited to class treatment. *See supra* Section III.B. The jury will be asked whether a reasonable consumer would find the nondisclosure material. The jury will also be asked whether Nissan knew of the alleged defect, which also turns on common proof, rather than anything individualized. This is all reinforced by the nature of the alleged problem with the PSRs here: that something in their *design* renders them unsuitable for normal driving conditions. If there are individual issues to be resolved, they have to do essentially with the precise amount of damages consumers will get based on the particular model of car they purchased at a particular price. In this circuit, that sort of individualized damages

calculation does not defeat certification. *See Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010).

A similar story plays out when it comes to the implied warranty of merchantability claims. The question under each state's law for those claims will be whether the vehicles were fit for ordinary purpose. *See, e.g.*, *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 819 (N.D. Cal. 2014) (Davila, J.) (discussing the requirements of the implied warranty). That question bears a strong resemblance to the inquiry the jury will be conducting under the consumer protection statutes in that it will require an assessment of (1) what constitutes an ordinary purpose and (2) whether the design of the PSRs lived up to it. Those questions will, just as above, be subject to common proof. And because the warranties are implied by law, there is no issue of individualized warranties given.

**ii. A Class Action is Superior**

As Nissan does not dispute (except to the extent its other arguments might bear on the issue), a class action is a superior vehicle for litigating these claims. There are potentially hundreds of thousands of class members across several states; it would be a waste of their time and resources, Nissan's time and resources, and the judiciary's time and resources to litigate their cases individually. This case, moreover, has required significant expert evidence; it would not be feasible for each individual consumer to replicate that in each case.

### iii. The Illinois Class Will Not Be Certified

On the Illinois claims, Nissan points out, Cert. Oppo. 23, that I have previously held that the Illinois consumer protection statute does not support a pure omission theory but instead requires an incomplete communication. *See* Dkt. No. 91 at 3; *see also De Bouse v. Bayer*, 235 Ill. 2d 544, 922 N.E. 2d 309, 316, 337 Ill. Dec. 186 (Ill. 2009) ("[W]e have repeatedly emphasized that in a consumer fraud action, the plaintiff must actually be deceived by a statement or omission. If there has been no communication with the plaintiff, there have been no statements and no omissions."). And because of this, it argues, common issues will predominate about the methods of dissemination of information. Cert. Oppo. 23. Nissan has raised a substantial concern, and courts have often denied certification based on similar problems. *See*, *e.g.*, *Reitman v. Champion Petfoods United States, Inc.*, No. CV181736DOCJPRX, 2019 U.S. Dist. LEXIS 221941, 2019 WL 7169792, at *8 (C.D. Cal. Oct. 30, 2019), aff'd, 830 F. App'x 880 (9th Cir. 2020) (denying certification on predominance grounds when there would be wide variance in the misleading communications plaintiffs would have been exposed to). The plaintiffs' briefing simply does not respond to illustrate how common issues would predominate on these facts. Accordingly, they have not carried their burden to show that certification of the Illinois class is appropriate. To that extent, the motion to certify is denied.

### iv. California and New York Class Definitions

Nissan challenges the predominance of common issues when it comes to the California and New York classes because both state statutes require that the product be for *personal* use. Cert. Oppo. 24-25. And, says Nissan, some class members may have bought theirs for business use. *Id.* Maybe this would be a predominance problem; I do not determine one way or the other. Instead, I take the plaintiffs' invitation, Cert. Reply 11, to simply tweak the proposed definitions for the California and New York classes to extend only to those who purchased the vehicles for personal use. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (holding that courts may modify class definitions). Not only would it be silly to toss out the entire classes for something like this, but even setting aside certifiability issues, the California and New York laws do not substantively allow recovery in other circumstances anyway.[11]

### v. New York and Colorado Statutes of Limitations on Warranty Claims

Nissan argues that, when it comes to the warranty claims under Colorado and New York law, the statute of limitations runs from delivery, so the jury will have

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11. Nissan argues that Seenarain (the New York named plaintiff) bought her vehicle for business use, Cert. Oppo. 24-25, but the evidence contradicts that claim. Seenarain bought a used vehicle that was *previously* part of a business fleet, but *she* purchased it for personal use. *See* Cert. Reply, Ex. II at 58:22-39:11 (deposition testimony).

to determine whether each class member's claims are untimely. Cert. Oppo. 26-27. The plaintiffs do not offer any defense on this issue, other than to say that the class can be shortened to accommodate it. Cert. Reply 14. Accordingly, the class definition will be changed to include a class period within the statute of limitations. *See Gen. Tel.*, 457 U.S. at 160.

### vi. Nissan's Remaining Counterarguments

Nissan offers several other rebuttals, but none are persuasive.[12]

#### 1. Lack of Common Defect

Nissan first argues that there is no evidence of a "defect" for essentially the same reasons it gave at summary judgment and because I should exclude the plaintiffs' experts. I denied its *Daubert* motions. Even if I had not, there is still evidence of a defect that can go to the jury—as discussed above when it came to summary judgment, the evidence of consumer complaints and reports of shattering is good enough.

#### 2. Individual Causes of Shattering

Nissan contends that there will be a need to examine why *each* PSR actually shattering, requiring

12. Nissan repeats its argument that Florida law requires a manifestation of the defect. Cert. Oppo. 25-26. And it repeats its argument about privity under New York law. *Id.* 27. As explained in preceding sections in-text, I reject those readings of both states' laws.

individualized examination. Cert. Oppo. 19-21. I disagree. As I have explained several times, the plaintiffs' theory does not depend on the precise reason their individual PSRs actually broke, it depends on whether the PSRs as a group were *designed* such that they were not fit for normal driving conditions or fit for ordinary purpose. And Nissan counters that its own evidence shows that most PSRs break from external impacts. But that is a merits question: whether the PSRs were designed as the plaintiffs contend. If Nissan is right and the plaintiffs cannot show that defect exists, it means the plaintiffs lose on the merits, not that common issues do not predominate—indeed, that their claims could fall in one fell swoop by failure to demonstrate a defect shows that they *are* amenable to class treatment, rather than the reverse.

### 3. Variance in Consumer Protection Statutes

Nissan next contends that the consumer protection inquiries in all five states require so much individualized analysis that it defeats certification. Cert. Oppo. 22-26.

Its first reason for thinking so is that its knowledge of PSR claims has changed over time, requiring individualized proof. *Id.* 22. But if Nissan's knowledge changed over time, then common proof as to the whole class will show it. Nissan is a single company; evidence of its knowledge may change over time, but it will be uniform as it relates to the claims at each period in time, and Nissan has pointed to no concrete evidence to the contrary. And if the plaintiffs cannot show Nissan's knowledge during

the class period to the jury's satisfaction, so be it; but it does not mean that any individualized issue predominates.

Nissan also contends that class members will have been exposed to different information at different times, so there will be individual issues about what they knew, when they knew it, and how they would have had the disclosure revealed to them. Cert. Oppo. 22-23. To the extent the case is about consumer protection law, however, it is based on an omission theory. The plaintiffs need not have viewed any particular misleading advertisement to be misled. Instead, the plaintiffs will just have to introduce (common) evidence that Nissan failed to disclose the information and that the information would have reached consumers had it been disclosed. That is unlike any of the cases Nissan cites that denied certification for reasons like this. To the extent the case is about merchantability, the violation occurs when the item is sold without being fit for its ordinary purpose and without an adequate disclosure or disclaimer.

Nissan next argues that there are too many individual questions about consumers' knowledge, or lack thereof, of the alleged defect. Cert. Oppo. 23-24. As a result, it contends, common questions do not predominate when it comes to reliance (and materiality). *Id.* This misunderstands the inquiry. As explained, the question is whether the omitted information would be material to a *reasonable consumer*—and the presumption of reliance that follows. To the extent Nissan's argument is that there was publicly available information about the alleged defect, that is insufficient to show that individual

issues predominate. It is not disputed that *Nissan* did not reveal the defect and, indeed, it still denies that it exists. So the idea that there was public reporting sufficient to convince consumers of it is farfetched. More fundamentally, whether sufficient information about the defect was revealed is, here, a merits question: if enough was revealed, maybe it could defeat the claim that Nissan concealed the information. But it is a question that asks about the reasonable consumer.

When it comes to the Florida class, Nissan argues that Florida law requires a mixed standard for reliance that combines the objective reasonable consumer test with a subjective test that requires examination of a particular consumer's specific context. *See* Cert. Oppo. 25. It makes too much of that doctrine. The only quirk to Florida law is that it applies the objective reasonable consumer test with a slight modification: "the plaintiff must show that "the alleged practice was likely to deceive a consumer *acting reasonably in the same circumstances*." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 983-84 (11th Cir. 2016) (internal quotation marks and citation omitted) (emphasis added). But the test is still an objective one. *Id.* at 984. Here, I see no reason—and Nissan has pointed to none—in which individuals would be in such distinct circumstances when purchasing these vehicles as to preclude common issues from predominating. And, indeed, courts have certified classes under Florida consumer protection law in similar circumstances.

### 4. Unjust Enrichment

Nissan argues that, to the extent the claims seek to recover for unjust enrichment, they will require individualized inquiries because, as both parties agree, unjust enrichment under each state's law requires an express contract. *See* Cert. Oppo. 26 (collecting citations); *see also* Cert. Reply 13 (agreeing that express contracts are required). But the plaintiffs have submitted evidence that each vehicle was sold with an express warranty. *See* Cert. Reply 13 (collecting citations). If so, no individualized inquiries appear to be required. If the evidence ultimately shows otherwise, I may decertify the classes when it comes solely to these claims.

### 5. Uninjured Class Members

Nissan makes two related arguments. It argues that some class members will have sold or traded their vehicles without the windshields shattering and, as a result, there will be more than a *de minimis* number of uninjured class members. Cert. Oppo. 27-28. As an initial matter, Nissan's *de minimis* argument depends on *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021). But, since Nissan filed its brief, the Ninth Circuit has overturned that portion of *Olean* in an en banc decision and made clear that the question remains whether common issues predominate. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022).

More importantly, Nissan misunderstands the injury at the heart of this suit. The *injury* for purposes of the consumer protection statutes occurred when class members paid more than they would had the information been disclosed. *See Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 822 (9th Cir. 2019). The *injury* for purposes of the implied warranty claims occurred when class members were sold a vehicle not fit for ordinary purposes. *Cf. id.* As I have previously explained in rejecting a similar argument, Ninth Circuit precedent is clear that damages are calculated at *that* time. *Maldonado*, 2021 U.S. Dist. LEXIS 92483, 2021 WL 1947512, at *24.

### 6. Infiniti

In its supplemental brief, Nissan argues that the Infiniti models should no longer be Class Vehicles because there are no named plaintiffs who purchased one.[13] Nissan Supp. 8-9. I disagree. The plaintiffs have shown that the PSRs in the Infiniti models are "substantially similar" to the PSRs in the named plaintiffs' vehicles, so can remain part of the suit. *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991). In particular, the plaintiffs' experts analyze the Infiniti PSRs along with the others, in one analysis, demonstrating their substantial similarity. *See id.*

13. There used to be, but that named plaintiff's claims were voluntarily dismissed. Dkt. No. 132.

**C. Damages**

Nissan attacks the damages model for failing to satisfy Comcast *Corp. v. Behrend*, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013), which requires that damages be tied to the theory of class-wide harm.[14] The details of that model are explained above in the section addressing the *Daubert* motion on Gaskin and Weir. *See supra* Section I.A.

Nissan's main argument is that Gaskin and Weir calculate damages at point of first sale, which does not "fit" those class members who bought used vehicles. Cert. Oppo. 28-31. At the hearing, I asked the parties to zero in on this issue. Based on their arguments, and for the reasons that follow, I am satisfied that the plaintiffs' damages model satisfied Rule 23 and *Comcast*.

As explained above, Gaskin and Weir's damages model is supposed to determine the price premium for a non-defective vehicle over a defective one to a consumer. *See supra* Section II.A. Then, they multiply that premium by the total number of new vehicles purchases. *See id.* That number will be the total pool of damages in the case. The *amount* of damages that each class member is entitled to can then be parceled up among the class members according to their injury. That makes sense because "the amount of damages is invariably an individual question and does not defeat class action treatment." *Yokoyama*,

14. Nissan also echoes much of its *Daubert* argument about Gaskin and Weir's damages model, which I address above.

594 F.3d at 1094 (internal quotation marks and alteration omitted). But that total pool of damages is sufficiently fitted to the harm to satisfy *Comcast*: it measures the harm associated with overpaying for a vehicle when it was purchased from Nissan. To Nissan's point about used vehicles, if a class member has purchased a used vehicle from someone else, she will likely be entitled to a lesser amount of damages than someone who purchased a new vehicle (as the plaintiffs' counsel conceded at the hearing). But that too is an issue of allocation of damages. The parties or court can settle on an appropriate methodology for adjusting the *amount* of *individual* damages to take due account of the depreciation in value and the lower price paid. This is not a problem from the perspective of *Comcast* because it *does* measure classwide damages. Nor does it require Nissan to pay for damages divorced from sales it made: the number is tied entirely to new sales that Nissan itself made without penalizing it for any used sale.

**D. Conclusion**

The motion to certify the California, Colorado, New York, and Florida classes is GRANTED with the definitions as discussed above. The motion to certify the Illinois class is DENIED. Of course, the case can only proceed on claims that remain. I leave it to the parties to work out in the first instance what the contours of the case are in light of all findings in this Order.

*Appendix B*

**CONCLUSION**

The *Daubert* motions are DENIED. Nissan's motion for summary judgment is GRANTED IN PART and DENIED IN PART as stated above. The plaintiffs' motion for class certification is GRANTED IN PART and DENIED IN PART as stated above. The related motions to seal will be ruled on in a forthcoming order.

A Case Management Conference is set for September 20, 2022, at 2 p.m. The Joint Statement, to be filed by September 13, 2022, shall include a proposed schedule for trial and the remainder of the case.

**IT IS SO ORDERED**.

Dated: July 21, 2022

/s/ William H. Orrick
William H. Orrick
United States District Judge

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-16644
D.C. No. 3:17-cv-00517-WHO

SHERIDA JOHNSON, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellees,*

v.

NISSAN NORTH AMERICA, INC.,

*Defendant-Appellant.*

Filed January 14, 2025

**ORDER**

Before: WARDLAW and SANCHEZ, Circuit Judges, and LYNN,** District Judge.

The panel has voted unanimously to deny the petition for rehearing. Judge Wardlaw and Judge Sanchez have

** The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

voted to deny the petition for rehearing en banc, and Judge Lynn has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. *See* Fed. R. App. P. 40. The petition for rehearing and rehearing en banc (Dkt. No. 96) is therefore DENIED.

## APPENDIX D — PROVISIONS INVOLVED

### Federal Rule of Civil Procedure 23

Rule 23. Class Actions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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