No. _____

In the Supreme Court of the United States

STARKIST CO.;
DONGWON INDUSTRIES CO., LTD.,
Petitioners,

v.

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, and in what circumstances, the presence of uninjured class members precludes the certification of a class under Federal Rule of Civil Procedure 23(b)(3).

2. Whether, and in what circumstances, a plaintiff may rely on representative evidence such as averaging assumptions to establish classwide proof of injury to satisfy Rule 23's requirements.

PARTIES TO THE PROCEEDING

Petitioners (defendant-appellants below) are StarKist Co. and Dongwon Industries Co., Ltd.

Respondents (plaintiffs-appellees below) are:

- Olean Wholesale Grocery Cooperative, Inc.; Pacific Groservice Inc. d/b/a PITCO Foods; Piggly Wiggly Alabama Distributing Co., Inc.; Central Grocers, Inc.; Trepco Imports and Distribution Ltd.; and Benjamin Foods LLC (collectively, the "Direct Purchaser Plaintiffs");
- Louise Adams; Nay Alidad; Jessica Bartling; Gay Birnbaum; Barbara Blumstein; Melissa Bowman; Sally Bredberg; Barbara Buenning; Michael Buff; Scott Caldwell; Jade Canterbury; Laura Childs; Casey Christensen; Jody Cooper; Kim Craig; Sundé Daniels; Elizabeth Davis-Berg; Brian Depperschmidt; Vivek Dravid; Gloria Emery; Robert Etten; Ana Gabriela Felix Garcia; John Frick; Kathleen Garner; Stephanie Gipson; Kathy Durand; Andrew Gorman; Tina Grant; Edgardo Gutierrez; Lisa Hall; Mary Hudson; Tya Hughes; Amy Jackson; Marissa Jacobus; Danielle Johnson; Zenda Johnston; Amy Joseph; Michael Juetten; Steven Kratky; Kathy Lingnofski; Carla Lown; Katherine McMahon; Diana Mey; Liza Milliner; Laura Montoya; Rick Musgrave; Jennifer A. Nelson; Corey Norris; Barbara Olson; Kirsten Peck; John Pels; Elizabeth Perron; Valerie Peters; John Peychal; Audra Rickman; Erica Rodriguez; Joelyna A. San Agustin; Amber Sartori; Rebecca Lee Simoens; Robert Skaff; Greg Stearns; Nancy Stiller; Christopher Todd; John Trent; Elizabeth Twitchell; Bonnie Vander

Laan; Nigel Warren; Julie Wiese; Thomas E. Willoughby III; and Daniel Zwirlein (collectively, the "End Payer Plaintiffs"); and

- Capitol Hill Supermarket; Janet Machen; Thyme Café & Market; Simon-Hindi LLC; LesGo Personal Chef, LLC; Maquoketa Care Center, Inc.; A-1 Diner; Francis T. Enterprises d/b/a Erbert & Gerbert's; Harvesters Enterprises, LLC d/b/a Harvester's Seafood and Steakhouse; Dutch Village Restaurant; Painted Plate Catering; GlowFisch Hospitality d/b/a Five Loaves Café; Rushin Gold LLC d/b/a The Gold Rush; Erbert & Gerbert, Inc.; Groucho's Deli of Raleigh; Sandee's Catering; Groucho's Deli of Five Points; and Confetti's Ice Cream Shoppe (collectively, the "Commercial Food Preparer Plaintiffs").

Bumble Bee Foods LLC was a defendant in the district court and an appellant in the court of appeals. On September 16, 2020, the court of appeals administratively closed the appeal as to Bumble Bee Foods LLC pursuant to the automatic stay for bankruptcy proceedings imposed by 11 U.S.C. § 362.

Tri-Union Seafoods LLC d/b/a Chicken of the Sea International and Thai Union Group PCL were defendants in the district court and appellants in the court of appeals until their voluntary dismissal from the appeal on May 5, 2021.

The following parties were defendants in the district court that did not participate in the proceedings in the court of appeals: Big Catch Cayman LP a/k/a Lion/Big Catch Cayman LP; Del Monte Corp.; Del Monte Foods Co.; Dongwon Enterprises; King Oscar, Inc.; Lion Capital

(Americas), Inc.; Thai Union Frozen Products PCL; Thai Union North America, Inc.; Tri Marine International, Inc.; and Christopher D. Lischewski.

The following parties were plaintiffs in the district court that did not participate in the proceedings in the court of appeals: 99 Cents Only Stores; Affiliated Foods, Inc., Affiliated Foods Midwest Cooperative, Inc.; Ahold U.S.A., Inc.; Albertsons Companies, LLC; Alex Lee, Inc.; Associated Food Stores, Inc.; Associated Grocers, Inc.; Associated Grocers of Florida, Inc.; Associated Grocers of New England, Inc.; Associated Wholesale Grocers, Inc.; Bashas' Inc.; Big Y Foods, Inc.; Bi-Lo Holding, LLC; Brookshire Brothers, Inc.; Brookshire Grocery Co.; Cash-Wa Distributing Co. of Kearney, Inc.; Certco, Inc.; The Cherokee Nation; CVS Pharmacy, Inc.; Delhaize America, LLC; Dolgencorp, LLC; Dollar General Corp.; Dollar Tree Distribution, Inc.; Family Dollar Services, LLC; Family Dollar Stores, Inc.; Fareway Stores, Inc.; Giant Eagle, Inc.; Gladys, LLC; Grand Supercenter, Inc.; Greenbrier International, Inc.; H.E. Butt Grocery Company; Hyvee, Inc.; John Gross & Co.; Kmart Corp.; Krasdale Foods, Inc.; The Kroger Co.; K-VA-T Food Stores, Inc. d/b/a Food City; Marc Glassman, Inc.; McLane Co., Inc.; Meadowbrook Meat Company, Inc.; Meijer Distribution, Inc.; Meijer, Inc.; Merchants Distributors, LLC; Moran Foods, LLC d/b/a Save-A-Lot; North Central Distributors, LLC; Publix Super Markets, Inc.; Sam's East, Inc.; Sam's West, Inc.; Schnuck Markets, Inc.; Spartannash Co.; Super Store Industries; SuperValu Inc.; Sysco Corp.; Target Corp.; Unified Grocers, Inc.; URM Stores, Inc.; US Foods, Inc.; W Lee Flowers & Co., Inc.; Wakefern Food Corp.; Walmart Stores East, LLC; Walmart Stores East, LP; Wal-Mart Stores, Inc.; Wal-Mart

Stores Texas, LLC; Wegmans Food Markets, Inc.; Western Family Foods, Inc.; Winn-Dixie Stores, Inc.; Woodman's Food Market, Inc.; Janelle Albarello; Galyna Andrusyshyn; Robert Benjamin; Paul Berger; Marc Blumstein; Jessica Breitbach; Adam Buehrens; Lisa Burr; Michael Coffey; Sally Crnkovich; Debra Damske; Jessica Decker; Larry Demonaco; Scott Dennis; Ken Dunlap; Karren Fabian; Robert Fragoso; Danielle Greenberg; Sheryl Haley; Blair Hysni; Dwayne Kennedy; Sterling King; Herbert Kliegerman; Gabrielle Kurdt; Joseph A. Langston; Carl Lesher; Brian Levy; Barbara Lybarger; Louise Ann Davis Matthews; Kristin Millican; Beth Milliner; Jinkyoung Moon; Colin Moore; Evelyn Olive; Ellen Pinto; Jeffrey Potvin; Sandra Powers; Erica Pruess; Virginia Rakipi; Robby Reed; Bryan Anthony Reo; Jonathan Rizzo; Ramon Ruiz; Seth Salenger; Sarah Metivier Schadt; Samuel Seidenburg; Clarissa Simon; Harold Stafford; Truyen Ton-Vuong a/k/a David Ton; Kathy Vangemert; James Walnum; Amy Waterman; Jason Wilson; Edy Yee; Dennis Yelvington; and Beverly Youngblood.*

CORPORATE DISCLOSURE STATEMENT

Petitioner StarKist Co. is a subsidiary of Dongwon Industries Co., Ltd., which owns 10% or more of its stock.

Petitioner Dongwon Industries Co., Ltd. is a subsidiary of Dongwon Enterprise Co., Ltd., which owns 10% or more of its stock.

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* Although some of these parties are designated as "plaintiffs-appellees" on the court of appeals' docket, none participated in the proceedings in the court of appeals.

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, No. 19-56514 (Apr. 8, 2022)

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC, No. 19-80108 (Dec. 20, 2019)

United States District Court (S.D. Cal.):

In re Packaged Seafood Products Antitrust Litig., No. 3:15-md-2670-JLS-MDD (July 30, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners StarKist Co. and Dongwon Industries Co., Ltd. (collectively, "StarKist") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 1a-71a) is reported at 31 F.4th 651. The opinion of the court of appeals panel (App. 72a-109a) is reported at 993 F.3d 774. The order of the district court (App. 110a-87a) is reported at 332 F.R.D. 308.

JURISDICTION

The en banc court of appeals entered its judgment on April 8, 2022. On June 27, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 8, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Relevant portions of Article III of the United States Constitution; the Clayton Act, 15 U.S.C. § 15; and Federal Rule of Civil Procedure 23 are reproduced at App. 195a-208a.

INTRODUCTION

This petition presents two recurring questions of foundational importance to class action law that have divided the courts of appeals, split both the en banc and three-judge panels of the Ninth Circuit below, and urgently warrant resolution by this Court.

The first question concerns whether, or in what circumstances, the presence of uninjured class

members precludes the certification of a class under Federal Rule of Civil Procedure 23(b)(3)—an issue this Court acknowledged as one of "great importance," but was unable to address due to case-specific reasons in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460-61 (2016). Since *Tyson Foods*, the conflict among the courts of appeals has only grown on this important issue—as well as the subsidiary question whether a district court must determine the extent of uninjured class members before certifying any class.

That discord has been thrown into sharp relief by the Ninth Circuit's en banc decision in this case. That decision upheld certification of a class even though a *third* of that class may be uninjured, on the premise that the extent of uninjured members is a "merits" question that should be resolved by a jury. App. 17a-18a, 46a-48a. As the dissent below explained, that ruling squarely conflicts with the decisions of other circuits. *Id.* at 70a-71a (Lee, J.). It flouts this Court's admonition that district courts must determine whether Rule 23's requirements are met *before* certifying any class, even when doing so "overlap[s] with the merits." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). And it contravenes the limits imposed by Article III itself. *See Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring). Ultimately, the Ninth Circuit's approach will invite "monstrously oversized classes designed to pressure and extract settlements." App. 71a (Lee, J., dissenting).

The second question is also critical, and likewise implicates a clear conflict among the courts of appeals. The decision below interprets this Court's decision in *Tyson Foods* as "establish[ing] the rule" that a class may be certified based on the *assumption* that each class member suffered the same injury as

the average person in the class, so long as a juror might find that assumption "plausible." *Id.* at 18a, 39a-40a. But other circuits have rejected that reading of *Tyson Foods* and refused to allow the use of representative evidence to satisfy Rule 23 in the same circumstances as here. The limits recognized by these courts are essential to ensuring that representative evidence is not allowed to mask individualized differences among class members or eliminate the individualized defenses that defendants would have in an individual action, in violation of the Rules Enabling Act. The Ninth Circuit's decision in this case dramatically lowers the bar for using representative evidence to satisfy Rule 23.

If allowed to stand, the Ninth Circuit's decision will "weaponize Rule 23 to impose an in terrorem effect on defendants" by sanctioning the certification of "grossly oversized classes." *Id.* at 68a, 70a (Lee, J., dissenting). Certiorari is warranted.

STATEMENT OF THE CASE

A. Factual Background

This case tests the certification of three enormous and widely divergent classes of direct and indirect purchasers of packaged tuna products, including hundreds of retailers ranging from mega-buyers like Costco and Amazon to local grocery stores and delis, and many millions of individual consumers. It arises from antitrust suits brought against the three largest suppliers of packaged tuna in the United States—StarKist, Chicken of the Sea ("COSI"), and Bumble Bee Foods LLC (collectively, "Defendants"). *Id.* at 5a. Plaintiffs claim that Defendants conspired to manipulate the list prices of hundreds of different tuna products. *Id.* at 112a. But the list price for the

products at issue is virtually never the price paid by direct purchasers, like a Costco, or passed through to individual consumers downstream. Instead, the actual price paid derives from purchaser-specific negotiations and a host of other factors that often result in variations from the list price.

1. The underlying market in this case is characterized by numerous, highly individualized factors affecting price. Defendants sell hundreds of different packaged tuna products to an array of different entities. These products include both branded products and private label products (*e.g.*, store-brand products sold by Trader Joe's and Costco), packaged both for individual consumers and for food preparers. The purchasers of Defendants' products vary greatly in size and negotiating power, procurement and retail strategies, and other factors, which influence the prices they actually pay.

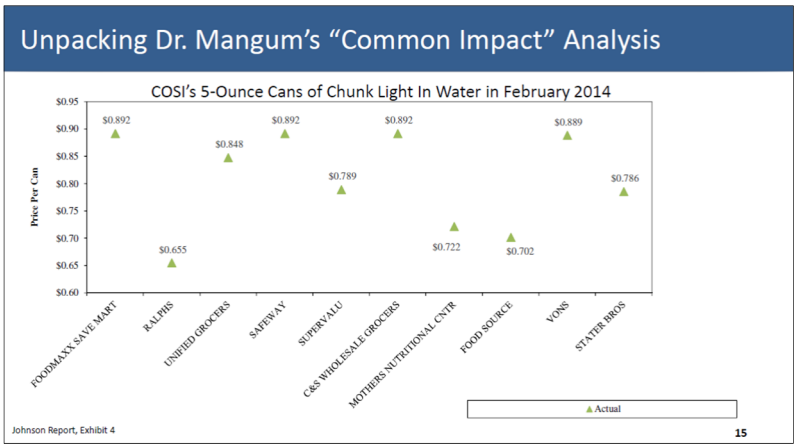
The prices paid by direct purchasers are reached through individualized negotiations, depending on the type of product. *Id.* at 94a; *see* Defs.' C.A. Br. 6 (collecting record cites). And certain products are sold under a direct purchaser's private label, like Costco's Kirkland brand, which are manufactured according to specifications set by the purchaser, with prices set by a bespoke bidding process. *See, e.g.*, C.A. Excerpts of Record (E.R.) 1713, 1717, 1944-47.

The direct purchasers range from nationwide outlets like Target, Costco, and Amazon to local supermarkets and convenience stores. These purchasers have significantly "different bargaining power." App. 54a. Large retailers wield significant leverage to "fiercely negotiate the list price down." *Id.* at 64a (Lee, J., dissenting). They are also frequently able to negotiate rebates and other promotional

concessions that offset any price increases. *Id.* at 64a-65a; *see* Defs.' C.A. Br. 6-7 (collecting cites).

Prices also vary based on differences in procurement and retail strategies. For example, some retailers use an everyday-low-price strategy that requires persistent negotiation over prices, whereas others may offer aggressive promotional deals for short periods, sometimes using tuna as a loss-leader by selling it below acquisition cost. C.A. E.R. 1627-28, 1662-63, 2204-05; *see* App. 94a. And private label products—at least 15-20% of the packaged tuna market—are subject to a distinct bidding process that typically produces prices far lower than those for branded products. *See* C.A. E.R. 1944-47.

All this results in broad variations in prices across these stores and markets. For example, as the graph below shows, the prices paid by different California direct purchasers for the *same* 5-ounce can of branded tuna during the *same* month varied by as much as *23 cents* on cans that cost just 66 to 89 cents each:



C.A. E.R. 1018.

2. This variation in prices flows downstream to indirect purchasers such as individual consumers. Direct purchasers not only pay different prices for packaged tuna, but the degree to which they pass through any changes in those prices to consumers also varies. Large retailers like Costco may choose to absorb some or all of any price increase, whereas small retailers are more likely to pass through some or all of an increase in their wholesale cost. C.A. E.R. 1094-98, 1102-03, 1662-65, 1768-69; *see* App. 51a-53a. Different retailers also use different pricing strategies, such as focal point pricing (*e.g.*, prices ending in $0.99). As a result, the prices paid by ordinary individual consumers vary significantly based on where they buy their packaged tuna products—e.g., from Amazon or a local deli. And large indirect purchasers, such as restaurant chains, often negotiate special price reductions unavailable to ordinary consumers. Defs.' C.A. Br. 9-12.

Because of highly individualized factors affecting pricing down the line, and because buyers have multiple (and varying) ways of *resisting* any price increases in their individual case, a change in the list price can and does leave many direct and indirect purchasers entirely unaffected. In fact, the evidence showed that numerous direct purchasers—including Amazon, Trader Joe's, and Food Lion—paid *less* than the price Plaintiffs claimed would have been paid absent the alleged price-fixing. C.A. E.R. 1076; *see* Defs.' C.A. Suppl. Record Cites (Doc. No. 99) (collecting record cites). And, as noted, private label products—accounting for some 20% of the packaged tuna market—do not appear on any price list and, instead, are negotiated separately. *Supra* at 4-5.

B. District Court Proceedings

1. This litigation follows on the heels of a federal criminal investigation into price-fixing in the packaged tuna market more than a decade ago. The investigation revealed that, following an increase in the cost of raw tuna in late 2010, sales executives from Bumble Bee and COSI, and one former executive from StarKist, coordinated the *timing* of when each company would issue new list prices for tuna products in late 2011 through 2013. *See* App. 6a. The investigation ultimately led to guilty pleas and criminal convictions for Bumble Bee and StarKist and certain of their employees. *Id.*

Plaintiffs initiated this litigation in 2015. *Id.* at 111a. Three putative class actions were filed, along with dozens of individual suits brought by large and small retailers, grocery stores, and distributors. The scope of the antitrust allegations in these cases sweeps far beyond the scope of the government's criminal case in terms of both the conduct and time period alleged. *See id.* at 6a-7a.

Following discovery, Plaintiffs sought to certify three putative classes of packaged tuna purchasers:

- A Direct Purchaser Plaintiff (DPP) class of all persons and entities that "directly purchased" Defendants' packaged tuna products from June 2011 to July 2015. *Id.* at 115a-16a. The direct purchasers vary significantly, ranging from major nationwide retailers like Amazon and Walgreens, to regional grocery store chains, to mom-and-pop stores and corner markets.
- An End Payer Plaintiff (EPP) class of millions of individuals, spanning 30 States, D.C., and Guam, who indirectly purchased Defendants'

packaged tuna for personal consumption from June 2011 to July 2015. *Id.* at 170a-71a.

- And a Commercial Food Preparer Plaintiff (CFP) class of individuals and commercial entities from 27 States and D.C. that, between June 2011 and December 2016, indirectly purchased Defendants' bulk-sized packaged tuna products from one of six large direct purchasers (Walmart, Sam's Club, Costco, Sysco, US Foods, and Dot Foods). *Id.* at 143a-44a. This class ranges from local food preparers like corner delis and restaurants to the nation's largest food service company, Aramark.[1]

As in any private antitrust case for damages, Plaintiffs are required to demonstrate that they suffered an "injur[y] in [their] business or property," 15 U.S.C. § 15—here, in the form of overcharges created by supra-competitive prices as a result of the alleged price-fixing conspiracy. *See* App. 14a-15a. This showing of injury is required both to establish an element of the antitrust claim, where it is sometimes called "antitrust impact," *Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013), and Article III standing, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207-08 (2021). In markets characterized by individualized negotiations and the kinds of other factors discussed above, injury does not automatically follow from a price-fixing conspiracy, even when one exists. Certain direct purchasers, for example, may have sufficient market power to resist any attempted price increase, and they may not pass through any price

[1] The arguments in this petition apply to all three classes, though—as in the decisions below—the focus is on the DPP class.

increase to the indirect purchasers. And private label products do not even appear on a price list.

2. Plaintiffs sought class certification in this case under Federal Rule of Civil Procedure 23(b)(3), which permits certification only if the district court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

As is frequently the case, the crux of the certification dispute turned on whether Plaintiffs' statistical models actually showed classwide impact. Although their methodologies differed slightly, Plaintiffs' experts all used regression models that purported to calculate "average" overcharges that would apply across-the-board to each member of the putative classes. Thus, for the DPP class:

- Plaintiffs' expert (Dr. Russell Mangum) pooled all of the direct purchasers together and first concluded that the average overcharge was 10.28%. App. 77a-78a. Dr. Mangum *assumed* that all direct purchasers were overcharged by this same 10.28% average overcharge, no matter their circumstances or the prices they actually paid. *Id.* at 78a.
- Dr. Mangum used a pooled regression to compute a "predicted actual price" paid by all direct purchasers. *Id.* He then subtracted the assumed common overcharge of 10.28% from the predicted actual price for every transaction to get a predicted "but-for price"—i.e., the price his model predicted each purchaser should have paid but for the alleged conspiracy. *Id.*
- Dr. Mangum then compared the predicted but-for price with the actual prices that each direct

> purchaser paid on their purchases. *Id.* If the predicted but-for price was lower than the actual price for even a single transaction, Dr. Mangum deemed the purchaser "injured." *Id.*

Even under this approach—which embedded his assumed 10.28% overcharge into almost every step—Dr. Mangum's model showed injury only to 94.5% of the DPP class. *Id.* For the remaining 5.5% of the class, the actual price paid was *lower*—for *every* transaction—than the price Dr. Mangum's model predicted the purchaser should have paid absent the alleged conspiracy. In other words, 5.5% of the class was uninjured even under Plaintiffs' own expert's model. The models used to predict injury for the EPP and CFP classes also used pooled regressions and average overcharges. *See id.* at 50a, 53a, 80a.

In response, Defendants' experts showed that Plaintiffs' models could not show classwide impact due to their inability to establish injury for a significant part of the class, and instead improperly masked the realities of the marketplace—where packaged tuna prices are individually negotiated, and direct purchasers are differently situated in those negotiations. *Id.* at 128a-29a; *see id.* at 64a (Lee, J., dissenting). To illustrate this flaw, Defendants' expert (Dr. John Johnson) re-ran Dr. Mangum's model with one modification: Instead of calculating only one average overcharge for all direct purchasers (10.28%), Dr. Johnson allowed the overcharge to vary by individual direct purchaser. *Id.* at 128a-29a. With that one modification, Dr. Johnson explained, Dr. Mangum's model could not show injury to at least

28%—nearly a third—of the putative DPP class members. *Id.* at 129a; *see* C.A. E.R. 718-24, 1479-81.[2]

Accordingly, Defendants argued that Plaintiffs' models failed to show the classwide impact necessary to meet Rule 23's requirements.

3. The district court agreed with Defendants that predominance was the "most important[]" issue at class certification, and that this issue hinged on whether the element of injury could be resolved on a common basis. App. 120a-22a. The court also acknowledged Defendants' expert's conclusion that, after allowing for variation in the purported overcharge, Dr. Mangum's model could not show impact for at least 28% of the putative DPP class. *Id.* at 129a. And the court recognized that a "model unable to show impact to over 28% of the class members would unquestionably" fail to satisfy Rule 23(b)(3)'s predominance requirement. *Id.* The court further recognized that "Defendants' criticisms [of Plaintiffs' models] are serious." *Id.* at 140a.

But instead of ruling on the parties' dispute over whether injury could be resolved on a classwide basis, in light of Defendants' expert's criticisms of Dr. Mangum's model, the district court just deferred that question to a jury at trial. The court reasoned that "determining which expert is correct is beyond the scope" of class certification and was, instead, "a merits decision" for a jury. *Id.* at 140a-41a (citation omitted). The district court thus certified the DPP

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[2] Dr. Mangum disputed Dr. Johnson's findings. But even Dr. Mangum conceded that, without his averaging assumption, his model could not calculate any statistically significant overcharge for 16.7% of the class. *See* App. 32a-33a; C.A. E.R. 627-29, 720-23, 1351.

class. The court applied a similar analysis with respect to the EPP and CFP classes—certifying the classes on the premise that the parties' dispute over the experts' models should be deferred to the jury at a class trial. *See id.* at 149a-55a, 173a-77a.

C. Ninth Circuit Proceedings

1. The Ninth Circuit granted Defendants' petition for interlocutory review of the district court's class certification decision. *See* Fed. R. Civ. P. 23(f). And a panel of the Ninth Circuit unanimously concluded, in an opinion by Judge Bumatay, that the district court's certification order could not stand. App. 76a-109a.[3]

Agreeing with decisions from the First and D.C. Circuits, the panel majority held that the significant presence of uninjured class members may "defeat predominance" by requiring individualized inquiries, and that the district court erred by "fail[ing] to resolve the factual disputes as to how many uninjured class members are included in Plaintiffs' proposed class" before certification. *Id.* at 95a-102a (citing *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624-25 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 47, 51-58 (1st Cir. 2018)). The court likewise explained that the presence of a large number of uninjured members also raises "serious" Article III concerns. *Id.* at 96a-97a & n.7.

The panel further held that Plaintiffs' representative evidence—their experts' "averaging assumptions"—could "be used to satisfy predominance" only if the district court had rigorously analyzed that evidence to determine if it

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[3] On appeal, Bumble Bee filed for bankruptcy, *see* App. 5a n.1, and COSI voluntarily dismissed its appeal, *see* C.A. Doc. No. 102.

"does *in fact* mask individualized differences." *Id.* at 95a. The panel then remanded for the district court to resolve the experts' dispute over the extent of uninjured members in the putative classes and to rigorously analyze whether Plaintiffs' averaging assumptions "mask[ed] individual differences among the class members," such that they could not be used to show predominance. *Id.* at 99a-102a.

Judge Hurwitz concurred in part and dissented in part. *Id.* at 102a-09a. He acknowledged that "a large percentage of uninjured plaintiffs may raise predominance concerns," and he agreed with the panel majority that the district court's class certification decision could not stand because of the court's failure to resolve the extent of uninjured class members in the putative classes. *Id.* at 102a-03a, 106a-07a. But he disagreed that either Rule 23 or Article III established any "*de minimis*" threshold for uninjured class members. *Id.* at 107a-09a.

2. The Ninth Circuit *sua sponte* called for, and granted, rehearing en banc. *Id.* at 188a-94a. Following argument, a divided, 11-judge en banc panel then issued a decision affirming the district court's class certification order. *Id.* at 1a-71a.

The en banc majority squarely "reject[ed] the . . . argument that Rule 23 does not permit the certification of a class that potentially includes more than a *de minimis* number of uninjured class members." *Id.* at 21a (italics added). It then went further, and held that district courts are not permitted to resolve expert disputes over the extent of uninjured class members, because such disputes are "merits" questions reserved for the jury. *Id.* at 18a, 46a-48a. In the majority's view, a plaintiff need only proffer "admissible" evidence that would be

"capable" of establishing injury on a classwide basis *if found persuasive by a jury*. *See id.* at 40a-41a. Once a plaintiff has satisfied that threshold, the majority found, "a district court *cannot* decline certification . . . because it considers plaintiffs' evidence . . . to be unpersuasive." *Id.* at 18a (emphasis added); *see id.* at 27a n.16 ("[T]he persuasiveness of Dr. Mangum's analysis is not at issue at this phase of the proceeding."). Accordingly, the court held that "it is for the jury, not the court," to resolve the parties' dispute over whether Dr. Mangum's model in fact provides classwide proof of harm, even though the district court acknowledged that there are "serious[]" challenges to Dr. Mangum's model and, if that model is rejected, the class would flunk the predominance requirement. *Id.* at 35a, 40a-41a.

The en banc majority further held that representative evidence—here, in the form of "averaging assumptions" applied to "different purchasers with different bargaining power" that pay prices derived from "individualized negotiations"—could establish liability on a classwide basis under this Court's decision in *Tyson Foods*. *Id.* at 38a-39a, 54a-55a; *see id.* at 18a-20a. In reaching this conclusion, the court overruled prior Ninth Circuit precedent that had confined *Tyson Foods* to the "wage and hour context" in which it arose. *Id.* at 19a n.11 (citation omitted). In the majority's view, Plaintiffs' averaging assumptions could be used to establish classwide impact in order to satisfy Rule 23 as long as it is "plausible" that the alleged conspiracy could have had an effect on "baseline prices"—even if the underlying "'market involves diversity in products, marketing, and prices,'" and even where prices are

subject to "individualized negotiations." *Id.* at 39a-41a (citation omitted).

Judge Lee, joined by Judge Kleinfeld, dissented. *Id.* at 56a-71a. He disagreed with the majority's holding that a class with a more-than-*de minimis* number of uninjured members could be certified, explaining that this ruling contradicts "Rule 23's language, common sense, and precedent from other circuits." *Id.* at 69a-71a; *see id.* at 69a ("The majority's rejection of a *de minimis* rule creates a circuit split."). Judge Lee further noted that the majority's requirement that district courts must defer to a jury at trial factual disputes critical to determining compliance with Rule 23 "gives a free pass to the intractable problem of highly individualized [injury and] damages analyses" in a way that "conflicts with the Supreme Court's" decisions. *Id.* at 66a. Indeed, as Judge Lee explained, by affirming the grant of class certification despite the presence of many "class members—perhaps almost a third of the class—who may not have suffered any harm," the majority's decision will plunge the parties and the district court into "individualized mini-trials to figure out who suffered an injury." *Id.* at 68a.

Ultimately, Judge Lee concluded, the majority's decision has the potential to "unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements." *Id.* at 71a.

REASONS FOR GRANTING THE PETITION

This petition readily satisfies the Court's criteria for certiorari. First, the questions presented each implicate direct circuit conflicts. Second, the Ninth Circuit's resolution of those questions is deeply flawed and directly contravenes this Court's own precedent.

And, third, the questions presented are undeniably important and, indeed, ones that this Court has already recognized are critical to class action law.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

A. The Circuits Are Divided Over The First Question Presented

The Ninth Circuit's en banc decision in this case squarely "reject[s]" any requirement that a class cannot be certified when it "includes more than a de minimis number of uninjured class members" (even where up to a *third* of the class may be uninjured), and holds that a district court must defer to a jury at a class trial any dispute over the extent of uninjured class members. App. 21a, 47a. As the en banc dissent recognized, that decision "creates a circuit split." *Id.* at 69a-71a (Lee, J. dissenting); *see id.* at 101a & n.14 (initial panel) (discussing out-of-circuit cases); *id.* at 107a-08a & n.2 (Hurwitz, J., concurring in part and dissenting in part) (acknowledging conflict).

1. First, the Ninth Circuit's decision creates a clear split with the D.C. Circuit's decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019). *Rail Freight* involved an alleged price-fixing conspiracy for fuel surcharges among freight railroads. The district court found that the "regression analysis" by plaintiffs' expert was "reliable enough to be admissible," but that it did not support class certification because it could not show injury to 12.7% of the class. *Id.* at 621-23. As the court explained, the "need for 'individualized inquiries to determine which of at least 2,037 (and possibly more) class members were actually injured

by the alleged conspiracy,' precluded a finding of predominance." *Id.* at 624 (citation omitted).

The D.C. Circuit affirmed, in a decision by Judge Katsas, holding that a class cannot be certified in circumstances virtually identical to those here. The court of appeals first noted that, "to establish predominance," a plaintiff must "'show that they can prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy.'" *Id.* (emphasis added) (citation omitted). That requirement, the court explained, is grounded in the common-sense concern that, because "[u]ninjured class members cannot prevail on the merits, . . . their claims must be winnowed away as part of the liability determination." *Id.* And when there is no way to "'segregate the uninjured from the truly injured,'" the court reasoned, then "the need for individualized proof of injury and causation destroy[s] predominance." *Id.* at 624-25 (citation omitted).

The D.C. Circuit further concluded that, even assuming "[f]or the sake of argument" there was "a *de minimis* exception to th[e] general rule" that a class containing any uninjured members cannot be certified, 12.7% uninjured class members was far above any *de minimis* threshold. *Id.*; *see also id.* at 625 (suggesting that "5% to 6% constitutes the outer limits of a *de minimis* number" (citation omitted)). The court further held that district courts considering class certification may not "defer questions about the number and nature of any individualized inquiries that might be necessary to establish liability." *Id.* at 626. Such questions, the court explained, were "part-and-parcel of the 'hard look' required by *Wal-Mart* and *Comcast*," and therefore could not simply be left for resolution by the jury at trial. *Id.*

The decision below directly conflicts with *Rail Freight*. While the D.C. Circuit found that a class *cannot* be certified if it contains a more-than-*de minimis* number of uninjured members, because the need for "individualized" injury determinations will defeat predominance, *id.* at 625, the Ninth Circuit expressly "reject[ed]" any *de minimis* requirement, App. 21a. And while the Ninth Circuit held that a court must defer disputes regarding the extent of uninjured class members to the jury, the D.C. Circuit held that the inquiry over uninjured members was "part-and-parcel of the 'hard look' required by" this Court's precedent *before* any class can be certified. *Rail Freight*, 934 F.3d at 626; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (A district court must "scrutinize the evidence before granting certification"; "[i]f the damages model cannot withstand this scrutiny then that is not just a merits issue," because the model is "essential to the plaintiffs' claim they can offer common evidence of classwide injury.").

2. The Ninth Circuit's decision likewise conflicts with the First Circuit's decision in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018). *Asacol* concerned antitrust claims against a drug manufacturer that allegedly improperly blocked entry of generic substitutes into the market. *Id.* at 45. The district court found that approximately 10% of class members would have opted for the defendant's branded products "even in the presence of a generic," and thus were uninjured. *Id.* at 47 (citation omitted). But the court nonetheless certified the class. *Id.*

The First Circuit reversed. In a decision by Judge Kayatta, the court of appeals held that the presence of 10% uninjured class members defeated

predominance. As the court explained, "this is not a case in which a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial"; instead, "there are apparently thousands who in fact suffered no injury," and the "need to identify those individuals will predominate and render an adjudication unmanageable." *Id.* at 53-54; *see also id.* at 57 (citing *Rail Freight*). A contrary holding, the court explained, would provide "no logical reason" against the certification of a class with "forty-nine percent or even ninety-nine percent" uninjured class members—an untenable result. *Id.* at 55-56.

Just like *Rail Freight*, the First Circuit's decision in *Asacol* is irreconcilable with the Ninth Circuit's holding here. The First Circuit squarely held that a class with 10% uninjured members could *not* be certified given that the need for individualized inquiries into injury would predominate at a class trial, and the court resolved the dispute between the parties' experts regarding plaintiffs' proffered classwide proof (instead of deferring it to a jury). *Id.* at 53-56. The decision below, by contrast, holds that a class may be certified even if a third (or more) of its members are uninjured, and that a district court must refer this issue to a jury at a class trial. As in *Rail Freight*, *Asacol* would have come out the opposite way under the Ninth Circuit's decision here.

3. The Ninth Circuit's decision also conflicts with the Third Circuit's decision in *In re Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (3d Cir. 2020). *Lamictal* concerned an allegedly anti-competitive settlement between drug manufacturers concerning the drug lamotrigine. *Id.* at 189. The Third Circuit noted that "in a market characterized

by individual negotiations and a discounted-brand competition strategy," "up to one-third of the entire class" may have "paid no more, or even *less*, for lamotrigine than they would have" without the allegedly anti-competitive conduct. *Id.* at 192. The court further held that, "even though it touche[d] on the merits," the district court erred in declining to resolve a battle of the experts over the extent of uninjured class members before certifying the class, since resolving that issue was "necessary in order to determine whether the Direct Purchasers . . . could show that common issues predominated by a preponderance of the evidence." *Id.* at 194.[4]

In short, the first question presented involves a clear and acknowledged circuit conflict, and certiorari is warranted on that basis alone.

B. The Circuits Are Divided Over The Second Question Presented

The circuits are also split on the second question presented and, in particular, the limits imposed by *Tyson Foods* on the use of representative evidence to satisfy Rule 23's requirements.

1. The Ninth Circuit below found that representative evidence—in the form of averaging assumptions—is broadly permissible based on an

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[4] Other circuits have similarly recognized problems with certifying classes with uninjured members. *See, e.g., Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302-05 (5th Cir. 2003); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987 (8th Cir. 2021); *Halvorson v. Auto-Owners Insurance Co.*, 718 F.3d 773, 779-80 (8th Cir. 2013); *Cordoba v. DIRECTV, LLC*, 942 F. 3d 1259, 1273, 1277 (11th Cir. 2019).

expansive reading of this Court's decision in *Tyson Foods*—one that plaintiffs have been aggressively pursuing in cases across the country (until now, with little success). In doing so, the Ninth Circuit disavowed its prior precedent cabining *Tyson Foods* to the "wage and hour context," App. 19a n.11 (citation omitted), and then adopted a sweeping rule that would allow the use of representative evidence to satisfy Rule 23's requirements any time a minimal "plausib[ility]" threshold is met, *id.* at 40a. Under the Ninth Circuit rule, even when there is substantial variation within a class as to the fact in question, the *only* limitation on when an averaging assumption may serve as "class-wide" proof is whether a jury could find the assumption "plausible" at a class trial. *Id.* at 40a-44a. Applying that rule, the court held that the averaging assumptions here are permissible, because it was "not *implausible* to conclude that a conspiracy could have a class-wide impact, even when the market involves diversity in products, marketing, and prices," and even where prices were subject to "individualized negotiations." *Id.* at 39a-41a (emphasis added) (citation omitted).

2. The Ninth Circuit's ruling allowing the use of such representative evidence here sharply conflicts with the Third Circuit's decision in *Lamictal* and the First Circuit's decision in *Asacol*.

In *Lamictal*, the plaintiffs, relying on *Tyson Foods*, similarly claimed that there would be no need for individualized inquiries, because their expert could prove antitrust impact by relying on the average impact to the class. In the plaintiffs' view, "unless no reasonable juror could believe the common proof at trial," the evidence was sufficient to satisfy the predominance requirement. 957 F.3d at 191. But the

Third Circuit rejected that argument, explaining: "*Tyson Foods* was discussing representative evidence in the [Fair Labor Standards Act] context, a unique labor situation in which, often due to inadequate record keeping, 'a representative sample . . . may be the only feasible way to establish liability.'" *Id.* (citation omitted). The court then rejected the plaintiffs' reliance on averaging assumptions to show classwide impact in "a market characterized by individual negotiations." *Id.* at 192; *see Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 128-30 (3d Cir. 2018) (similarly discussing limits imposed by *Tyson Foods*).

In *Asacol*, the plaintiffs, relying on the same reading of *Tyson Foods* that the Ninth Circuit adopted here, claimed that they could "prove 'class-wide impact' with the testimony of their expert, Dr. Conti," who used a regression model to "estimate that a generic drug would achieve roughly ninety percent market penetration." 907 F.3d at 54. But, just like the Third Circuit in *Lamictal*, the First Circuit in *Asacol* squarely rejected that argument, holding that Dr. Conti's study could not serve as classwide proof because, unlike in *Tyson Foods*, "plaintiffs point to no . . . substantive law that would make an opinion that ninety percent of class members were injured both admissible and *sufficient to prove* that any given individual class member was injured." *Id.* (emphasis added). As in *Lamictal*, it was not sufficient that a reasonable juror in a *class* trial might find the averaging assumption plausible. *Id.* at 54-55.

Once again, this conflict is outcome-determinative for purposes of class certification: Plaintiffs' averaging assumptions here would not have been allowed in the First and Third Circuits. That conflict also warrants this Court's review.

II. THE DECISION BELOW IS WRONG

The Ninth Circuit's en banc decision is also deeply flawed and at odds with this Court's precedent.

A. The Ninth Circuit Erred In Holding That Class Certification Is Proper Despite The Parties' Dispute Over The Extent Of Uninjured Class Members

Rule 23(b)(3) requires a plaintiff to make an additional—and "even more demanding," *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)—showing: that common questions will "predominate over any questions affecting only individual class members." Fed. R. Civ. P. 23(b)(3). That requirement applies to the essential elements of a plaintiff's claim, including (as here) the injury required to establish antitrust liability. Where uninjured class members are present, the need to determine *which* class members have been injured—and, in turn, which may establish liability—will predominate. *See Asacol*, 907 F.3d at 53-54; App. 62a (Lee, J., dissenting) ("If a large number of class members 'in fact suffered no injury,' identifying those class members 'will predominate.'" (quoting *Asocal*, 907 F.3d at 53-54)); *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 463-64 (2016) (Roberts, C.J., concurring) ("[I]t is undisputed that hundreds of class members suffered no injury in this case. The question is: which ones?" (citations omitted)). Yet, under the decision below, a district court "cannot" resolve the parties' dispute over the extent of uninjured members within the class—even if a third of the class may be uninjured—before certification;

instead, that is a "merits" issue that must be referred to a jury. App. 18a. That is error.[5]

As discussed, the First and D.C. Circuits have held that the presence of a more-than-*de minimis* number of uninjured class members indicates a fatal predominance problem. *Rail Freight*, 934 F.3d at 624-35 ("5% to 6% constitutes the outer limits of a de minimis number"); *Asacol*, 907 F.3d at 54 ("around 10%"). This *de minimis* threshold is simply a rough proxy for determining when individualized questions of which class members are injured will predominate. The presence of uninjured members is an obvious red flag that everyone in the class has *not* "suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (citation omitted). How could a class be "sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), if a substantial portion of that class has not been injured by the alleged misconduct? As Judge Lee explained, "[i]f one-third—or half or two-thirds—of the class members suffered no injury, it follows that 'common' issues would not 'predominate,' as required under the text of Rule 23, because those uninjured class members have little in common with those who have been harmed." App. 70a (dissenting). And, as Judge Bumatay recognized in his initial panel decision, regardless of the "upper bound of what is *de minimis*,

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[5] Whether a class member has been injured at all concerns a necessary element of liability—antitrust impact—and the existence of Article III standing. But to the extent that the *degree* of injury requires individualized damages determinations, that presents its own predominance problem. *See Comcast,* 569 U.S. at 35-36. As Judge Lee noted, this case raises both problems. App. 66a (Lee, J., dissenting).

it's easy enough to tell that 28% would be out-of-bounds." *Id.* at 100a. Even the district court acknowledged that if 28% of the class were uninjured, then Plaintiffs would "unquestionably" fail to satisfy the predominance requirement. *Id.* at 129a.

The en banc majority nonetheless found that the class could be certified—*despite* the number of uninjured members there may be within the class—because determining the extent of uninjured class members would impermissibly inquire into the "merits." *Id.* at 17a-21a. That rationale is sharply inconsistent with this Court's precedents. Indeed, it is virtually identical to the reasoning this Court rejected from a prior Ninth Circuit en banc panel in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). In *Wal-Mart*, the Ninth Circuit certified a Title VII class on the premise that the plaintiffs' proffered expert testimony was capable of proving liability on a classwide basis. Similar to here, the Ninth Circuit found that, "[w]hile a *jury* may ultimately agree with Wal-Mart that . . . Dr. Bielby's analysis [does not show] Wal-Mart engaged in actual gender discrimination, that question must be left to the merits stage of the litigation." *Id.* at 603. This Court reversed, holding that a district court cannot simply accept a plaintiff's proffer of common harm, but instead must engage in a "rigorous analysis" of whether the prerequisites of certification have been met, even if that analysis "overlap[s] with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 350-51. And the Court concluded that the class could not be certified because, notwithstanding the plaintiff's expert's proffer to the contrary, the claims at issue in *Wal-Mart* did not, in fact, "depend

upon a common contention" that was "capable of classwide resolution." *Id.* at 350.

Yet, here, the Ninth Circuit held that it was enough for a plaintiff to proffer evidence that *might* establish Rule 23's requirements have been satisfied. In the en banc majority's view, so long as Plaintiffs' evidence was "capable of" showing injury, "it [was] for the jury, not the court, to decide" whether up to a third of the class was, in fact, uninjured. App. 40a-41a. But, as even the district court appeared to recognize, the extent of uninjured members is a predicate for determining whether the predominance requirement is satisfied. *Id.* at 129a (recognizing that if 28% of the class were uninjured, predominance would "unquestionably" not be satisfied). By certifying a class where a third of its members may be uninjured, the district court essentially certified a class that *may or may not* satisfy the predominance requirement—depending on what the jury *later* finds. That "certify now, decide later" approach abdicates the district court's vital gate-keeping role in determining whether Rule 23 is met. *See Comcast*, 569 U.S. at 35 ("[O]ur cases requir[e] a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim").

The Ninth Circuit's repeated use of the term "capable of" classwide resolution to justify its rule was misplaced. App. 43a. As this Court explained in *Wal-Mart*, an issue is "capable of classwide resolution" only if it can be "resolve[d]" for all class members "in one stroke." 564 U.S. at 350. It is not enough for a district court simply to inquire whether the plaintiffs have proffered evidence supporting a plausible inference of classwide injury. Plaintiffs can virtually *always* present an expert report proffering such

evidence, as the plaintiffs did in *Wal-Mart* itself. *Id.* at 354-55. Rather, a court must also ask whether there are individualized reasons—reasons that the defendants are entitled to litigate—that particular class members may have escaped injury. If so, the issue of injury *does not* stand or fall for all class members together, and *cannot* be resolved in "one stroke" at a classwide trial based only on the success or failure of the plaintiffs' proposed common proof.

The district court thus was required to resolve the experts' dispute over whether Plaintiffs' model actually shows classwide injury. If Defendants' expert is correct that Plaintiffs' model fails to show injury for a third of the class, that is not just a "merits" problem to be deferred for trial—it is a red flag that there is a fatal predominance defect. Yet, the district court made clear that it *declined* to resolve "which expert is correct," even while recognizing that Dr. Johnson's "criticisms are serious." App. 140a. And the Ninth Circuit affirmed that ruling, declaring that "the persuasiveness of Dr. Mangum's analysis is *not* at issue at this phase of the proceeding." *Id.* at 27a n.16 (emphasis added). That ruling squarely conflicts with the decisions of this Court, which require a district court to determine whether Rule 23's requirements are met before certifying a class. *See Wal-Mart*, 564 U.S. at 350; *Comcast*, 569 U.S. at 35-36; App. 61a-62a (Lee, J., dissenting).

Deferring this critical issue to a class trial on the merits also violates the Rules Enabling Act and its "instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Tyson Foods*, 577 U.S. at 455 (quoting 28 U.S.C. § 2072(b)). Ordinarily, a plaintiff who has not been injured cannot invoke the power—and machinery—of the federal courts to

subject a defendant to the pain of litigation. But the decision below allows a class including potentially *thousands* of uninjured members to proceed to a class trial, which could deprive defendants of the ability to challenge liability on an individualized basis. That discrepancy "violate[s] the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Id*. at 458.

Likewise, certifying classes populated with uninjured class members presents fundamental Article III concerns. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," and, accordingly, "if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand." *Id.* at 466 (Roberts, C.J., concurring). The Ninth Circuit's approach flouts this principle by permitting the certification of classes engorged with uninjured individuals, with nothing to prevent damages (or settlements) being directed to such individuals—a particular concern given the enormous pressures for settlement as soon as a class is certified, regardless of how strong a defendant's defenses to the claims may be on the merits. *See infra* at 32-33.

The result will be "monstrously oversized classes" that contravene Rule 23, this Court's precedent, and Article III itself. App. 71a (Lee, J., dissenting).

B. The Ninth Circuit Erred In Allowing Plaintiffs To Establish Classwide Impact Through Averaging Assumptions

The Ninth Circuit's ruling that averaging assumptions are broadly permissible under *Tyson*

Foods whenever a reasonable juror could find the assumption "plausible" at a trial is also deeply flawed.

Tyson Foods involved a claim for overtime payments under the Fair Labor Standards Act (FLSA). This Court explained that, under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), when an "employer[] [has] violate[d] their statutory duty to keep proper records," an FLSA claimant may establish her hours worked from a representative sample to prove her own injury. 577 U.S. at 456. Moreover, in *Tyson Foods*, plaintiffs were similarly situated—"each employee worked in the same facility, did similar work, and was paid under the same policy." *Id.* at 459. For these reasons, the representative study in *Tyson Foods* "could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action." *Id.* And reliance on that study did not "deprive [the defendant] of its ability to litigate individual defenses," because "there w[as] *no alternative means* for the employees to establish their hours worked," in light of their employer's record-keeping failures. *Id.* at 457 (emphasis added).

In so holding, the *Tyson Foods* Court contrasted *Wal-Mart*, where the Court refused to permit the plaintiffs to rely on representative evidence of alleged discrimination across workplaces. In *Wal-Mart*, the Court explained, "the experiences of the employees . . . bore little relationship to one another." *Id.* at 459. Thus, because "the employees [there] were not similarly situated," they could *not* "have *prevailed in an individual suit* by relying on [representative evidence] detailing the ways in which other employees were discriminated against." *Id.* at 458 (emphasis added). Thus, even assuming it was

admissible, the representative evidence in *Wal-Mart*, was *not* permissible classwide proof to satisfy Rule 23, because it could not "sustain a jury finding" in each class-member's "individual action." *Id.* at 459.

In the decision below, the Ninth Circuit en banc majority disavowed the court's prior precedent holding that *Tyson Foods* is limited to the "wage and hour context" and, in its place, adopted a rule of astonishing breadth. App. 19a n.11 (citation omitted). The court held that evidence that averages impact across class members can justify class certification so long as it would be "admissible" and "not implausible." *Id.* at 39a-41a. But as *Wal-Mart* shows, *admissibility* is not sufficient to allow the use of representative evidence to satisfy Rule 23. 564 U.S. at 354 (noting that even if it were admissible, plaintiffs' expert's "testimony does nothing to advance respondents' case"). Rather, under *Tyson Foods*, a plaintiff must show that the representative evidence "could have been *sufficient to sustain* a jury finding . . . if it were introduced in each [class member's] *individual* action," under the specific law governing that claim. *Tyson Foods*, 577 U.S. at 459 (emphasis added); *see Asacol*, 907 F.3d at 54 (evidence must be both "admissible and sufficient to prove that any given individual class member was injured").

Here, the representative evidence plainly would not have been "sufficient to sustain" a jury finding on injury in an individual action. Unlike in *Tyson Foods*, (1) there is no substantive rule allowing a plaintiff to show antitrust impact through averaging assumptions in an individual case, and (2) the class members here are *not* similarly situated; there are innumerable individualized factors differentiating class members. The individual actions involving

purchasers who opted out of the class prove the point. More than 100 direct purchasers opted out of the proposed DPP class and filed their own individual actions against defendants—yet *none* relied on Plaintiffs' averaging assumptions to attempt to show injury. That confirms that the key assumption underpinning *Tyson Foods* is inapplicable here. 577 U.S. at 456-57 (relying on the premise that "each employee likely would have had to introduce" the same representative study in their individual case).

The Ninth Circuit's decision is flawed in another important respect. As Judge Bumatay explained in the initial panel decision, even if representative evidence might be allowed in some circumstances, a district court must rigorously analyze that evidence to ensure that it is not masking individualized differences among class members *before* certifying any class. *See* App. 95a; *Tyson Foods*, 577 U.S. at 467 (Thomas, J., dissenting) ("Our precedents" require that, "[b]efore class action plaintiffs can use representative evidence in this way, district courts must undertake a rigorous analysis to ensure that such evidence is sufficiently probative of the individual issue to make it susceptible to classwide proof."). The district court below, however, never engaged in that critical analysis here.

The upshot is that, in the Ninth Circuit, a plaintiff can now "prevail on class certification by merely offering a well-written and plausible expert opinion." App. 63a (Lee, J., dissenting).

III. THE QUESTIONS PRESENTED ARE EXTRAORDINARILY IMPORTANT AND WARRANT REVIEW IN THIS CASE

1. This case is one of the most closely watched class actions in more than a decade. Respondents themselves have recognized that "[t]his case presents questions of exceptional importance." C.A. Resp. to En Banc Order 13 (C.A. Doc. No. 117). And the Ninth Circuit believed that the questions were so important that it not only granted rehearing en banc, but initiated en banc proceedings *sua sponte*. The rulings in this case have already been cited more than sixty times in judicial opinions, underscoring how quickly the decision below can—and will—take root.

None of this is surprising. The questions presented "strike[] at the heart" of class certification under Rule 23(b)(3). *Asacol*, 907 F.3d at 51. And class certification is the seminal event in class litigation. As Judge Lee observed, "[i]f a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses." App. 56a (Lee, J., dissenting); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."). Nowhere is this pressure greater than in the antitrust context, where defendants face the threat of "massive damages." 2A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 331a (5th ed. 2022). Indeed, Defendant Bumble Bee—a major tuna supplier—*already* has been forced into bankruptcy.

The requirement that a district court rigorously analyze whether Rule 23(b)'s requirements are met *before* certification is a crucial "safeguard[]" for class action defendants. *Comcast*, 569 U.S. at 34. By permitting class certification without resolving the extent of uninjured class members and vastly lowering the threshold for use of averaging assumptions, the decision below "create[s] an unacceptable risk" that StarKist will "be held liable to a large class without adequate proof that each individual class member" was actually injured. *Tyson Foods*, 577 U.S. at 472 (Thomas, J., dissenting). And it "allow[s] plaintiffs to weaponize Rule 23 to impose an in terrorem effect on defendants," compounding the pressure to settle. App. 68a (Lee, J., dissenting).

The questions presented are also frequently recurring. "[A]round 10,000 class action lawsuits are filed annually." *Id.* at 59a (Lee, J., dissenting). The issue of predominance will be at the forefront of a large majority of those lawsuits, with district courts frequently grappling with conflicting standards and rules. Indeed, district courts in the Ninth Circuit are already relying on the en banc majority's decision in this case to justify the certification of classes with uninjured class members on the basis of dubious expert evidence. *See, e.g.*, *Utne v. Home Depot U.S.A., Inc.*, No. 16-cv-01854, 2022 WL 1443338, at *8 (N.D. Cal. May 6, 2022); *Lytle v. Nutramax Lab'ys, Inc.*, No. 19-cv-0835, 2022 WL 1600047, at *14, *18 (C.D. Cal. May 6, 2022). Yet, class certification disputes typically escape appellate review, as interlocutory review is the exception and most defendants are forced to capitulate to settlement following certification rather than pursue final judgment.

The circuit splits alone are enough to warrant review. But these conflicts are especially intolerable given that the Ninth Circuit—the nation's largest judicial circuit—is an outlier on these issues. If the decision below is allowed to stand, it will inevitably spawn rampant forum-shopping, with plaintiffs flocking to file the biggest cases—i.e., nationwide class-actions—in the Ninth Circuit. Moreover, as Judge Lee explained, the "implications" of the Ninth Circuit's decision are not limited to antitrust cases but will wreak havoc on "a wide sea of class action cases." App. 71a (Lee, J., dissenting). It is thus imperative for the Court to grant certiorari here.

2. This case is also an ideal vehicle to resolve the questions presented. The questions were pressed and passed upon at length in opinions by the district court, the Ninth Circuit panel majority and concurrence, and the Ninth Circuit en banc majority and dissent. Well-respected judges at almost every step of this case have sharply disagreed on the proper outcome, underscoring the confusion that persists on these issues. The questions presented are also outcome-determinative on the crucial class certification issue here. And because this case comes to the Court on an interlocutory appeal of a class certification decision, it does not present the complications that often attend post-verdict appeals, such as the problem of untangling damages awarded to classes that should not have been certified in the first place. *Cf. Tyson Foods*, 577 U.S. at 465-66 (Roberts, C.J., concurring). In short, this case cleanly presents the Court with a much-needed opportunity to address pressing issues of class action law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 8, 2022

APPENDIX

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Peck; John Pels; Valerie Peters; Elizabeth Perron; Audra Rickman; Erica C. Rodriguez, Plaintiffs-Appellees,

and

Jessica Decker, Joseph A. Langston, Sandra Powers, Grand Supercenter, Inc., The Cherokee Nation, US Foods, Inc., Sysco Corporation, Gladys, LLC, Spartannash Company, Bryan Anthony Reo, Plaintiffs,

v.

BUMBLE BEE FOODS LLC; StarKist Co.; Dongwon Industries Co., Ltd., Defendants-Appellants,

and

King Oscar, Inc.; Thai Union Frozen Products PCL; Del Monte Foods Company; Tri Marine International, Inc.; Dongwon Enterprises; Del Monte Corp.; Christopher D. Lischewski; Lion Capital (Americas), Inc.; Big Catch Cayman LP, AKA Lion/Big Catch Cayman LP; Francis T Enterprises; Glowfisch Hospitality; Thai Union North America, Inc., Defendants.

No. 19-56514

Argued and Submitted En Banc September 22, 2021

Pasadena, California

Filed April 8, 2022

31 F.4th 651

Before: ANDREW J. KLEINFELD, SIDNEY R. THOMAS, SUSAN P. GRABER, WILLIAM A. FLETCHER, RONALD M. GOULD, RICHARD A. PAEZ, CONSUELO M. CALLAHAN, SANDRA S. IKUTA, PAUL J. WATFORD, MICHELLE T.

FRIEDLAND and KENNETH K. LEE, Circuit Judges.

Dissent by Judge LEE.

OPINION

IKUTA, Circuit Judge:

The primary suppliers of packaged tuna in the United States appeal the district court's order certifying three classes of tuna purchasers who allege the suppliers violated federal and state antitrust laws. The main issue on appeal is whether the purchasers' statistical regression model, along with other expert evidence, is capable of showing that a price-fixing conspiracy caused class-wide antitrust impact, thus satisfying one of the prerequisites for bringing a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Because the district court did not abuse its discretion in concluding that Rule 23(b)(3) was satisfied, we affirm.

I

Bumble Bee,[1] StarKist, and Chicken of the Sea (COSI), and their parent companies are the largest suppliers of packaged tuna in the United States (referred to collectively as the "Tuna Suppliers"). Their products include packaged tuna sold to direct purchasers like Costco and Walmart, and food-service-size tuna products sold to various distributors for resale. Together, the Tuna Suppliers sell over 80 percent of the packaged tuna in the country.

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[1] As a result of Appellant Bumble Bee Foods LLC's bankruptcy proceeding, appellate proceedings against Bumble Bee Foods have been held in abeyance due to the automatic stay imposed by 11 U.S.C. § 362. Dkt. No. 51.

In late 2015, the United States Department of Justice (DOJ) opened an investigation into the packaged tuna industry for violations of federal antitrust law. The DOJ investigation uncovered evidence of a price-fixing scheme among the Tuna Suppliers, which led the DOJ to enter multiple indictments alleging a criminal conspiracy to fix prices of canned tuna for the period from approximately November 2011 through December 2013. Bumble Bee, StarKist, and three tuna industry executives pleaded guilty to the conspiracy. Bumble Bee's former CEO was convicted by a jury of a conspiracy to fix prices.[2] COSI cooperated with the DOJ and admitted to price fixing in exchange for leniency.

A number of purchasers of the Tuna Suppliers' products (referred to collectively as the "Tuna Purchasers") filed putative class actions against the Tuna Suppliers alleging violations of various federal and state antitrust laws. The Tuna Purchasers alleged that the Tuna Suppliers engaged in a conspiracy from November 2010 through at least December 31, 2016 to fix prices of tuna, along with other collusive activities in furtherance of the price-fixing conspiracy. The Tuna Purchasers alleged that

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[2] Plea Agreement, *United States v. Bumble Bee Foods LLC*, No. 3:17-cr-00249-EMC (N.D. Cal. Aug. 2, 2017), ECF No. 32; Plea Agreement, *United States v. Worsham*, No. 3:16-cr-00535-EMC (N.D. Cal. Mar. 15, 2017), ECF No. 14; Plea Agreement, *United States v. Cameron*, No. 3:16-cr-00501-EMC (N.D. Cal. Jan. 25, 2017), ECF No. 18; Plea Agreement, *United States v. Hodge*, No. 3:17-cr-00297-EMC (N.D. Cal. June 28, 2017), ECF No. 13; Plea Agreement, *United States v. StarKist Co.*, No. 3:18-cr-00513-EMC (N.D. Cal. Nov. 14, 2018), ECF No. 24.

they were damaged by the conspiracy because they paid supra-competitive prices for the Tuna Suppliers' products.[3]

The Tuna Purchasers' actions were consolidated in a multidistrict litigation pretrial proceeding in the Southern District of California. The Tuna Purchasers consist of three putative subclasses: (i) direct purchasers of the Tuna Suppliers' products, such as nationwide retailers and regional grocery stores, who purchased packaged tuna between June 1, 2011 and July 1, 2015 (the "DPPs"); (ii) indirect purchasers of the Tuna Suppliers' products who bought bulk-sized tuna products between June 2011 and December 2016 for prepared food or resale (the "CFPs"); and (iii) individual end purchasers who bought the Tuna Suppliers' products between June 1, 2011 and July 1, 2015 for personal consumption (the "EPPs").

In 2018, the Tuna Purchasers moved to certify the three subclasses under Rule 23 of the Federal Rules of Civil Procedure to proceed as a class action. *See* Fed. R. Civ. P. 23(a), (b)(3). To demonstrate class-wide antitrust impact, each subclass proffered evidence from a different economist, each of whom employed substantially similar methodologies, to show that each member of the subclasses had paid an overcharge caused by the Tuna Suppliers' conspiracy. The Tuna Suppliers contested this expert evidence through their own economists. The district court held

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[3] Supra-competitive prices are those prices elevated "above competitive levels" by a market participant who "exercise[s] [its] market power" to do so. ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 252 (2d ed. 2014) ("*Econometrics*").

a three-day evidentiary hearing on the certification motion, and heard substantial testimony from each expert witness. In July 2019, the district court certified all three subclasses.

The Tuna Suppliers timely appealed, and a panel of this court vacated the district court's order and remanded. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 794 (9th Cir. 2021), *reh'g en banc granted*, 5 F.4th 950 (9th Cir. 2021). We took the case en banc to consider whether the district court erred in finding that each subclass satisfied the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

We have jurisdiction under 28 U.S.C. § 1292(e) and Rule 23(f) of the Federal Rules of Civil Procedure. We review the decision to certify a class and "any particular underlying Rule 23 determination involving a discretionary determination" for an abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). We review the district court's determination of underlying legal questions de novo, *id.*, and its determination of underlying factual questions for clear error, *see Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016). The Supreme Court has indicated that a court's determination regarding what a statistical regression model may prove or is capable of proving is not a question of fact, even though there may be disputed issues of fact raised by "the data contained within an econometric model." *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 n.5, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). Accordingly, we review the district court's determination that a statistical

regression model, along with other expert evidence, is capable of showing class-wide impact, thus satisfying one of the prerequisites of Rule 23(b)(3) of the Federal Rules of Civil Procedure, for an abuse of discretion. *See Yokoyama*, 594 F.3d at 1091.

II

A

Rule 23 provides a procedural mechanism for "a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010). As a claims-aggregating device, Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *id.*, and it does not affect the substance of the claims or plaintiffs' burden of proof, *see* 28 U.S.C. § 2072(b).

To take advantage of Rule 23's procedure for aggregating claims, plaintiffs must make two showings. First, the plaintiffs must establish "there are questions of law or fact common to the class," as well as demonstrate numerosity, typicality and adequacy of representation.[4] Fed. R. Civ. P. 23(a). A

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[4] Rule 23(a) provides:

> 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

common question "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). By contrast, an individual question is one where members of a proposed class will need to present evidence that varies from member to member. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016).

Second, the plaintiffs must show that the class fits into one of three categories. *See* Fed. R. Civ. P. 23(b). To qualify for the third category, Rule 23(b)(3), the district court must find 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).[5] "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036 (cleaned up).

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

[5] Rule 23(b)(3) provides in pertinent part:

> A class action may be maintained if Rule 23(a) is satisfied and if . . . (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 requirements of Rule 23(b)(3) overlap with the requirements of Rule 23(a): the plaintiffs must prove that there are "questions of law or fact common to class members" that can be determined in one stroke, *see Wal-Mart*, 564 U.S. at 349, 131 S.Ct. 2541, in order to prove that such common questions predominate over individualized ones, *see Tyson Foods*, 577 U.S. at 453–54, 136 S.Ct. 1036. Therefore, courts must consider cases examining both subsections in performing a Rule 23(b)(3) analysis.

B

Before it can certify a class, a district court must be "satisfied, after a rigorous analysis, that the prerequisites" of both Rule 23(a) and 23(b)(3) have been satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Comcast*, 569 U.S. at 35, 133 S.Ct. 1426. "[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)," and must carry their burden of proof "before class certification." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275–76, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014).

We have not yet prescribed the plaintiffs' burden for proving that the prerequisites of Rule 23 are satisfied. In the absence of direction from Congress or the Constitution, it is up to the court to prescribe the burden of proof. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–90, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). To do so, we must consider both the allocation of "the risk of error between the litigants" and "the relative importance attached to the ultimate decision." *Id.* at 389, 103 S.Ct. 683 (quoting

Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)). The preponderance of the evidence standard allows both parties to "share the risk of error in roughly equal fashion," *id.* at 390, 103 S.Ct. 683 (quoting *Addington*, 441 U.S. at 423, 99 S.Ct. 1804), while "[a]ny other standard expresses a preference for one side's interests," *id.* Therefore, the preponderance of the evidence standard is "generally applicable in civil actions." *Id.* By contrast, the Court has "required proof by clear and convincing evidence where particularly important individual interests or rights are at stake," such as termination of parental rights or involuntary commitment proceedings. *Id.* at 389, 103 S.Ct. 683.

Applying this test here, the balance of interests in this case favors prescribing the preponderance of the evidence standard. The Supreme Court has made clear that Rule 23 is consistent with the Rules Enabling Act and does not "abridge, enlarge or modify any substantive right." *Shady Grove*, 559 U.S. at 406–07, 130 S.Ct. 1431 (citing 28 U.S.C. § 2072(b)). Rule 23 does not "change plaintiffs' separate entitlements to relief nor abridge defendants' rights" and, instead, alters "only how the claims are processed." *Id.* at 408, 130 S.Ct. 1431. Therefore, the Supreme Court has concluded that the authorization of class actions is substantively neutral, even though it may expose defendants to the imposition of aggregate liability. *Id.* Because the application of Rule 23 to certify a class does not alter the defendants' rights or interests in a substantive way, there is no basis for applying a heightened standard of proof beyond the traditional preponderance standard. We therefore join our sister circuits in concluding that plaintiffs must prove the facts necessary to carry the

burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence.[6]

In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any admissible evidence. *See Tyson Foods*, 577 U.S. at 454–55, 136 S.Ct. 1036 (explaining that admissibility of evidence at certification must meet all the usual requirements of admissibility and citing to Rules 401, 403, and 702 of the Federal Rules of Evidence). Plaintiffs frequently offer expert evidence, including statistical evidence or class-wide averages, to prove that they meet the prerequisites of Rule 23(b)(3). *See id.* at 455, 136 S.Ct. 1036. Where, as here, a defendant did not raise a *Daubert* challenge to the expert evidence before the district court,[7] the defendant forfeits the ability to argue on appeal that the evidence was inadmissible, but may still argue that the evidence is not capable of answering a common question on a class-wide basis. *See Comcast*, 569 U.S. at 32 n.4, 133 S.Ct. 1426; *Tyson Foods*, 577 U.S. at 458–59, 136 S.Ct. 1036.

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[6] *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008)

[7] In a class proceeding, defendants may challenge the reliability of an expert's evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Rule 702 of the Federal Rules of Evidence. *See Tyson Foods*, 577 U.S. at 459, 136 S.Ct. 1036; *see also Comcast*, 569 U.S. at 32 n.4, 133 S.Ct. 1426.

In order for the plaintiffs to carry their burden of proving that a common question predominates, they must show that the common question relates to a central issue in the plaintiffs' claim. *See Wal-Mart*, 564 U.S. at 349–50, 131 S.Ct. 2541. Therefore, "[c]onsidering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S.Ct. 2179, 180 L.Ed.2d 24 (2011) (quoting Fed. R. Civ. P. 23(b)(3)).

The claims at issue here are violations of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 15, and California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq*.[8] The elements of a claim for such antitrust action are (i) the existence of an antitrust violation; (ii) "antitrust injury" or "impact" flowing from that violation (i.e., the conspiracy); and (iii) measurable damages. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101–02 (9th Cir. 1999); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (citing 15 U.S.C. § 15). "Antitrust injury" is

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[8] The DPPs claim a violation of the Sherman Act, while the CFPs and the EPPs allege violations of California's antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code, § 16700 *et seq*. The elements of a Cartwright Act claim are "(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." *Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal.App.4th 480, 132 Cal. Rptr. 3d 660, 670–71 (2011) (cleaned up). Because the analysis of a claim under the Cartwright Act "mirrors the analysis under federal [antitrust] law," we do not consider the Cartwright Act claims separately from the federal antitrust claims. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001).

"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Damages are measured only after each plaintiff has demonstrated that the defendant's conduct caused the plaintiff to suffer an antitrust injury. *See In re Hydrogen Peroxide*, 552 F.3d at 311.

Therefore, to prove there is a common question of law or fact that relates to a central issue in an antitrust class action, plaintiffs must establish that "essential elements of the cause of action," such as the existence of an antitrust violation or antitrust impact, are capable of being established through a common body of evidence, applicable to the whole class. *Id.* (cleaned up). Here, the Tuna Purchasers claim that they can establish the existence of antitrust impact through common proof.

C

In making the determinations necessary to find that the prerequisites of Rule 23(b)(3) are satisfied, the district court must proceed "just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), *decision clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007). This means that the court must make a "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the [class-wide] evidence to prove" the common question in one stroke. *In re Hydrogen Peroxide*, 552 F.3d at 312. In addition, the court must find that this common question (i.e., the "common, aggregation-enabling" issue) predominates over

individual issues. *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036. The determination whether expert evidence is capable of resolving a class-wide question in one stroke may include "[w]eighing conflicting expert testimony" and "[r]esolving expert disputes," *In re Hydrogen Peroxide*, 552 F.3d at 323–24, where necessary to ensure that Rule 23(b)(3)'s requirements are met and the "common, aggregation-enabling" issue predominates over individual issues, *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036.[9]

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[9] Not all expert evidence is capable of resolving a class-wide issue in one stroke. *Cf.* Dissent at 688–89. Courts have frequently found that expert evidence, while otherwise admissible under *Daubert*, was inadequate to satisfy the prerequisites of Rule 23. For instance, a class did not meet the prerequisites of Rule 23 where the expert evidence was inadequate to prove an element of the claim for the entire class, *see Wal-Mart*, 564 U.S. at 354, 356, 359, 131 S.Ct. 2541 (holding that class members failed to establish existence of common question with respect to Title VII claims because they "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy"); where the damages evidence was not consistent with the plaintiffs' theory of liability, *see Comcast*, 569 U.S. at 35, 133 S.Ct. 1426 (holding that at the class certification stage, "any model supporting a plaintiff's damages case must be consistent with its liability case"); where the evidence contained unsupported assumptions, *see In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008) (criticizing the unsupported assumption that, absent the defendants' anti-competitive conduct, there would have been an influx of cars from Canada to United States sufficient to substantially decrease national prices); or where the evidence demonstrated nonsensical results such as false positives, i.e., injury to class members who could not logically have been injured by a defendant's conduct, *see In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869* (*Rail Freight I*), 725 F.3d 244, 252–55 (D.C. Cir. 2013) (vacating a certification order where the plaintiffs' expert evidence predicted that certain

In determining whether the "common question" prerequisite is met, a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial. While such an analysis may "entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541, the "[m]erits questions may be considered [only] to the extent [ ] that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied," *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466, 133 S.Ct. 1184.

A district court must also resolve disputes about historical facts if necessary to determine whether the plaintiffs' evidence is capable of resolving a common issue central to the plaintiffs' claims.[10] For instance, in a case in which a nationwide class of plaintiff employees alleged nationwide discrimination by their employer, we held that a district court had to resolve factual disputes at certification regarding whether decisions regarding promotions were made at the

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plaintiffs had been injured by a price-fixing conspiracy even though they operated under fixed-price contracts and were not exposed to overcharges caused by the conspiracy).

[10] The district court's findings at the certification stage "do not bind the fact-finder on the merits." *In re Hydrogen Peroxide*, 552 F.3d at 318.

local level or by upper management. *See Ellis*, 657 F.3d at 983–84 & n.7. We reasoned that if such decisions were made only at the local level, plaintiffs "would face an exceedingly difficult challenge in proving that there are questions of fact and law common to the *nationwide* class." *Id.* at 983–84. Nevertheless, the district court was not required to resolve factual disputes regarding ultimate issues on the merits, such as "whether women were in fact discriminated against" or whether the defendant "does in fact have a culture of gender stereotyping and paternalism." *Id.* at 983; *see also id.* at 983 n.8. Resolving such issues would "put the cart before the horse" by requiring plaintiffs to show at certification that they will prevail on the merits. *Amgen*, 568 U.S. at 460, 133 S.Ct. 1184.

Therefore, a district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue. *See id.* at 459–60, 133 S.Ct. 1184. Rather, *Tyson Foods* established the rule that if "each class member could have relied on [the plaintiffs' evidence] to establish liability if he or she had brought an individual action," and the evidence "could have sustained a reasonable jury finding" on the merits of a common question, *Tyson Foods*, 577 U.S. at 455, 136 S.Ct. 1036, then a district court may conclude that the plaintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements as to that common question of law or

fact.[11] In *Tyson Foods*, for instance, the Court held that if the class members had pursued individual lawsuits, each could have relied on the expert evidence purporting to show how long it took to don and doff protective equipment. *Tyson Foods*, 577 U.S. at 456–57, 136 S.Ct. 1036. Accordingly, the Court concluded that such expert evidence was capable of answering a common question for the entire class in one stroke, and could reasonably sustain a jury verdict in favor of the plaintiffs, even though a jury could still decide that the evidence was not persuasive. *Id.* at 459–60, 136 S.Ct. 1036; *see also id.* at 457, 136 S.Ct. 1036 (explaining that the question whether the expert's "study was unrepresentative or inaccurate" was "itself common to the claims made by all class members"). The rule that the evidence need merely be capable of resolving a common question on a class-wide basis holds true whether the common question concerns an element of plaintiffs' claim, *see*

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[11] *Senne v. Kansas City Royals Baseball Corp.* referenced *Tyson Foods*'s rule that a district court may deny the use of admissible expert evidence to meet the requirements of Rule 23(b)(3) only if " 'no reasonable juror' could find it probative of whether an element of liability was met," and then stated in passing that "*Tyson* expressly cautioned that this rule should be read narrowly and not assumed to apply outside of the wage and hour context." 934 F.3d 918, 947 & n.27 (9th Cir. 2019) (citing *Tyson Foods*, 577 U.S. at 459–60, 136 S.Ct. 1036). But *Tyson Foods* contains no such limitation; rather, it declined to adopt "broad and categorical rules governing the use of representative and statistical evidence in class actions," and indicated that district courts should evaluate the sufficiency of plaintiffs' evidence on a case-by-case basis, depending on the purpose for which the expert evidence is being introduced and the underlying cause of action. 577 U.S. at 459–60, 136 S.Ct. 1036. Accordingly, we disapprove this dictum in *Senne*, 934 F.3d at 947 n.27.

Amgen, 568 U.S. at 468–69, 133 S.Ct. 1184 (materiality in a Rule 10b-5 action), or a fact that must be determined to establish liability, *see Tyson Foods*, 577 U.S. at 450, 136 S.Ct. 1036 (time spent donning and doffing protective equipment per week).

Nor can a district court decline to certify a class that will require determination of some individualized questions at trial, so long as such questions do not predominate over the common questions. *See* Fed. R. Civ. P. 23(b)(3). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453, 136 S.Ct. 1036 (internal quotation marks omitted). Thus, *Halliburton* concluded that so long as plaintiffs could show that their evidence is capable of proving the prerequisites for invoking the presumption of reliance (a key element in a securities class action) on a class-wide basis, the fact that the defendants would have the opportunity at trial to rebut that presumption as to some of the plaintiffs did not raise individualized questions sufficient to defeat predominance. 573 U.S. at 276, 134 S.Ct. 2398. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id.*

When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions. *See Cordoba v. DIRECTV, LLC*, 942 F.3d

1259, 1277 (11th Cir. 2019).[12] In an analogous context, we have held that a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones. *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016); *see also Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015); *In re Urethane*, 768 F.3d 1245, 1255 (10th Cir. 2014) ("The presence of individualized damages issues" does not preclude a court from certifying a class because "[c]lass-wide proof is not required for all issues").

Therefore, we 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. Dissent at 691–92. This position is inconsistent with Rule 23(b)(3), which requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages. *See* Fed. R. Civ. P. 23(b)(3).[13]

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[12] Because the Supreme Court has clarified that "[e]very class member must have Article III standing in order to recover individual damages," *TransUnion LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 2208, 210 L.Ed.2d 568 (2021), Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions, *see Cordoba*, 942 F.3d at 1277.

[13] The dissent focuses on policy reasons why district courts should refrain from certifying classes that may include more than a de minimis number of uninjured class members. Dissent

A district court is in the best position to determine whether individualized questions, including those regarding class members' injury, "will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Halliburton*, 573 U.S. at 276, 134 S.Ct. 2398; *see also Ruiz Torres*, 835 F.3d at 1137 (stating that "the district court is well situated to winnow out" a fortuitously non-injured subset of class members). We "uphold a district court's determination that falls within a broad range of permissible conclusions." *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (quoting *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010)).[14]

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at 685–86, 690–91, 691–92. But we are bound to apply Rule 23(b)(3) as written, regardless of policy preferences. And contrary to the dissent's assertion, our conclusion that courts must apply Rule 23(b)(3) on a case-by-case basis, rather than rely on a per se rule that a class cannot be certified if it includes more than a de minimis number of uninjured class members, is consistent with the approach taken by our sister circuits. Dissent at 692. Neither of the two cases cited by the dissent, *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869* (*Rail Freight II*), 934 F.3d 619 (D.C. Cir. 2019) and *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), adopted a per se rule. Rather, based on the particular facts of the cases before them, our sister circuits held that Rule 23(b)(3)'s predominance requirement is not satisfied when the need to identify uninjured class members "will predominate and render an adjudication unmanageable." *In re Asacol Antitrust Litig.*, 907 F.3d at 53–54; *see also Rail Freight II*, 934 F.3d at 625 (holding that a district court did not abuse its discretion in denying class certification where the plaintiffs "proposed no further way—short of full-blown, individual trials" to determine the common question of whether class members were injured).

[14] Nevertheless, a court must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad. When "a class is defined so broadly as to include a great number of members who for some

III

We now turn to the Tuna Suppliers' arguments and consider them in light of this legal framework. We begin with the DPP class, which is the focus of the Tuna Suppliers' arguments. In order to prevail on their antitrust claim, the DPP class must prove that the Tuna Suppliers engaged in a conspiracy (an antitrust violation), which resulted in antitrust impact in the form of higher prices paid by each

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reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." *Messner*, 669 F.3d at 824; *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (holding that the class definition in a false advertising action was fatally overbroad where many members learned that the advertising was misleading before purchase or had never been exposed to the allegedly misleading advertisements); *In re Asacol*, 907 F.3d at 55–58 (holding that the class did not meet Rule 23(b)(3) requirements because the plaintiffs' evidence showed that thousands of plaintiffs who were loyal to brand-name drugs would not have purchased the generic drugs that were the subject of the price-fixing conspiracy). In such a case, the court may redefine the overbroad class to include only those members who can rely on the same body of common evidence to establish the common issue. *See, e.g., Mazza*, 666 F.3d at 596 (holding that false advertising "class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading"). A court may not, however, create a "fail safe" class that is defined to include only those individuals who were injured by the allegedly unlawful conduct. *See Ruiz Torres*, 835 F.3d at 1138 n.7 (internal quotation marks omitted). "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. But, ultimately, the problem of a potentially "over-inclusive" class "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Id.*

member of the class, which in turn led to measurable damages. The question whether each member of the DPP class suffered antitrust impact "is central to the validity of each one of the [DPP] claims." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. The central questions on appeal are whether the expert evidence presented by the DPPs is capable of resolving this issue "in one stroke," *id.*, and whether this common question predominates over any individualized inquiry. We conclude that the district court did not abuse its discretion in certifying the class.

A

The centerpiece of the DPPs' claim that each member of the class suffered antitrust impact is economist Dr. Russell Mangum's expert testimony and report. According to his testimony and report, Dr. Mangum reviewed a comprehensive range of available information to develop an understanding of the nature of the market at issue and the details of the Tuna Suppliers' price-fixing conspiracy. That information included court filings, the Tuna Suppliers' guilty pleas, discovery materials such as the Tuna Suppliers' business records concerning their sales of packaged tuna, deposition testimony, publicly available information regarding the tuna industry, and data regarding supply and demand factors that affect the manufacture, sale and consumption of packaged tuna such as raw material prices and details about customer preferences.

After examining the economic structure of the tuna market and the available record evidence concerning the Tuna Suppliers' behavior, Dr. Mangum determined that the packaged tuna market was conducive to price-fixing, given the Tuna Suppliers' dominance in the market, the attendant

barriers to entry for competitors, the Tuna Suppliers' use of price lists for their products, and other characteristics of the packaged tuna industry. According to Dr. Mangum, these findings supported a baseline economic theory that the Tuna Suppliers' collusive behavior would affect the DPPs on a class-wide basis. Dr. Mangum then used a number of different econometric tools to evaluate whether quantitative evidence supported this theory.[15]

Dr. Mangum first performed a pricing correlation test, which demonstrated that the prices of the Tuna Suppliers' products moved up or down together regardless of product or customer type, and thus supported the proposition that the Tuna Suppliers' collusion had a common, supra-competitive impact on their prices. Based on this evidence, Dr. Mangum concluded that the Tuna Suppliers' collusion would result in higher prices that would affect direct purchasers on a class-wide basis, which was consistent with his original theory. This finding is also consistent with "the prevailing [economic] view [that] price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *In re Urethane*, 768 F.3d at 1254.

To further explore whether the DPPs were subject to an overcharge caused by the price-fixing conspiracy (rather than by other variables that could affect

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[15] Econometrics is "the application of statistical methods to economic data . . . to draw inferences about economic relationships from observed data on market outcomes [i.e., price], even when those outcome are the result of complex interactions among numerous economic forces." *Econometrics* at 1.

prices) on a class-wide basis, Dr. Mangum constructed a statistical model using a multiple regression analysis. Regression analyses are used to determine "the relationship between an unknown [dependent] variable [such as price] and one or more independent variables [e.g., transaction characteristics, and supply and demand factors] that are thought to impact the dependent variable." *Id.* at 1260 (quotation marks omitted) (citing Michael J. Saks, et al., *Reference Manual on Scientific Evidence* 179, 181 (2d ed. 2000)). If a regression model uses "appropriate independent [or explanatory] variables," it can test and isolate the extent to which the actual prices paid by plaintiffs are higher because of a defendant's collusive behavior. *Id.* Assuming Dr. Mangum's regression model met this standard, it could provide further evidence that the DPPs were impacted by the Tuna Suppliers' collusion on a classwide basis.

In simple terms, Dr. Mangum first aggregated (or "pooled") the actual tuna sale transaction data for the Tuna Suppliers' sales to the DPPs during both the alleged conspiracy period and during benchmark periods before and after the conspiracy. Dr. Mangum then identified a number of variables (referred to as independent or explanatory variables) that could affect the price of tuna, including product characteristics, input costs, customer type, and variables related to consumer preference and demand, such as disposable income, seasonal effects, and geography. The model then isolated (or "controlled for") the effect of these explanatory variables on the prices paid by DPPs, which allowed the model to isolate the effect that the conspiracy by itself had on the prices paid by DPPs. When all the tuna sale transactions were aggregated, and the

explanatory variables (other than the price-fixing conspiracy) were controlled for, the model showed that the DPPs paid 10.28 percent more for tuna during the conspiracy period than they did during the benchmark periods. Dr. Mangum labeled this 10.28 percent as the "overcharge," meaning the common amount paid by the DPPs resulting from the collusive behavior alone. This result was statistically significant, meaning that there was a less than five percent chance that the higher prices during the price-fixing conspiracy was a product of chance. Thus, by isolating the common overcharge amount, Dr. Mangum's regression model was further confirmation of his theory that the Tuna Suppliers' collusion had a class-wide effect.[16]

Dr. Mangum performed several tests (which he referred to as "robustness checks") to confirm that his regression model was an appropriate tool to be used by the entire DPP class to show common impact. These tests were used to confirm the reliability of the

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[16] The dissent argues that Dr. Mangum's opinion is not persuasive because large retailers have bargaining power and can extract price discounts, promotional credits, and rebates. Dissent at 689–90. As the dissent concedes, Dissent at 690 & n. 5, Dr. Mangum took these issues into account (to the extent that the Tuna Suppliers provided relevant data). After doing so, Dr. Mangum ran the regression model using both gross and net prices and determined that his regression model continued to produce a statistically significant overcharge. Dr. Mangum therefore reasoned that discounts and promotions did not affect his pooled model or his conclusion of class-wide impact. Although the dissent argues that (in the dissent's view) Dr. Mangum did not consider price discounts, promotional credits, and rebates "adequately," Dissent at 690 & n. 5, the persuasiveness of Dr. Mangum's analysis is not at issue at this phase of the proceeding.

model, and, according to Dr. Mangum, the test results supported his ultimate conclusion that the model could be used to show class-wide injury. First, Dr. Mangum changed the model to evaluate the overcharge specific to each individual defendant. The results showed that prices were still elevated above competitive levels during the collusion period. Second, Dr. Mangum changed the model to evaluate the overcharge specific to certain products with different characteristics, such as fish type and package type. These tests showed that each type of product tested was impacted to a similar degree. Third, Dr. Mangum changed the model to evaluate the overcharge based on customer types.[17] This test showed that there were large, statistically significant overcharges for every customer type. These robustness checks confirmed Dr. Mangum's theory that the DPPs paid an overcharge during the conspiracy period. Finally, Dr. Mangum used the output of the pooled regression model to predict the but-for prices (i.e., what the price of tuna during the conspiracy period would have been without the overcharge caused by the conspiracy), and compared these predicted but-for prices to the actual prices paid by the DPP class. This comparison showed that 94.5 percent of the purchasers had at least one purchase above the predicted but-for price, which again provided further evidence that the conspiracy had a common impact on all or nearly all the members of

[17] Direct purchasers were grouped into categories called customer types, which included Retail, Club, Special Market, Food Service, Mass Merchandise, Discount, and e-Commerce.

the DPP class.[18] Dr. Mangum therefore concluded that his aggregated regression model provided econometric evidence that the conspiracy resulted in higher prices paid by all or nearly all DPPs. According to Dr. Mangum, the results were strong evidence of common, class-wide antitrust impact.[19]

In sum, Dr. Mangum's findings about the tuna market and the Tuna Suppliers' collusive behavior, his pricing correlation test, his regression model, and his robustness checks all confirmed his theory that the conspiracy resulted in substantial price impacts,

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[18] According to Dr. Mangum, the purpose of this robustness test was to demonstrate that his regression model was sound. Contrary to the dissent's assertion, Dissent at 686, Dr. Mangum did not "suggest" that 5.5 percent of the class were uninjured. Rather, Dr. Mangum concluded that each class member was injured by supra-competitive prices, and used a different methodology for calculating damages for each member of the class. *See infra* at n.19. The Tuna Suppliers do not develop the argument that the results of this robustness test preclude certification of the class as currently defined. Therefore, we do not address this issue here. *See United States v. Sineneng-Smith*, —— U.S. ——, 140 S. Ct. 1575, 1578, 206 L.Ed.2d 866 (2020); *see also Tyson Foods*, 577 U.S. at 460, 136 S.Ct. 1036 (declining to reach a similar issue).

[19] Although the regression model primarily served as evidence of class-wide antitrust impact, Dr. Mangum used the overcharge derived from the regression model to estimate class-wide damages. This estimate was developed by multiplying the overcharge estimate of 10.28 percent by the appropriate sales volume for the defendants, adjusted by several pertinent factors. Dr. Mangum used the same method to estimate damages for each of the class representatives identified in the complaint. The Tuna Suppliers do not challenge Dr. Mangum's damages methodology. Thus, the dissent's contention that the court has created a "sweeping rule that gives a free pass to the intractable problem of highly individualized damages analyses" misses the mark. Dissent at 690.

and that the impact was common to the DPPs during the collusion period.

B

The Tuna Suppliers attacked Dr. Mangum's expert report on multiple fronts, but primarily relied on their rebuttal expert, economist Dr. John Johnson, who made multiple criticisms of Dr. Mangum's methodology. The essence of Dr. Johnson's critique was that it was not statistically appropriate to use a pooled regression model for transactions in the tuna market, given the multiple individualized differences among class members, such as disparities in negotiating tactics and bargaining power. Dr. Mangum's use of pooled data, Dr. Johnson alleged, masked these individual differences among class members. Thus, Dr. Johnson claimed, Dr. Mangum's conclusion that the conspiracy had a class-wide impact based on a uniform overcharge did not reflect the real world.

Dr. Johnson supported this allegation on several grounds. First, Dr. Johnson claimed that a statistical tool called a Chow test[20] shows that the data relating to tuna transactions should not be pooled due to individual differences in each purchaser's transactions. Second, Dr. Johnson criticized Dr. Mangum's calculation that 94.5 percent of DPPs whose transactional data were included in the model had at least one purchase at a price above the predicted but-for price. According to Dr. Johnson, this calculation was misleading because it was premised

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[20] A Chow test is a statistical test designed to "determine whether it is appropriate to pool potential subgroups when estimating the average effect of the alleged conspiracy." *Econometrics* at 358.

on what Dr. Johnson characterized as the faulty assumption that all direct purchasers paid the same 10.28 percent overcharge throughout the proposed class period. Instead, Dr. Johnson performed his own test of Dr. Mangum's model. As part of this test, Dr. Johnson changed the model to evaluate overcharge based on each individual customer. According to Dr. Johnson, the test showed that of the 604 direct purchasers who bought from the Tuna Suppliers during the proposed class period, the model did not estimate a positive and statistically significant overcharge (attributable to the conspiracy) for 169 direct purchasers (or 28 percent). Therefore, Dr. Johnson argued that the plaintiffs could not rely on the model to demonstrate class-wide impact of the conspiracy.[21]

Dr. Johnson made several additional critiques in arguing that Dr. Mangum's model was not capable of demonstrating class-wide impact. First, Dr. Johnson argued that Dr. Mangum's model showed false positives. According to Dr. Johnson, an application of Dr. Mangum's regression model showed that several DPP class members had paid an overcharge when they purchased tuna products from non-defendants, i.e., tuna suppliers who had not participated in the conspiracy. Second, Dr. Johnson attacked the

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[21] Dr. Johnson's test attempted to show that Dr. Mangum's model was flawed because 169 direct purchasers could not rely on the model to show antitrust impact due to the fact (as Dr. Mangum subsequently explained) that some purchasers had no or too few transactions during the pre-collusion benchmark period to generate statistically significant results. Contrary to the dissent's claim, Dissent at 686, Dr. Johnson did not show that 28 percent of the class potentially suffered no injury. *See infra* Section IV.B.

reliability of Dr. Mangum's model because Dr. Mangum's model selected time periods that did not precisely match the class periods in the DPPs' complaint. Finally, Dr. Johnson criticized Dr. Mangum's use of a cost index (a calculated measure of costs for all the Tuna Suppliers) as one of the explanatory variables in his model, rather than using actual accounting cost data. According to Dr. Johnson, the use of a cost index inappropriately assumed that the Tuna Suppliers' costs responded in a like way to supply and demand factors.

In rebuttal, Dr. Mangum rejected Dr. Johnson's premise that a pooled, aggregated model was inappropriate to use in this case. Dr. Mangum explained that his technique was a well-known and well-accepted method for examining antitrust impact in markets with individualized differences among purchasers. According to Dr. Mangum, both of the bases for Dr. Johnson's challenges to the use of a pooled regression model failed. First, Dr. Mangum claimed that a Chow test should not be used in the manner employed by Dr. Johnson in his report. According to Dr. Mangum, Dr. Johnson's Chow test was "designed to fail," meaning that in this context, the test results would always show that the data relating to tuna transactions should not be pooled. Second, Dr. Mangum asserted that the record contained insufficient transaction data for Dr. Johnson's test of the regression model to yield meaningful results. For example, Dr. Mangum acknowledged that the model, as changed by Dr. Johnson to consider purchasers on an individual basis, could not estimate a positive and statistically significant overcharge for 169 direct purchasers. But according to Dr. Mangum, *no* regression model could

yield a statistically significant estimate for many of those 169 direct purchasers on such an individual purchaser-by-purchaser basis, because 61 of those purchasers did not make any purchases during the benchmark periods, and many of the other purchasers had not undertaken a sufficient number of transactions during either the benchmark periods or collusion period to yield statistically significant results. And logically, Dr. Mangum asserted, given the evidence that the defendants were able to inflate prices generally through the conspiracy, that the tuna market was susceptible to collusion, and that the model showed a robust, statistically significant impact of the price-fixing scheme on the tuna market, even the DPP class members for whom Dr. Johnson's test did not yield a positive, statistically significant overcharge should be able to rely on the pooled regression model as evidence of impact. Therefore, according to Dr. Mangum, Dr. Johnson erred in concluding that the regression model had no relevance for that 28 percent of class members.

Dr. Mangum also rebutted Dr. Johnson's additional critiques. With respect to Dr. Johnson's claim that the regression model yielded false positives, Dr. Mangum explained that overcharges imposed by non-defendant tuna suppliers (who were not part of the conspiracy) were not false positives but were caused by the "umbrella effect." This term refers to an economic observation that when many suppliers engage in a conspiracy to raise prices, non-conspirators may raise their prices to supra-competitive levels because of the conspirator's dominant market power. *See* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal & Economic Issues* 226 (2d ed. 2010). Dr. Mangum also

argued that Dr. Johnson's claim of false positives was based on an erroneous analysis of the tuna market. According to Dr. Mangum, Dr. Johnson incorrectly claimed that two of the individual DPPs (Sysco and U.S. Foods) purchased tuna from non-defendant suppliers because both of those class members actually purchased tuna that was produced by the Tuna Suppliers and merely sold through a middleman. Dr. Mangum defended his selection of time periods relating to the model, claiming he narrowed the class period based on his analysis of the evidence in the case. Finally, Dr. Mangum rejected Dr. Johnson's critique of his use of cost indexes. Dr. Mangum asserted that costs indexes were statistically superior to using individual cost accounting data. He noted that one of the robustness tests he performed on the data showed that using defendant-specific cost structures confirmed the results of the pooled model. And he asserted that it was preferable to use his cost index for determining competitive market prices based on market supply and demand conditions, rather than relying on cost data derived from the Tuna Suppliers' individual approaches to cost accounting.

C

In considering whether the DPPs' evidence was capable of establishing antitrust impact for the class as a whole, the district court reviewed Dr. Mangum's expert testimony and report, the rebuttal testimony and report by Dr. Johnson, and Dr. Mangum's reply, and then addressed the parties' disputes. In doing so, the district court did not make any legal or factual error.

First, the district court considered Dr. Johnson's argument that Dr. Mangum's pooled regression model

masked differences between purchasers, and that when the overcharge is determined for individual DPP class members the model did not show a positive, statistically significant impact for some 28 percent of the class. After reviewing each of the experts' analyses, the district court credited Dr. Mangum's rebuttal of Dr. Johnson's critique. Even if the model (when modified by Dr. Johnson to evaluate individual purchasers) did not yield a positive, statistically significant overcharge for some purchasers who had no or too few transactions during the pre-collusion benchmark period, the district court concluded that those purchasers could still rely on the pooled regression model as evidence of the conspiracy's impact on similarly situated class members. The court further noted that other evidence in the record, including the guilty pleas and market characteristics, showed that class members suffered a common impact.

The district court also considered Dr. Johnson's argument that the Chow test showed that Dr. Mangum's model cannot be applied to all defendants. The court acknowledged that failure of a statistical test used to determine whether a regression is appropriate should be taken seriously, and could lead a court to reject the model at the class certification stage as not capable of providing class-wide proof. But it also noted that most regressions models will fail one or more tests if enough are run, even if the model itself is statistically sound. Because there was a rational basis for Dr. Mangum's use of the pooled regression model to demonstrate class-wide impact, the court concluded the failure of the Chow test did not require the court to reject the model.

The district court rejected Dr. Johnson's additional arguments. With respect to Dr. Johnson's claim that the false positives in Dr. Mangum's model rendered the model unreliable, the court credited Dr. Mangum's explanation that the false positives could be explained by the umbrella effect and that Dr. Johnson had erroneously concluded that some tuna was supplied by non-defendants when in fact the tuna was supplied by defendants. The district court also addressed the dispute over Dr. Mangum's selection of the time period for the class, and concluded that Dr. Mangum's narrowing of the time frame bolstered the reliability of the model. Finally, the district court rejected Dr. Johnson's critique of Dr. Mangum's use of a cost index, rather than actual accounting cost data. The court credited Dr. Mangum's explanation as to why the use of such an index provided more reliable results than actual cost accounting data, and concluded that his use of a cost index did not undermine the reliability of his methodology or model.

After resolving each dispute between the experts, the district court acknowledged that the defendants' critique of Dr. Mangum's model could be persuasive to a jury at trial. But the district court recognized that at this stage of the proceedings, its task was to determine whether Dr. Mangum's evidence was capable of showing class-wide impact, not to reach a conclusion on the merits of the DPPs' claims. After weighing the evidence put forth by the DPPs, including the regression model, the correlation tests, the record evidence and the guilty pleas and admissions entered in this case, the district court concluded there was sufficient evidence to show common questions predominated as to common

impact. Therefore, it ruled that this prerequisite to Rule 23(b)(3) was met.

We conclude that the district court did not abuse its discretion in reaching this conclusion. The court conducted a rigorous analysis of the expert evidence presented by the parties. The district court did not err legally or factually in concluding that Dr. Mangum's pooled regression model, along with other evidence, is capable of answering the question whether there was antitrust impact due to the collusion on a class-wide basis, thus satisfying this prerequisite of Rule 23(b)(3).

IV

We now turn to the Tuna Suppliers' claims that the district court abused its discretion in determining that the evidence presented by the DPPs proved: (1) that the element of antitrust impact is capable of being established class-wide through common proof, and (2) that this common question predominates over individual questions.[22]

A

The Tuna Suppliers' main argument is that the district court abused its discretion in determining that Dr. Mangum's model is capable of proving

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[22] The Tuna Suppliers do not challenge the district court's gatekeeping function under *Daubert*, to ensure that Dr. Mangum's evidence was not "statistically inadequate or based on implausible assumptions." *Tyson Foods*, 577 U.S. at 459, 136 S.Ct. 1036. And contrary to the dissent's argument, Dissent at 687–88, the district court did not merely determine that Dr. Mangum's evidence was admissible under *Daubert*. Rather, it subjected the evidence to a rigorous examination with full consideration of Dr. Johnson's critique. Therefore, the dissent's assertion that the district court committed the same error as the district court in *Ellis* is misplaced. Dissent at 687–88.

common impact for all class members. According to the Tuna Suppliers, Dr. Mangum's evidence is not a permissible method of proving class-wide liability because the regression model uses "averaging assumptions," meaning that the model assumes that all DPPs were overcharged by the same uniform percentage (10.28 percent). These averaging assumptions, according to the Tuna Suppliers, "paper over" individualized differences among class members. Because the tuna market is characterized by individualized negotiations and different bargaining power among the purchasers, the Tuna Suppliers claim it is fundamentally impossible to show common proof of injury. To support this argument, the Tuna Suppliers note that the DPPs who pursued their antitrust claims individually did not rely on a pooled regression model but used actual cost data and claimed an individualized overcharge rate. Given the nature of the tuna market, the Tuna Suppliers conclude, Dr. Mangum's model cannot meet the prerequisites of Rule 23(b)(3).

To the extent that the Tuna Suppliers argue that pooled regression models involve improper "averaging assumptions" and therefore are inherently unreliable when used to analyze complex markets, we disagree. In antitrust cases, regression models have been widely accepted as a generally reliable econometric technique to control for the effects of the differences among class members and isolate the impact of the alleged antitrust violations on the prices paid by class members.[23] *See, e.g., Econometrics* at 1. Further,

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[23] *See, e.g., Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016); *In re Urethane*, 768 F.3d at 1263; *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 97,

Tyson Foods rejected any categorical exclusion of representative[24] or statistical evidence. 577 U.S. at 459–60, 136 S.Ct. 1036. Therefore, any categorical argument that a pooled regression model cannot control for variables relating to the individualized differences among class members must be rejected.

To the extent the Tuna Suppliers and the dissent raise the more focused argument that, in this case, the model's output (estimating that the Tuna Suppliers' conspiracy resulted in a 10.28 percent overcharge for the entire class) cannot plausibly serve as common evidence for all class members given the individualized differences among those class members, we again disagree.[25] It is not implausible

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107 (2d Cir. 2007); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188–89 (9th Cir. 2002); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002).

[24] Although the Tuna Suppliers refer to Dr. Mangum's regression model as "representative evidence," that term is imprecise. As explained in *Tyson Foods*, representative evidence generally refers to a sample that represents the class as a whole. *See* 577 U.S. at 454–55, 136 S.Ct. 1036. Thus, *Tyson Foods* concluded that each individual in a class could rely on exemplars of persons donning and doffing protective equipment to prove the amount of time each spent donning and doffing; this sample was claimed to be representative of all members of the class. *See id.* By contrast, a regression model analyzes available data to determine the degree to which a known variable, such as collusion, affected an unknown variable, such as price, while eliminating the effect of other variables.

[25] To the extent the Tuna Suppliers challenged the model's inputs, the district court considered and rejected Dr. Johnson's critique that some of the model's inputs (i.e., the use of a cost index and Dr. Mangum's selection of time periods) rendered the model incapable of demonstrating class-wide impact. *Cf. In re Lamictal*, 957 F.3d at 194 (holding that the district court abused

to conclude that a conspiracy could have a class-wide impact, "even when the market involves diversity in products, marketing, and prices," especially "where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations." *In re Urethane*, 768 F.3d at 1254–55. As the Tenth Circuit explained, a district court could reasonably conclude "that price-fixing would have affected the entire market, raising the baseline prices for all buyers." *Id.* at 1255. In other words, it is both logical and plausible that the conspiracy could have raised the baseline prices for all members of the class by roughly ten percent. The district court did not abuse its discretion in so concluding.

The dissent argues that Dr. Mangum's expert opinion "flies against common sense and empirical evidence," because large retailers like Walmart likely would have used their bargaining power to negotiate lower prices, and thus may not have paid higher prices because of the Tuna Suppliers' collusion. Dissent at 689. But the district court is not free to prefer its own views about the economics of the tuna market over the statistical evidence submitted by the plaintiffs, and here the regression model controlled for the variables identified by the dissent. Indeed, Dr. Mangum provided an individualized overcharge estimate for Walmart when he changed the model to evaluate the overcharge based on customer types. This test showed that Walmart paid statistically significant overcharges because of the conspiracy. Provided that the evidence is admissible and, after rigorous review, determined to be capable of

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its discretion in certifying class because it failed to scrutinize each expert's data).

establishing antitrust impact on a class-wide basis, it is for the jury, not the court, to decide the persuasiveness of Dr. Mangum's evidence in light of "common sense and empirical evidence."

The Tuna Suppliers rely on *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6 (1st Cir. 2008), for the proposition that a market involving individualized negotiations is inherently incompatible with common impact. This reliance is misplaced.[26] In *New Motor Vehicles*, plaintiffs raised a "novel and complex" theory of how consumers were injured by defendants' alleged horizontal conspiracy to discourage imports of lower-cost cars from Canada into the United States. *Id.* at 27. Plaintiffs' theory proceeded in two steps: (1) "but for the defendants' illegal stifling of competition," manufacturers would have set lower prices to compete with Canadian imports; and (2) because the manufacturers did not do so, consumers paid higher retail prices. *Id.* The First Circuit rejected this theory because plaintiffs failed to demonstrate they had an approach for proving either step. For the first step, plaintiffs had not shown how they would establish that but for the horizontal conspiracy, enough lower-priced Canadian cars would flood into the American market so as to cause manufacturers to decrease their prices. *Id.* As for the second step, the plaintiffs had not proved their damages model was

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[26] As a threshold matter, the First Circuit held in *New Motor Vehicles* that the district court lacked federal jurisdiction over the plaintiffs' claims, but went on to provide its thoughts on certification of the class in the event the district court exercised its discretion to exert supplemental jurisdiction over the state damages claims. 522 F.3d at 17.

capable of showing "which consumers were impacted by the alleged antitrust violation and which were not." *Id.* at 28. In this regard, the plaintiffs relied on an inference that "any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers." *Id.* at 29. But the First Circuit rejected this inference because "[t]oo many factors play into an individual negotiation to allow an assumption—*at least without further theoretical development*—that any price increase or decrease will always have the same magnitude of effect on the final price paid." *Id.* at 29 (emphasis added). The court contrasted the plaintiffs' unsupported inference with cases allowing "a presumption of class-wide impact in price-fixing cases when 'the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions.' " *Id.* (quoting *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151 (3d Cir. 2002)). Despite rejecting the plaintiffs' theory at an early stage of the case, the court did not rule out certification of a class but instead concluded that "more work remained to be done in the building of plaintiffs' damages model and the filling out of all steps of plaintiffs' theory of impact." *Id.*

As this explanation of the case makes clear, *New Motor Vehicles*' analysis is not applicable here. First, the DPPs' price-fixing theory is not "novel" or "complex." *Id.* at 27. Rather than adopting a theory requiring multiple speculative steps, the DPPs have a simple one-step theory: the Tuna Suppliers conspired

to raise tuna prices, resulting in higher prices for all buyers. Second, while the plaintiffs in *New Motor Vehicles* had not provided a thorough explanation or developed a model showing how they would establish their theory, *id.* at 29, the DPPs have already offered well-developed expert testimony and regression modeling supporting common impact. The other cases relied on by the Tuna Suppliers are equally inapposite. *See, e.g., Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005) (affirming denial of class certification because evidence of a conspiracy to raise prices, without more, could not demonstrate impact across highly localized and highly individualized markets for hundreds of seed varieties, and the plaintiffs had not offered a common method of showing injury); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423 (5th Cir. 2004) (reversing class certification where the plaintiffs lacked a plausible theory of how the challenged conduct had consistently affected purchase prices).

The Tuna Suppliers also argue that because the individual plaintiffs pursuing their own antitrust claims showed overcharges both above and below the overcharge indicated by Dr. Mangum's model, a uniform 10.28 percent overcharge is implausible. We also reject this argument, because it improperly conflates the question whether evidence is capable of proving an issue on a class-wide basis with the question whether the evidence is persuasive. A lack of persuasiveness is not fatal at certification. *See Amgen*, 568 U.S. at 459–60, 133 S.Ct. 1184. For purposes of determining whether each member of the DPP class can rely on the model to prove antitrust impact, it is irrelevant whether actual sales data shows a specific class member was overcharged by

more or less than 10.28 percent. Rather, the question is whether each member of the class can rely on Dr. Mangum's model to show antitrust impact of any amount. The district court did not abuse its discretion in finding that each member could. While individualized differences among the overcharges imposed on each purchaser may require a court to determine *damages* on an individualized basis, *see supra* Section III.C, such a task would not undermine the regression model's ability to provide evidence of common *impact*. Accordingly, we reject the Tuna Suppliers' argument that the regression model could not sustain liability in individual proceedings. Rather, "each class member could have relied on [the model] to establish liability if he or she had brought an individual action." *See Tyson Foods*, 577 U.S. at 455, 136 S.Ct. 1036. We therefore conclude that the district court did not err legally or factually in concluding that Dr. Mangum's pooled regression model does not fail on any of the grounds raised by the Tuna Suppliers.[27]

B

The Tuna Suppliers and the dissent next contend that the district court erred by failing to resolve a dispute between the parties as to whether 28 percent of the class did not suffer antitrust impact. Instead of resolving the dispute between the parties' experts, the Tuna Suppliers claim, the district court improperly

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[27] The Tuna Suppliers do not "specifically and distinctly" raise the argument that the district court abused its discretion in resolving challenges to the inputs to the model which were raised below, such as Dr. Mangum's choice of benchmark period and use of cost indexes, so that argument is deemed forfeited on appeal. *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005)

shifted the critical inquiry to the jury. In other words, the Tuna Suppliers argue that to satisfy Rule 23(b)(3)'s predominance requirement, plaintiffs must prove that all or nearly all class members were *in fact injured* by the alleged conspiracy, i.e., suffered antitrust impact.[28]

In raising this argument, the Tuna Suppliers focus on Dr. Johnson's critique of Dr. Mangum's model, which stated that when he tested Dr. Mangum's model by changing it to evaluate the overcharge specific to each individual member of the DPP class, the test showed that 28 percent of the DPPs could not rely on the model to show an overcharge attributable to the conspiracy. According to the Tuna Suppliers, this evidence indicated that 28 percent of the DPP class did not suffer antitrust impact. And in district court, the Tuna Suppliers argued that "28% of a class—nearly one-third—far exceeds the *de minimis* number of uninjured class members that some courts have permitted in certifying a class." Therefore, the Tuna Suppliers argue that the class should not have been certified. Further, the Tuna Suppliers argue that the existence of a large number of uninjured class members raises a question as to whether the class has Article III standing. The Tuna Suppliers contend that because the class cannot be certified (and there are Article III issues) if Dr. Johnson's analysis is correct, the district court abused its discretion in failing to

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[28] Because the Tuna Suppliers' primary argument on appeal is that the DPPs failed to prove class-wide antitrust impact, we understand the Tuna Suppliers' reference to injury as referring to antitrust impact, an element of the class antitrust claims, not that the class members would not be able to prove that they suffered monetary damages.

resolve the dispute regarding whether Dr. Johnson's conclusions about Dr. Mangum's model were correct.

We disagree. First, the Tuna Suppliers and the dissent mischaracterize the import of Dr. Johnson's critique. Dr. Johnson did not make a factual finding that 28 percent of the DPP class or 169 class members were uninjured. Instead, Dr. Johnson's test was aimed at undermining confidence in Dr. Mangum's pooled regression model, because class members with no or limited transactions during the benchmark period could not rely on the model to show that they suffered overcharges. At most, this critique supports the more attenuated argument that Dr. Mangum's model is unreliable, or would be unpersuasive to a jury. But the district court considered and resolved this methodological dispute between the experts in favor of Dr. Mangum by crediting his rebuttal that even class members with limited transactions during the class period can rely on the pooled regression model as evidence of impact on similarly situated class members. In other words, the district court determined that Dr. Mangum's pooled regression model was *capable* of showing that the DPP class members suffered antitrust impact on a class-wide basis, *notwithstanding* Dr. Johnson's critique. This was all that was necessary at the certification stage. The DPP class did not have to "first establish that it will win the fray" in order to gain certification under Rule 23(b)(3). *Amgen*, 568 U.S. at 460, 133 S.Ct. 1184. Nor is this a case such as *Ellis*, in which the court had to resolve a dispute regarding an issue of historical fact in order to determine whether the challenged discriminatory conduct could affect a class as a whole. *See* 657 F.3d at 983. There is no factual dispute that the Tuna Suppliers engaged in a price-fixing scheme

affecting the entire packaged tuna industry nationwide.

The district court's conclusion that the Tuna Suppliers could present Dr. Johnson's critique at trial did not improperly shift the burden of determining whether the Rule 23(b)(3) prerequisites were met to the jury.[29] *See Amgen*, 568 U.S. at 459–60, 466, 133 S.Ct. 1184. The district court fulfilled its obligation to resolve the disputes raised by the parties in order to satisfy itself that the evidence proves the prerequisites for Rule 23(b)(3), which is that the evidence was capable of showing that the DPPs suffered antitrust impact on a class-wide basis. "Reasonable minds may differ as to whether the [overcharge Dr. Mangum] calculated is probative" as to all purchasers in the class, but that is a question of persuasiveness for the jury once the evidence is sufficient to satisfy Rule 23. *See Tyson Foods*, 577 U.S. at 459, 136 S.Ct. 1036.

Neither Dr. Mangum's pooled regression model nor Dr. Johnson's critique required individualized inquiries into the class members' injuries. If the jury found that Dr. Mangum's model was reliable, then the DPPs would have succeeded in showing antitrust

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[29] The Tuna Suppliers do not "specifically and distinctly" develop the argument that the district court failed to resolve the parties' dispute as to whether the evidence generated false positives. *Kama*, 394 F.3d at 1238. In any event, as explained above, Dr. Mangum rebutted these critiques by reference to the umbrella effect, and by claiming that Dr. Johnson's analysis was itself flawed because Dr. Johnson thought DPP class members had purchased non-defendant tuna, when they actually purchased tuna supplied by defendants. The district court did not abuse its discretion in resolving this issue by crediting Dr. Mangum's rebuttal.

impact on a class-wide basis, an element of their antitrust claim. On the other hand, if the jury were persuaded by Dr. Johnson's critique, the jury could conclude that the DPPs had failed to prove antitrust impact on a class-wide basis.[30] In neither case would the litigation raise individualized questions regarding which members of the DPP class had suffered an injury. Although such issues would have to be addressed at the damages stage, the dissent's argument that the district court here erred by failing to determine whether questions of individualized damages predominate, Dissent at 690, misses the mark. As noted above, the Tuna Suppliers have not argued that the complexity of damages calculations would defeat predominance here, and as previously explained, there is no per se rule that a district court is precluded from certifying a class if plaintiffs may have to prove individualized damages at trial.[31]

We need not consider the Tuna Suppliers' argument that the possible presence of a large number of uninjured class members raises an Article III issue, because the Tuna Purchasers have

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[30] Although Dr. Johnson argued that Dr. Mangum's pooled regression model was unreliable and so could not sustain a jury finding of antitrust injury to the entire DPP class, the evidence adduced at trial may nevertheless sustain a jury finding of antitrust injury to all or part of the class.

[31] In any event, Dr. Mangum's proposal for calculating damages is a straightforward process of applying the class-wide overcharge to the Tuna Purchasers' net sales records. *See supra* n.19. That proposal does not give rise to a concern about individualized mini-trials to determine each class member's damage award. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton*, 573 U.S. at 276, 134 S.Ct. 2398.

demonstrated that all class members have standing here.[32] A plaintiff is required to establish the elements necessary to prove standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Here, the district court concluded that the DPPs' evidence was capable of establishing antitrust impact on a class-wide basis. Because antitrust impact—i.e., that the Tuna Suppliers' collusion had a common, supra-competitive impact on a class-wide basis—is sufficient to show an injury-in-fact traceable to the defendants and redressable by a favorable ruling, the Tuna Purchasers have

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[32] The Supreme Court expressly held open the question "whether every class member must demonstrate standing before a court certifies a class." *TransUnion*, 141 S.Ct. at 2208 n.4 (emphasis omitted). Outside the class action context, the Supreme Court has held that each plaintiff must demonstrate Article III standing in order to seek additional money damages and, therefore, a litigant must demonstrate Article III standing in order to intervene as a matter of right. *Town of Chester v. Laroe Ests., Inc.*, —— U.S. ——, 137 S.Ct. 1645, 1651, 198 L.Ed.2d 64 (2017). But the Supreme Court has long recognized that in cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy Article III. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 366 n.5, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *Horne v. Flores*, 557 U.S. 433, 446–47, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009). We have likewise applied this rule where a class sought injunctive or equitable relief. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). We therefore overrule the statement in *Mazza* that "no class may be certified that contains members lacking Article III standing," 666 F.3d at 594, which does not apply when a court is certifying a class seeking injunctive or other equitable relief. We do not overrule *Mazza* as to any other holding which remain good law.

adequately demonstrated Article III standing at the class certification stage for all class members, whether or not that was required. *See TransUnion*, 141 S.Ct. at 2208 n.4.

Accordingly, we affirm the district court's certification of the DPP class.

V

We next turn to the Tuna Suppliers' arguments that the district court abused its discretion in determining that the evidence presented by the CFPs and EPPs was capable of proving the element of antitrust impact under California's Cartwright Act, thus satisfying the prerequisites of Rule 23(b)(3).

A

The CFP subclass includes individuals and commercial entities who purchased bulk sized packaged tuna (packages of 40 ounces or more) from six companies (direct purchasers) which had purchased the tuna from the Tuna Suppliers. The CFPs' theory of antitrust impact proceeds in two steps. First, the CFPs claim that the Tuna Suppliers' conspiracy resulted in the direct purchasers paying an overcharge. Second, the CFPs claim that the overcharge was passed on from the direct purchasers to the CFPs.

The CFPs supported this theory with the expert testimony and report of economist Dr. Michael Williams, who employed a methodology substantially similar to that employed by Dr. Mangum. Dr. Williams first conducted a regression analysis to determine the overcharge the CFPs' suppliers (i.e., the six direct purchasers) incurred because of the Tuna Suppliers' collusion. Like Dr. Mangum's analysis, Dr. Williams's regression analysis

controlled for the effect of other variables that affected price in order to isolate the effect of the Tuna Suppliers' collusion. Dr. Williams concluded that COSI overcharged the CFPs' direct purchasers by 16.6 percent, StarKist by 18.2 percent, and Bumble Bee by 15.3 percent.

Next, Dr. Williams performed a separate regression analysis to determine if those overcharges passed through to the CFPs, and determined that the direct purchasers passed through 92 to 113 percent of their overcharge to the CFPs. Dr. Williams then performed two tests to verify that his estimates applied class-wide, both of which confirmed his theory.

To rebut Dr. Williams's analysis, the Tuna Suppliers relied on a critique by economist Dr. Linda Haider. Dr. Haider asserted that Dr. Williams erroneously assumed that all CFPs paid a common overcharge and that the same overcharge was passed through to the individual CFPs. Dr. Haider also contended that some of the CFP class members, such as food preparers and distributors, were not impacted because they could have passed through their overcharges to other purchasers downstream. Finally, Dr. Haider claimed that Dr. Williams's model was unreliable because it failed to account for non-defendant tuna purchased by the CFPs' direct purchasers.

The district court reviewed Dr. Williams's report and testimony as well as Dr. Haider's critiques, and after resolving the parties' disputes, concluded that Dr. Williams's methodology was valid and capable of resolving the antitrust impact issue in a single stroke, even though the Tuna Suppliers could raise the same critiques at trial to persuade the jury.

On appeal, the Tuna Suppliers argue that the district court abused its discretion in concluding that Dr. Williams's methodology satisfied Rule 23(b)(3)'s requirement of common proof of antitrust impact, because Dr. Williams erred in assuming that all direct purchasers were overcharged by the same percentage and that each class member was subject to the same pass-through rate. We disagree. As explained in Section IV, *supra*, a district court does not abuse its discretion in concluding that a regression model such as the one used by Dr. Williams may be *capable* of showing class-wide antitrust impact, provided that the district court considers factors that may undercut the model's reliability (such as unsupported assumptions, erroneous inputs, or nonsensical outputs such as false positives) and resolves disputes raised by the parties. The district court did so in this case, and therefore did not abuse its discretion in concluding that Dr. Williams's methodology was reliable and capable of showing class-wide impact.

We also reject the Tuna Suppliers' argument based on Dr. Haider's contention that some CFP class members may have passed on their overcharges to downstream purchasers. Dr. Haider claimed that the CFPs' ability to prove common impact was problematic because the impact of overcharges on class members who passed on their overcharges would be different from the impact on members who did not pass on such overcharges. The district court did not abuse its discretion in rejecting this argument on the ground that the Tuna Suppliers had not shown that determining whether or not those class members had passed overcharges down the distribution chain would overwhelm the common issues and require an individualized analysis. Therefore, the district court

could reasonably conclude that the common question of antitrust impact predominated over individualized questions concerning a passed-on overcharge.

B

The EPP subclass contains individual consumers who purchased the Tuna Suppliers' products for personal consumption. Thus, like the CFPs, the EPPs are indirect purchasers whose theory of antitrust impact depends on two separate overcharges: first, an overcharge by the Tuna Suppliers to the direct purchasers (i.e., retail stores), and then an overcharge passed on to the EPPs. To carry their burden of showing they could establish class-wide overcharges through common proof, the EPPs offered the testimony of economist Dr. David Sunding, who employed a methodology substantially similar to that employed by Dr. Mangum and Dr. Williams.

Like Drs. Mangum and Williams, Dr. Sunding first conducted a regression analysis to isolate the impact of the collusion on the direct purchasers, which he concluded was an 8.1 percent overcharge from COSI, 4.5 percent from StarKist, and 9.4 percent from Bumble Bee. He then determined that the overcharges passed through to the EPP class members ranged from 65.3 to 135 percent with an estimated pass-through rate of 100 percent for the entire class. Dr. Sunding provided qualitative, quantitative and anecdotal evidence to support his assumption of a pass through rate for the entire class, including an examination of retail scanner data and the Tuna Suppliers' internal records.

Dr. Haider critiqued Dr. Sunding's methodology and findings on many of the same grounds as she criticized Dr. Williams's model and conclusions. She

also made the additional criticisms that Dr. Sunding's methodology produced absurd results because it showed prices that made no economic sense, and that his model ignored, and therefore failed to control for, important factors like loss-leader and focal point pricing. The district court analyzed the evidence and the experts' disputes, and concluded that Dr. Sunding's report and testimony were capable of showing antitrust impact common to the class, for the same reasons explained in the court's analysis of Dr. Mangum's and Dr. Williams's models. The district court determined that Dr. Haider's additional critiques were based either on a misreading of Dr. Sunding's report, or her own miscalculations.

On appeal, the Tuna Suppliers argue only that Dr. Sunding's model and testimony was not capable of proving common impact for all class members because of its use of "averaging assumptions." This argument fails for the reasons explained above. *See supra* Section IV.A. Thus, the district court properly considered and rejected Dr. Haider's arguments, and determined that Dr. Sunding's methodology was capable of proving antitrust impact on a class-wide basis. That is enough to satisfy Rule 23(b)(3).

VI

In a complex market such as the one at issue here, where different purchasers with different bargaining power purchased a range of products at different prices from different suppliers, commentators have raised reasonable questions whether statistical models are capable of resolving the issue of antitrust impact with common proof. *See, e.g.*, Michelle M. Burtis & Darwin V. Neher, *Correlation and Regression Analysis in Antitrust Class Certification*, 77 Antitrust L.J. 495, 518 (2011). But such statistical

models and other evidence have been accepted as probative in a range of litigation contexts, and the Supreme Court has made clear that the permissibility of statistical evidence "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Tyson Foods*, 577 U.S. at 455, 136 S.Ct. 1036. Here the district court did not abuse its discretion in rigorously analyzing such statistical evidence, determining that it was not flawed in a manner that would make it incapable of providing class-wide proof, *see supra* Section III.C, concluding that the evidence was sufficient to sustain a jury verdict on the question of antitrust impact for the entire class, and preserving the defendants' ability to challenge the persuasiveness of such evidence at trial. We therefore affirm the district court's decision to certify the Tuna Purchasers' three subclasses under Rule 23(b)(3). Nevertheless, the Tuna Suppliers will have the opportunity to convince a jury that not all class members were overcharged due to their collusion.

AFFIRMED.

LEE, Circuit Judge, with whom KLEINFELD, Circuit Judge, joins, dissenting:

Over the past two decades, plaintiffs have notched over $103 *billion* in settlements from securities class actions alone.[1] If we include other types of class actions—wage and hour, consumer lawsuits, antitrust disputes, and many others—that settlement amount almost certainly swells up by tens of billions of dollars more. These settlement sums are staggering because class action cases rarely go to trial. If trials these days are rare, class action trials are almost extinct.[2] And it is no wonder why class actions settle so often: If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses.

That is why the Supreme Court has urged lower courts to "rigorous[ly]" scrutinize whether plaintiffs have met class certification requirements. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). The majority opinion, however, allows the district court to certify a class, even though potentially about one out of three class members suffered no injury. But if defendants'

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[1] *See* Securities Class Action Settlements—2019 Review and Analysis, Harvard Law School Forum on Corporate Governance, available at https://corpgov.law.harvard.edu/2020/03/11/securities-class-action-settlements-2019-review-and-analysis/ (last visited Oct. 21, 2021).

[2] *See, e.g.*, Securities Class Action Filings, 2020 Year in Review, Cornerstone Research, at 18, available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review (last visited Oct. 21, 2021) (noting only 11 securities class action cases tried to verdict in the past quarter century and only one tried since 2014).

econometrician expert is correct that almost a third of the class members may not have suffered injury, plaintiffs have not shown the predominance of common issues under Rule 23(b).

The district court acknowledged the dueling experts' differing opinions on this crucial question but held that it would leave that issue for another day—at trial—because it involves a merits issue that a jury should decide. *See In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 325–28 (S.D. Cal. 2019). But as a practical matter, that day will likely never come to pass because class action cases almost always settle once a court certifies a class. A district court thus must serve as a gatekeeper to resolve key issues implicating Rule 23 requirements—including whether too many putative class members suffered no injury—at the class certification stage. *See Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020) ("Rule 23 makes clear that the district court in which a class action is filed operates as a gatekeeper").

Punting this key question until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue. The refusal to address this key dispute now is akin to the NFL declining to review a critical and close call fumble during the waning minutes of the game unless and until the game reaches overtime (which, of course, will likely never occur if it does not decide the disputed call). Such a practice is neither fair nor true to the rule.

I thus respectfully dissent.

* * * * *

The U.S. Department of Justice's investigation revealed that the three largest domestic producers of packaged tuna colluded to try to inflate the prices of their products. This class action lawsuit soon followed the criminal indictment. Among the plaintiffs include the direct purchasers of the tuna products, ranging from multibillion dollar chain retailers to small mom-and-pop stores. Not surprisingly, some plaintiffs (such as Walmart) wield substantial negotiating leverage: They can demand lower prices or extract additional promotional credits or rebates that defray the offered price. In contrast, an owner of a bodega likely cannot demand even an audience with the tuna producers, let alone ask for lower prices or more promotional credits.

Despite the varying negotiating power among the plaintiffs, their expert, Dr. Russell Mangum III, concluded that the tuna producers overcharged the direct purchasers by an average of 10.28%. He also suggested that about 5.5% of the class may not have suffered an injury because of this price-fixing. In contrast, the defendants' expert, Dr. John Johnson, offered an analysis showing that potentially about 28% of the class members suffered no injury.

Faced with this gaping difference between the two experts' conclusions, the district court acknowledged that Dr. Johnson's "criticisms are serious." *In re Packaged Seafood*, 332 F.R.D. at 328. But it held that this question should be left for trial because Dr. Mangum's method was reliable under *Daubert* and "*capable* of showing" class-wide impact. *Id.* The majority agrees with the district court, ruling that a class can be certified—even if potentially one out of three members suffered no injury—because Plaintiffs'

expert offered a method "capable" of measuring class-wide impact and the district court can winnow out those uninjured members later at trial. But the majority opinion conflicts with Rule 23's text, common sense, and precedent from other circuits.

I. The district court did not "rigorously" scrutinize the dueling experts' opinions about uninjured class members.

While around 10,000 class action lawsuits are filed annually[3], class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Rule 23 thus establishes stringent requirements for certifying a class.

Among the Rule 23 requirements, the plaintiff must show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. 23(b)(3). The word "common" means "belonging to or shared . . . by all members of a group," while "predominate" means "to hold advantage in numbers or quantity."[4] Rule 23(b)(3) thus requires that questions of law or fact be shared by all or substantially all members of the class.

The Supreme Court has also reminded us that Rule 23 does not establish a "mere pleading

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[3] *Class Actions 2021*, Lexology, Jonathan D. Polkes and David J. Lender, eds., at 91 (2021).

[4] "Common" and "predominance," *Merriam-Webster* Dictionary, available at *www.merriam-webster.com/dictionary* (last checked on Oct. 21, 2021).

standard." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. Rather, plaintiffs must prove by a preponderance of the evidence that they have met the Rule 23 requirements. *See id.*; Maj. Op. at 664–65. Rule 23 imposes a requirement on the trial court, too. A trial court can certify a class only after engaging in a "rigorous analysis" and determining that the plaintiff has satisfied Rule 23. *Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541. And in conducting that "rigorous analysis," trial courts "[f]requently" must assess "the merits of the plaintiff's underlying claim" because the issues are often intertwined. *Id.*

Rule 23's "rigorous analysis" is different from "reliable" or "relevant." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982–84 (9th Cir. 2011). A trial court must do more than just consider one side's expert opinion as "reliable" and then kick the can down the road until trial. Rather, it must dig into the weeds and decide the battle of dueling experts if their dispute implicates Rule 23 requirements.

Here, the two experts' contentions centered on Rule 23(b)(3)'s predominance requirement—whether it has been met if the defendants' expert concludes that potentially a significant number of putative class members were uninjured. Plaintiffs' expert argued that only about one out of twenty class members likely did not suffer an injury, while defendants' expert maintained it was potentially more than one out of four. The district court held that the plaintiffs' expert's opinion passed muster under *Daubert* but admitted that the defendants' expert offered "serious" criticism, too. The district court admirably analyzed this difficult issue but ultimately did not resolve it, ruling that a jury should decide it at trial.

Despite the detailed analysis of the district court, I believe it abused its discretion in committing the same error that we cautioned against in *Costco*. There, the two dueling experts offered contrasting opinions on whether Costco's alleged discrimination was regional or nationwide, which touched upon Rule 23(a)'s commonality requirement (*i.e.*, whether all the putative class members nationwide suffered discrimination). The trial court held the plaintiffs' expert was reliable under *Daubert*, and declined to decide which experts' opinion should prevail at the class certification stage. It then certified a class and ruled that this "battle of the experts" issue could be decided at trial because Costco's criticisms of the expert report "attack the weight of the evidence and not its admissibility." *Id.* at 982 (quoting district court opinion).

But because that dispute implicated Rule 23(a)'s commonality requirement, we reversed the district court's certification order and directed it to address it at the class certification stage. As we put it, the trial court "confused" the *Daubert* standard's "reliable" requirement with the "rigorous analysis" standard for Rule 23. *Id.* at 982 ("Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible."). Rather than "examining the merits [of the dispute between experts] to decide this issue," the trial court "merely concluded that, because both Plaintiffs' and Costco's evidence was admissible, a finding of commonality was appropriate." *Id.* at 984. That was error.

And that is exactly what happened here. The district court found plaintiffs' expert to be reliable

under *Daubert*, but it also conceded that the defendants' expert offered a "serious" critique of plaintiffs' expert opinion. The district court ultimately held that resolving this "battle of the experts" was a merits issue. But the dispute over the number of uninjured class members overlaps with Rule 23(b)(3)'s predominance requirement as well as Rule 23(a)'s lower threshold commonality requirement. Simply put, a plaintiff cannot prove that common issues predominate if one out of three putative class members suffered no harm. *Cf. Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012) ("[T]he relevant class must be defined in such a way as to include only members who were [harmed by being] exposed to advertising that is alleged to be materially misleading."). If a large number of class members "in fact suffered no injury," identifying those class members "will predominate." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53–54 (1st Cir. 2018). Thus, the district court had to "examin[e] the merits" of this dispute between the experts, and not "merely conclude[ ] that" both expert reports are reliable and admissible. *Costco*, 657 F.3d at 984.

The majority holds that Dr. Mangum's estimate of a 10.2% "average" price inflation meets Rule 23's requirements because it shows a method "capable" of showing common antitrust impact. The majority appears to distinguish between (i) cases in which the class members "*logically*" could not have been harmed (because, for example, they were never exposed to the misleading advertisement) or there is insufficient evidence to support commonality, and (ii) cases like this one in which an expert holds that many class members *in reality* may not have suffered any harm, even if they theoretically could have. Maj. Op. 666–

67, n.9. In the former scenario, the majority says that a class cannot be certified because logically there cannot be commonality under Rule 23; in the latter case, the majority appears to argue that it is a merits issue because a jury will need to assess the persuasiveness of the expert's opinion.

I believe that creates a false distinction. Nothing in our decision in *Costco* or the Supreme Court's opinion in *Wal-mart* creates such a difference. If the evidence presented implicates Rule 23—as it does here—then the district court must decide whether the plaintiffs have "prove[n] that there are *in fact* . . . common questions of law or fact," even if it means assessing the persuasiveness of the expert opinions. *Wal-mart*, 564 U.S. at 350–51, 131 S.Ct. 2541 (emphasis in original). In *Costco*, we chastised the district court for not "judging the persuasiveness of the evidence presented" and "end[ing] its analysis of the plaintiffs' evidence after determining such evidence was merely admissible." 657 F.3d at 982. If we had to refrain from deciding the persuasiveness of an expert opinion used to show commonality, a plaintiff could prevail on class certification by merely offering a well-written and plausible expert opinion. *See West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (failure to resolve dueling experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

Admittedly, resolving a battle of dueling experts over highly technical issues may seem like a difficult job for a court. But that tough task is likely even more difficult and daunting for jurors. In the end, a "district judge may not duck hard questions by observing that each side has some support . . . Tough

questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.* After reviewing the evidence, a district court must make findings of fact necessary for determining whether Rule 23's requirements have been met.

And here, the expert opinion offered by Plaintiffs to show commonality (though admissible) is not persuasive. The majority contends that the expert's model is capable of measuring class-wide impact through an "averaging assumption" of 10.2% price inflation from the price-fixing conspiracy. Put another way, the model assumes that almost all class members suffered an injury because the price-fixing would elevate the list price of tuna for everyone, even if individual class members ultimately paid different prices for the tuna. But the expert's assumption flies against common sense and empirical evidence. Powerful retailers (like Walmart) are not passive or ill-informed consumers; they will not sit still when faced with a price increase. They will fiercely negotiate the list price down, or more likely, demand promotional credits or rebates that offset any price increase. *See* R. Pandey, et al., *Factors Influencing Organization Success: A Case Study of Walmart*, International Journal of Tourism & Hospitality in Asia Pasific, Vol. 4, No. 2, June 2021. *See also* Gary Rivlin, *Rigged: Supermarket Shelves for Sale*, Center for Science in the Public Interest, September 2016, available at cspinet.org/Rigged (last visited January 4, 2021).

Major retailers wield significant power over manufacturing and food companies because they represent the major channel to distribute the food products. If a major retail chain refuses to carry a

company's product after a pricing dispute, it can significantly affect that company's bottom line. As one case study put it, "Walmart has huge bargaining power since . . . it is one of the largest distributors for manufacturing [sic]. For instance, 17% of the total sales of P&G and 38.7% of the total sales of CCA Industries rely on Walmart stores. Without Walmart, these businesses would be unable to operate." Pandey, *supra* page 10, at 120.

Large retailers can also extract rebate or promotional concessions from the companies by threatening to place their products at the bottom of the shelves or less-visited aisles where consumers are less likely to notice them. All told, large retailers use this power to "collect more than $50 billion a year in trade fees and discounts from food and beverage companies." Rivlin, *supra* page 10, at ii. And "[f]ood manufacturers pay these fees . . . because they have no choice. The stores are the gatekeepers." *Id.* at 21.

None of this is to say that Wal-Mart and other retailers achieved those price discounts and promotional credits or rebates here. We simply do not know because Plaintiffs' expert did not adequately consider it.[5] The only way we can find out if Wal-Mart and other major retailers suffered any injury (and if so, how much) would be if we conducted highly

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[5] The majority cites the deposition testimony of Plaintiffs' expert to argue that he considered promotional credits and rebates. Maj. Op. 672, n.16. But the expert added the caveat that he did so only in instances that he "could reliably" calculate the data. He then conceded that he did not include "discount or promotional information" with much of the data but said that "I have done all that I could." He ultimately concluded that he could measure damages by relying on the average 10.2% "overcharge" analysis in his expert report.

individualized analyses of each class member. But that would defeat the commonality requirement under Rule 23.

The majority seemingly waves away this difference in negotiating power between the class members by relying on our oft-quoted language that the "need for individualized findings as to amount of damages does not defeat class certification." Maj. Op. 668–69 (citing *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016)*; Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015)).

I believe our court has misconstrued that often-quoted language to create a sweeping rule that gives a free pass to the intractable problem of highly individualized damages analyses. And such a rule also conflicts with the Supreme Court's holding that a class action must be capable of being resolved in "one stroke." *Wal-mart*, 564 U.S. at 350, 131 S.Ct. 2541; *see also Comcast*, 569 U.S. at 35, 133 S.Ct. 1426 (requiring a "rigorous analysis" to confirm that the damages model is "consistent with its liability case").

We first stated that the "amount of damages is invariably an individual question and does not defeat class action treatment" in *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). That was a securities fraud class action, and we recognized that "computing individual damages will be virtually a *mechanical task*" because "the amount of price inflation during the period can be charted." *Id.* (emphasis added). Put another way, damages can be easily calculated because it is a plug-and-play exercise: Look at the number of shares bought by each shareholder and the price of the share that day, and compare it to the price inflation caused by the misrepresentation. While

each class member may have individualized damages, the damages can be easily calculated for the entire class in "one stroke." *See Wal-mart*, 564 U.S. at 350, 131 S.Ct. 2541.

Since *Barrack*, we have applied that concept mostly in employment and wage-and-hour cases. *See, e.g., Vaquero*, 824 F.3d at 1152 (suing for payment for unpaid hours on non-sales work); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (class action based on wage and hour claims in which defendant's "computerized payroll and time-keeping database would enable the court to accurately calculate damages"). Wage-and-hour cases present another mechanical application scenario: a class administrator can easily look at the employer's payroll records and calculate the number of hours or wages that each employee was underpaid. At times, however, we have quoted that language without determining whether damages could be calculated mechanically or if the court would have to engage in individualized mini-trials for damages. *See, e.g., Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (stating that individualized damages do not defeat class certification in case involving misleading statements in annuities promotional materials).

But here, it will not be a "mechanical task" to calculate the damages for each class member. *Blackie*, 524 F.2d at 905. The district court will need to conduct individualized mini-trials to determine whether each class member suffered an injury, and if so, what the damages are for each member. That would upend Rule 23's commonality requirement. The majority opinion notes that commonality may still be met, even if a defendant "might attempt to

pick off the occasional class member here or there." Maj. Op. 682, n. 31 (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014)). But our case does not involve a "pick off" of a few uninjured class members, but rather a massive grab bag of class members—perhaps almost a third of the class—who may not have suffered any harm. The district court thus will have to engage in individualized mini-trials to figure out who suffered an injury.

Finally, the majority suggests that an oversized class with unharmed class members does not pose a practical problem if a method can separate the uninjured from the injured at trial. No harm, no foul, the majority implies. But that cannot be so if a large number of class members (certainly, a third) suffered no injuries. Suppose that 80% of the putative class members suffered no harm. Could a district court still certify a class just because it could later winnow out the 80% who were uninjured? Would Rule 23(b)'s predominance of common issues be met even if only 20% of the putative members belong in the class? By definition, a class with 80% uninjured members cannot present a predominance of common issues because they have nothing in common with the remaining sliver of injured members.

If we allow a court to certify a class in which a large number of putative class members have suffered no injury, we will allow plaintiffs to weaponize Rule 23 to impose an in terrorem effect on defendants. The "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 485, 133 S.Ct. 1184, 185 L.Ed.2d

308 (2013) (Scalia, J., dissenting). Indeed, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

So if a court certifies a class with many uninjured class members, it dramatically expands the potential exposure and artificially jacks up the stakes. It matters little that the uninjured class members can be separated at trial because with "the stakes so large . . . settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002). The opportunity at trial to jettison uninjured members from the certified class is a phantom solution because defendants will have little choice but to settle before then.

II. The majority's rejection of a *de minimis* rule creates a circuit split.

I believe the majority also errs in rejecting a *de minimis* rule. To be sure, a plaintiff need not show that every single putative class member has suffered an injury. But the number of uninjured class members should be *de minimis*—based on Rule 23's language, common sense, and precedent from other circuits.

First, as noted above, the words "common" and "predominate" in Rule 23(b)(3) suggest that the class should include only (or mostly only) people who have

suffered an injury. If one-third—or half or two-thirds—of the class members suffered no injury, it follows that "common" issues would not "predominate," as required under the text of Rule 23, because those uninjured class members have little in common with those who have been harmed. In short, Rule 23 allows a *de minimis* number of uninjured members but no more.

Second, allowing more than a *de minimis* number of uninjured class members tilts the playing field in favor of plaintiffs. By expressly rejecting a *de minimis* rule, the majority's opinion will invite plaintiffs to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids being denied for lack of "predominance" or "commonality." And in creating these grossly oversized classes, plaintiffs will inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to extract a settlement, even if the merits of their claims are questionable.

Finally, the majority opinion needlessly creates a split with other circuits that have endorsed a *de minimis* rule. The D.C. Circuit, for example, suggested that "5% to 6% constitutes the outer limits of a *de minimis* number." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–25 (D.C. Cir. 2019) (cleaned up). The district court had found that the class of 16,065 members (12.7% of whom were uninjured) failed to meet the predominance requirement because more than a "*de minimis*" number were uninjured. *Id.* at 623–24. The D.C. Circuit on appeal affirmed, ruling that the plaintiffs' model "even if sufficiently reliable, does not prove classwide injury." *Id.* at 623. Put another way,

"even assuming the model can reliably show injury and causation for 87.3 percent of the class, that still leaves the plaintiffs with no common proof of those essential elements of liability for the remaining 12.7 percent." *Id.* at 623–24

Likewise, the First Circuit suggested that "around 10%" of uninjured class members marks the *de minimis* border. *See In re Asacol*, 907 F.3d at 47, 51–58. The First Circuit was perhaps willing to look past "a very small absolute number of class members" who have suffered no injury because they "might be picked off in a manageable, individualized process at or before trial." *Id.* at 53. But if "there are apparently thousands who in fact suffered no injury . . . [t]he need to identify those individuals will predominate." *Id.* at 53–54.

* * * * *

While this case centers on the narrow issue of price-fixing of canned tuna, its implications extend beyond to a wide sea of class action cases. I fear that today's decision will unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY COOPERATIVE, INC.; Beverly Youngblood; Pacific Groservice, Inc., DBA Pitco Foods; Capitol Hill Supermarket; Louise Ann Davis Matthews; James Walnum; Colin Moore; Jennifer A. Nelson; Elizabeth Davis-Berg; Laura Childs; Nancy Stiller; Bonnie Vanderlaan; Kristin Millican; Trepco Imports and Distribution, Ltd.; Jinkyoung Moon; Corey Norris; Clarissa Simon; Amber Sartori; Nigel Warren; Amy Joseph; Michael Juetten; Carla Lown; Truyen Ton-Vuong, AKA David Ton; A-1 Diner; Dwayne Kennedy; Rick Musgrave; Dutch Village Restaurant; Lisa Burr; Larry Demonaco; Michael Buff; Ellen Pinto; Robby Reed; Blair Hysni; Dennis Yelvington; Kathy Durand Gore; Thomas E. Willoughby III; Robert Fragoso; Samuel Seidenburg; Janelle Albarello; Michael Coffey; Jason Wilson; Jade Canterbury; Nay Alidad; Galyna Andrusyshyn; Robert Benjamin; Barbara Buenning; Danielle Greenberg; Sheryl Haley; Lisa Hall; Tya Hughes; Marissa Jacobus; Gabrielle Kurdt; Erica Pruess; Seth Salenger; Harold Stafford; Carl Lesher; Sarah Metivier Schadt; Greg Stearns; Karren Fabian; Melissa Bowman; Vivek Dravid; Jody Cooper; Danielle Johnson; Herbert H. Kliegerman; Beth Milliner; Liza Milliner; Jeffrey Potvin; Stephanie Gipson; Barbara Lybarger; Scott A. Caldwell; Ramon Ruiz;

Thyme Cafe & Market, Inc.; **Harvesters Enterprises, LLC**; **Affiliated Foods, Inc.**; **Piggly Wiggly Alabama Distributing Co., Inc.**; **Elizabeth Twitchell**; **Tina Grant**; **John Trent**; **Brian Levy**; **Louise Adams**; **Marc Blumstein**; **Jessica Breitbach**; **Sally Crnkovich**; **Paul Berger**; **Sterling King**; **Evelyn Olive**; **Barbara Blumstein**; **Mary Hudson**; **Diana Mey**; **Associated Grocers of New England, Inc.**; **North Central Distributors, LLC**; **Cashwa Distributing Co. of Kearney, Inc.**; **URM Stores, Inc.**; **Western Family Foods, Inc.**; **Associated Food Stores, Inc.**; **Giant Eagle, Inc.**; **McLane Company, Inc.**; **Meadowbrook Meat Company, Inc.**; **Associated Grocers, Inc.**; **Bilo Holding, LLC**; **WinnDixie Stores, Inc.**; **Janey Machin**; **Debra L. Damske**; **Ken Dunlap**; **Barbara E. Olson**; **John Peychal**; **Virginia Rakipi**; **Adam Buehrens**; **Casey Christensen**; **Scott Dennis**; **Brian Depperschmidt**; **Amy E. Waterman**; **Central Grocers, Inc.**; **Associated Grocers of Florida, Inc.**; **Benjamin Foods LLC**; **Albertsons Companies LLC**; **H.E. Butt Grocery Company**; **Hyvee, Inc.**; **The Kroger Co.**; **Lesgo Personal Chef LLC**; **Kathy Vangemert**; **Edy Yee**; **Sunde Daniels**; **Christopher Todd**; **Publix Super Markets, Inc.**; **Wakefern Food Corp.**; **Robert Skaff**; **Wegmans Food Markets, Inc.**; **Julie Wiese**; **Meijer Distribution, Inc.**; **Daniel Zwirlein**; **Meijer, Inc.**; **Supervalu Inc.**; **John Gross & Company**; **Super Store Industries**; **W. Lee Flowers & Co. Inc.**; **Family Dollar Services, LLC**; **Amy Jackson**; **Family Dollar Stores,**

Inc.; Katherine McMahon; Dollar Tree Distribution, Inc.; Jonathan Rizzo; Greenbrier International, Inc.; Joelyna A. San Agustin; Alex Lee, Inc.; Rebecca Lee Simoens; Big Y Foods, Inc.; David Ton; KVAT Food Stores, Inc., DBA Food City; Affiliated Foods Midwest Cooperative, Inc.; Merchants Distributors, LLC; Brookshire Brothers, Inc.; Schnuck Markets, Inc.; Brookshire Grocery Company; Kmart Corporation; Certco, Inc.; Rushin Gold, LLC, DBA The Gold Rush; Unified Grocers, Inc.; Target Corporation; Simon-Hindi, LLC; Fareway Stores, Inc.; Moran Foods, LLC, DBA Save-A-Lot; Woodman's Food Market, Inc.; Dollar General Corporation; Sam's East, Inc.; Dolgencorp, LLC; Sam's West, Inc.; Krasdale Foods, Inc.; Walmart Stores East, LLC; CVS Pharmacy, Inc.; Walmart Stores East, LP; Bashas' Inc.; Wal-Mart Stores Texas, LLC; Marc Glassman, Inc.; Wal-Mart Stores, Inc.; 99 Cents Only Stores; Jessica Bartling; Ahold U.S.A., Inc.; Gay Birnbaum; Delhaize America, LLC; Sally Bredberg; Associated Wholesale Grocers, Inc.; Kim Craig; Maquoketa Care Center; Gloria Emery; Erbert & Gerbert's, Inc.; Ana Gabriela Felix Garcia; Janet Machen; John Frick; Painted Plate Catering; Kathleen Garner; Robert Etten; Andrew Gorman; Groucho's Deli of Five Points, LLC; Edgardo Gutierrez; Groucho's Deli of Raleigh; Zenda Johnston; Sandee's Catering; Steven Kratky; Confetti's Ice Cream Shoppe; Kathy Lingnofski; End Payer Plaintiffs; Laura Montoya; Kirsten

Peck; John Pels; Valerie Peters; Elizabeth Perron; Audra Rickman; Erica C. Rodriguez, Plaintiffs-Appellees,

and

Jessica Decker; Joseph A. Langston; Sandra Powers; Grand Supercenter, Inc.; The Cherokee Nation; US Foods, Inc.; Sysco Corporation; Gladys, LLC; Spartannash Company; Bryan Anthony Reo, Plaintiffs,

v.

BUMBLE BEE FOODS LLC; Tri-Union SeafoodS, LLC, DBA Chicken of the Sea International, DBA Thai Union Group PCL, DBA Thai Union North America, Inc.; Starkist Co.; Dongwon Industries Co., Ltd.; Thai Union Group PCL, Defendants-Appellants,

and

King Oscar, Inc.; Thai Union Frozen Products PCL; Del Monte Foods Company; Tri Marine International, Inc.; Dongwon Enterprises; Del Monte Corp.; Christopher D. Lischewski; Lion Capital (Americas), Inc.; Big Catch Cayman LP, AKA Lion/Big Catch Cayman LP; Francis T. Enterprises; Glowfisch Hospitality; Thai Union North America, Inc., Defendants.

No. 19-56514

Argued and Submitted October 9, 2020
Pasadena, California

Filed April 6, 2021

993 F.3d 774

Before: ANDREW J. KLEINFELD, ANDREW D. HURWITZ, and PATRICK J. BUMATAY, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge HURWITZ.

OPINION

BUMATAY, Circuit Judge:

StarKist Company and Tri-Union Seafoods d/b/a Chicken of the Sea (collectively, "Defendants"),[1] producers of packaged tuna, appeal an order certifying three classes in a multidistrict antitrust case alleging a price-fixing conspiracy. Defendants challenge the district court's determination that Rule 23(b)(3)'s "predominance" requirement was satisfied by expert statistical evidence finding classwide impact based on averaging assumptions and pooled transaction data.

We ultimately conclude that this form of statistical or "representative" evidence can be used to establish predominance, but the district court abused its discretion by not resolving the factual disputes necessary to decide the requirement before certifying these classes. We thus vacate the district court's order certifying the classes and remand for the court to determine the number of uninjured parties in the proposed class based on the dueling statistical evidence. Only then should the district court rule on whether predominance has been established.

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[1] As a result of Appellant Bumble Bee Foods LLC's bankruptcy proceeding, appellate proceedings against Bumble Bee Foods have been held in abeyance due to the automatic stay imposed by 11 U.S.C. § 362. Dkt. No. 51.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Price-Fixing Conspiracy

Various purchasers of tuna products ("Plaintiffs") brought this class action alleging a price-fixing conspiracy by Defendants, the three largest domestic producers of packaged tuna. Together, Defendants account for over 80% of all branded packaged tuna sales in the country. Plaintiffs allege that Defendants colluded to artificially inflate the prices of their tuna products by engaging in various forms of anti-competitive conduct, including agreeing to (1) fix the net and list prices for packaged tuna, (2) limit promotional activity for packaged tuna, and (3) exchange sensitive or confidential business information in furtherance of the conspiracy. There is little dispute over the existence of a price-fixing scheme. Soon after this action was commenced, the Department of Justice initiated criminal charges against Defendants for their price-fixing conspiracy. Bumble Bee and StarKist have since pleaded guilty to federal, criminal price-fixing charges, as have several of their current and former executives. Chicken of the Sea has also admitted to price fixing and agreed to cooperate with the federal investigation.

B. Certifying the Classes

Plaintiffs proposed three classes of purchasers who bought packaged tuna products between November 2010 and December 2016.

The first proposed class, called the Direct Purchaser Plaintiff ("DPP") Class, consists of retailers who directly purchased packaged tuna products during the relevant period. In support of certification, the Plaintiffs submitted the expert testimony and

report of econometrician Dr. Russell Mangum III. Dr. Mangum "primarily" relied on statistical evidence "in the form of a regression model which purports to prove that the price-fixing conspiracy harmed all, or nearly all, of the Class members." First, Dr. Mangum calculated what the price for wholesale tuna would have been "but for" the alleged price fixing. To do so, he compared the prices during the period of the alleged price-fixing scheme to prices either before or after the alleged impacted period, while controlling for other factors that affect price differences. Comparing that but-for price to a "clean" benchmark period with no anticompetitive activity, Dr. Mangum concluded that the DPP Class was overcharged by an average of 10.28% because of the price fixing. Finally, assuming each class member experienced the same 10.28% average overcharge, Dr. Mangum ran a regression analysis and concluded that 1,111 out of 1,176 direct purchasers (or 94.5%) were injured by Defendants' actions.

The Defendants' expert econometrician, Dr. John Johnson, posed several objections to Dr. Mangum's methodology. First, Dr. Johnson contended that because Dr. Mangum used an average estimated overcharge, his model incorrectly assumed "every direct purchaser was injured—and necessarily in the same way." Dr. Johnson instead calculated a unique overcharge coefficient for 604 individual class members and concluded that only 72% paid an inflated price, meaning 28% of the class members suffered no injury at all. Second, Dr. Johnson argued that Dr. Mangum found "false positives" because his equation identified overcharges during the "clean" benchmark period by both Defendants and by packaged tuna sellers who are not Defendants.

Additionally, Dr. Johnson claimed that Dr. Mangum relied on faulty economic assumptions. For example, Dr. Mangum's report purportedly assumed that all Defendants would respond identically to changes in supply and demand factors, and therefore costs would rise or fall identically across all producers. Dr. Johnson also commented that Dr. Mangum's model failed a "Chow Test," which examines the stability of coefficients among separate subgroups of a data set to determine if pooling them together to create an average is appropriate.

In rebuttal, Dr. Mangum noted that Dr. Johnson did not keep the average overcharge coefficient constant but rather allowed that coefficient to vary by customer. According to Dr. Mangum, this created too small sample sizes of customers with each coefficient, and this explained why Dr. Johnson was unable to create *any* results for some members of the DPP Class. Dr. Mangum claimed that, even under Dr. Johnson's analysis, 98% of DPP customers were overcharged if those customers who showed no result whatsoever were excluded.[2]

The district court certified the class, concluding that the Defendants' challenges to Dr. Mangum's methods were "ripe for use at trial" but "not fatal to a finding of classwide impact." *In re Packaged Seafood Prod. Antitrust Litig.*, 332 F.R.D. 308, 325 (S.D. Cal. 2019). The district court stressed that although Dr. Johnson's "criticisms are serious and could be persuasive to a finder of fact . . . determining which expert is correct is beyond the scope" of a class

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[2] This is compared to Dr. Mangum's view that 94% of DPP customers were overcharged if only statistically significant results were considered.

certification motion. *Id.* at 328. The court instead thought the critical issue was to determine whether Dr. Mangum's method is "capable of showing" impact on all or nearly all class members. *Id.* Because it was not persuaded that "Dr. Mangum's model is unreliable or incapable of proving impact on a class-wide basis," the court found predominance established for the DPP Class. *Id.*

For the next two proposed classes, Plaintiffs offered expert reports and testimony that proceeded similarly to Dr. Mangum's statistical analysis. The Commercial Food Service Product ("CFP") Class consists of those who purchased packaged tuna products of 40 ounces or more from six major retailers (Dot Foods, Sysco, US Foods, Sam's Club, Wal-Mart, and Costco). The End Payer Plaintiffs ("EPP") Class is defined as consumers who bought Defendants' packaged tuna products in cans or pouches smaller than 40 ounces for end consumption from any of the six major retailers. Defendants' expert, Dr. Laila Haider, objected to Plaintiffs' experts' methodology largely for the same reasons raised in opposition to the DPPs' methodology, focusing on benchmark selection, averaging, and false positives. Finding only "subtle differences" between the methodologies of Plaintiffs' experts' and Defendants' objections in these two classes and the DPP Class, the district court certified the CFP and the EPP Classes. Despite finding "potential flaws" in Plaintiffs' experts' methodology, the court nonetheless concluded it was "reliable and capable of proving impact" and that the jury could determine whether liability and damages were proven.

A motions panel granted Defendants' petition for permission to appeal the class certification order

under Federal Rule of Civil Procedure Rule 23(f) and 28 U.S.C. § 1292(e).

II. LEGAL STANDARDS

A. Standard of Review

We review a district court's decision to certify a class under Rule 23 for abuse of discretion and review the factual findings for clear error. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016).

B. The Predominance Requirement

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (simplified). To police this exception, Rule 23 imposes "stringent requirements" for class certification. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013). A party seeking class certification must first meet Rule 23(a)'s four requirements: numerosity, commonality, typicality, and adequacy of representation. *Leyva v. Medline Indus.*, 716 F.3d 510, 512 (9th Cir. 2013); *see* Fed. R. Civ. P. 23(a). "To obtain certification of a class action for money damages under Rule 23(b)(3)," a putative class must also establish that "the questions of law or fact common to class members predominate over any questions affecting only individual members." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013); *see* Fed. R. Civ. P. 23(b)(3).

When considering whether to certify a class, it is imperative that district courts "take a close look at whether common questions predominate over individual ones." *Comcast*, 569 U.S. at 34, 133 S.Ct.

1426. The Supreme Court has made clear that district courts must perform a "rigorous analysis" to determine whether this exacting burden has been met before certifying a class. *Id.* at 35, 133 S.Ct. 1426; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). This "rigorous analysis" requires "judging the persuasiveness of the evidence presented" for and against certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). Courts must resolve all factual and legal disputes relevant to class certification, even if doing so overlaps with the merits. *Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541. A district court abuses its discretion when it fails to adequately determine predominance was met *before* certifying the class. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

C. The Burden of Proof for Predominance

Although we have not previously addressed the proper burden of proof at the class certification stage, we hold that a district court must find by a preponderance of the evidence that the plaintiff has established predominance under Rule 23(b)(3). *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 191 (3d Cir. 2020) (holding that district courts must find by a "preponderance of the evidence that the plaintiffs' claims are capable of common proof at trial"); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015) (holding that plaintiffs must show "each disputed requirement has been proven by a preponderance of evidence"); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012) ("Plaintiffs bear the burden of showing that a proposed class satisfies the Rule 23 requirements, but they need not make that showing to a degree of

absolute certainty. It is sufficient if each disputed requirement has been proven by a preponderance of evidence."); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009) ("[A]n issue of predominance must be established at the class certification stage by a preponderance of all admissible evidence.") (simplified); *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) ("[We] hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements."); *see also Newberg on Class Actions*, § 7:21 (5th ed.) ("The trend in recent cases has been a move . . . towards adoption of a preponderance of the evidence standard to facts necessary to establish the existence of a class.").[3]

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[3] A number of district courts in our circuit have likewise applied a preponderance of the evidence standard to establish a class. *See, e.g., Gomez v. J. Jacobo Farm Labor Contractor, Inc.*, 334 F.R.D. 234, 248 (E.D. Cal. 2019) ("Federal courts throughout the country require the movant to demonstrate by a preponderance of the evidence that class certification is appropriate."); *Martin v. Sysco Corporation*, 325 F.R.D. 343, 354 (E.D. Cal. 2018) ("While Rule 23 does not specifically address the burden of proof to be applied, courts routinely employ the preponderance of the evidence standard."); *Valenzuela v. Ducey*, 2017 WL 6033737, at *3 (D. Ariz. Dec. 6, 2017) ("[The preponderance of the evidence] standard appears to be the trend in federal courts and will be applied in this case.") (simplified); *Southwell v. Mortg. Inv'rs Corp. of Ohio*, 2014 WL 3956699, at *1 (W.D. Wash. Aug. 12, 2014) ("[T]his Court finds itself in need of such a standard and chooses to align itself with the emerging trend in other districts towards the adoption of a preponderance of the evidence standard[.]"); *Smilovits v. First Solar, Inc.*, 295 F.R.D. 423, 427 (D. Ariz. 2013) ("[The preponderance] standard appears to be the trend in federal courts[.]"); *Keegan v. American Honda Motor Co., Inc.*, 284 F.R.D. 504, 521 n.83 (C.D. Cal. 2012)

Aside from joining our sister circuits, employing a preponderance of the evidence standard supports the district court's role as the gatekeeper of Rule 23's requirements. *See Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541; *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 375 (5th Cir. 2016) (holding the predominance inquiry envisions "what a class trial would look like"). It best accords with the Supreme Court's warning that class certification is "proper only if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores*, 564 U.S. at 349–51, 131 S.Ct. 2541 (emphasis added). And a preponderance standard is more faithful to Rule 23(b)(3)'s text, which provides that courts can certify a class "only if . . . the court *finds* that the questions of law or fact common to class members predominate" over individual ones. Fed. R. Civ. P. 23(b)(3) (emphasis added).

The preponderance standard also flows from the Supreme Court's emphasis that the evidence used to satisfy predominance be "sufficient to *sustain a jury finding* as to [liability] if it were introduced in each [plaintiff's] individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 S. Ct. 1036, 1048, 194 L.Ed.2d 124 (2016) (emphasis added). Establishing predominance, therefore, goes beyond determining whether the evidence would be *admissible* in an individual action. Instead, a "rigorous analysis" of predominance requires "judging the persuasiveness of

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("[D]efendants cite no Ninth Circuit authority that directs use of a preponderance standard in deciding class certification motions. Because that is the general standard of proof used in civil cases, however, the court applies it here.").

the evidence presented" for and against certification. *Ellis*, 657 F.3d at 982 (vacating class certification because the district court "confused the *Daubert* standard" for admissibility of expert evidence "with the 'rigorous analysis' standard to be applied when analyzing" the Rule 23 factors).[4]

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[4] We acknowledge that *Tyson Foods* stated that once a district court finds representative evidence "admissible, its persuasiveness is, in general, a matter for the jury," and class certification should only be denied if "no reasonable juror" could have found the plaintiffs' representative evidence persuasive. 136 S. Ct. at 1049. But that discussion was in the context of a wage-and-hour class action where representative evidence is explicitly permitted to establish liability in individual cases. *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946)). Such an evidentiary rule exists because defendants often fail to keep proper records of hours worked by employees. *Id.*; *see also Lamictal*, 957 F.3d at 191–92 (discussing how representative evidence is particularly appropriate in wage-and-hour suits since "a representative sample of employees may be the only feasible way to establish liability" in a wage-and-hour case due to the defendant's own "inadequate record keeping").

Given that representative evidence can be used to infer harm in individual wage-and-hour suits, *Tyson Foods* reasoned that representative evidence was *presumptively* usable at the class certification stage as well. *See Tyson Foods*, 136 S. Ct. at 1049; *see also id.* at 1046 (stating that representative evidence can be used to establish predominance if "each class member could have relied on that sample to establish liability if he or she had brought an individual action."). But the "no reasonable jury" standard is cabined to wage-and-hour suits and doesn't apply here. *See Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 923, 947 & n.27 (9th Cir. 2019) ("*Tyson* expressly cautioned that this rule should be read narrowly and not assumed to apply outside of the wage and hour context.").

D. The Use of Representative Evidence

The acceptance of representative evidence at the class certification stage is nothing new. The Supreme Court has held that representative evidence can be relied on to establish a class, but it has also declined to adopt "broad and categorical rules governing" its use. *Tyson Foods*, 136 S. Ct. at 1049. Instead, whether a representative sample can "establish classwide liability" at the certification stage "will depend on the purpose for which the sample is being introduced and on the underlying causes of action." *Id.* While consideration of representative evidence may be flexible, it must be scrutinized with care and vigor. *See Comcast*, 569 U.S. at 35, 133 S.Ct. 1426 (rejecting the use of representative evidence to establish predominance); *Wal-Mart*, 564 U.S. at 350–51, 131 S.Ct. 2541 (rejecting the use of representative evidence to establish commonality).

There is reason to be wary of overreliance on statistical evidence to establish classwide liability. Academic literature abounds observing that "judges and jurors, because they lack knowledge of statistical theory, are both overawed and easily deceived by statistical evidence." *United States v. Veysey*, 334 F.3d 600, 604 (7th Cir. 2003).[5] If "highly

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[5] *See, e.g.*, Douglas H. Ginsburg & Eric M. Fraser, *The Role of Economic Analysis in Competition Law* (May 16, 2010) ("[Courts] almost certainly will not have the assistance of even one staff economist, nor will the judges likely be familiar with the economic concepts about the application of which [the parties] are debating."); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1342 n.40 (1971) (discussing how courts misunderstand and misapply statistical evidence); G. Alexander Nunn, *The Incompatibility of Due Process and Naked Statistical*

consequential evidence emerges from what looks like an indecipherable" statistical model to most "non-statisticians," it is "imperative that qualified individuals explain how the [model] works," and courts must "ensure that it produces reliable information." *United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021).[6]

Moreover, the use of representative evidence cannot "abridge, enlarge or modify [a plaintiff's] substantive right[s]." *See* 28 U.S.C. § 2072(b). Otherwise, its use would contravene the Rules Enabling Act. *Id*. Class actions are merely a procedural tool aggregating claims, *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 291, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008), and Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010) (plurality opinion). The use of representative evidence at the class certification stage must therefore be closely and carefully scrutinized, and "[a]ctual, not presumed, conformance" with Rule 23's requirements is "indispensable." *Wal-Mart*, 564 U.S. at 351, 131 S.Ct. 2541 (simplified).

Evidence, 68 Vand. L. Rev. 1407 (2015) (discussing how the use of statistical evidence in certain circumstances can constitute a due process violation).

[6] As Mark Twain famously popularized, "[t]here are three kinds of lies: lies, damn lies, and statistics." *See* Mark Twain, *Chapters from My Autobiography*—XX, 186 N. Am. Rev. 465, 471 (1907). Although we welcome the use of statistical evidence when appropriate, it would be injudicious to swallow it uncritically.

With these background legal principles in mind, we turn to Defendants' contentions on appeal.

III. DEFENDANTS' CLAIMS

Defendants raise two challenges to the district court's reliance on Plaintiffs' representative evidence. First, Defendants argue that this type of representative evidence—especially the use of averaging assumptions—cannot be used to establish predominance. Second, Defendants claim that, even if this type of evidence can show predominance, Plaintiffs' econometric analysis does not *in fact* establish predominance because a significant percentage of the class may have suffered no injury at all under Plaintiffs' experts' statistical modeling. We consider each argument in turn.

A. Whether Plaintiffs' Representative Evidence Can Establish Predominance

The threshold consideration is whether Plaintiffs' representative evidence can be used to establish predominance. We believe this question raises several considerations.

First, we address whether the representative evidence could be used to establish liability in an individual suit. *Tyson Foods*, 136 S. Ct. at 1048. Second, we ensure that classwide liability is "capable of proof" through the representative analysis. *Comcast*, 569 U.S. at 30, 133 S.Ct. 1426. Finally, we assess whether the use of averaging assumptions masks the predominance question itself "by assuming away the very differences that make the case inappropriate for classwide resolution." *Tyson Foods*, 136 S. Ct. at 1046.

We conclude that Plaintiffs' representative evidence can prove the classwide impact element of

Plaintiffs' price-fixing theory of liability and, thus, may be used to establish predominance.

1. Plaintiffs' Evidence Could Have Been Used to Establish Liability in a Class Member's Individual Suit

To establish predominance, the representative evidence must be capable of use at trial in individual—not just class action—antitrust cases. *See Tyson Foods*, 136 S. Ct. at 1046 (Representative evidence is permissible to establish predominance if "each class member could have relied on that sample to establish liability if he or she had brought an individual action."). This is because plaintiffs and defendants cannot have "different rights in a class proceeding than they could have asserted in an individual action." *Id.* at 1048. If the representative evidence could not be "relied on . . . to establish liability" in an "individual action," *id.* at 1046, then it cannot establish predominance at the class certification stage.

The District Court held that to meet the predominance requirement on their antitrust claims, Plaintiffs had to establish: (1) the existence of an antitrust conspiracy; (2) the existence of individual injury, also referred to as "antitrust impact," as a result of the conspiracy; and (3) resultant damages. *Packaged Seafood*, 332 F.R.D. at 320; *see* 1 McLaughlin on Class Actions § 5:33 (17th ed. 2020); *see also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 n. 18 (1st Cir. 2008).

Plaintiffs rely on their representative evidence to establish the "antitrust impact" of their price-fixing claims against the Defendants. Statistical evidence has long been used to prove antitrust impact in

individual suits. To establish impact in any antitrust action, plaintiffs must "delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847–48 (9th Cir. 1996). Even in individual suits, doing so often requires comparing the actual world with a "hypothetical" world that would have existed " 'but for' the defendant's unlawful activities." *See LePage's Inc. v. 3M*, 324 F.3d 141, 165 (3d Cir. 2003); *see, e.g.*, *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 851–52 (5th Cir. 2015) (holding that the district court didn't abuse its discretion by using a "yardstick" calculation of damages in an antitrust suit where the individual plaintiffs did a but-for analysis by comparing their profits with "a study of the profits of business operations that are closely comparable to the plaintiff's").

In individual cases, constructing these "but-for" comparisons usually requires the use of statistical evidence. *See* Manual of Complex Litigation (Fourth) § 23.1, at pp. 470–71 ("[S]tatistical evidence is routinely introduced . . . in antitrust litigation."). And injury may be inferred from statistical evidence. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (stating that antitrust impact can be inferred from "circumstantial evidence"); *see also* ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* § 13.B.1.c. (2d ed. 2014) (discussing the use of regression models in antitrust actions).

Here, each class member could have relied on Dr. Mangum's models to show classwide impact in each of their individual suits. By constructing a clean, "benchmark" period and comparing it to market price

before and after the benchmark, Dr. Mangum created a "yardstick" comparison to isolate the "but-for" effect of the price-fixing conspiracy, similar to the type of evidence relied upon in individual antitrust actions. *See, e.g.*, *LePage's Inc.*, 324 F.3d at 165; *MM Steel*, 806 F.3d at 851–52. And the regression analysis Dr. Mangum ran to calculate that 94% of the DPP Class suffered an injury is consistent with the use of regression models to prove price-fixing impact in other cases. *See, e.g.*, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002) (affirming use of plaintiffs' "multiple regression analysis" to prove "impact on a class-wide basis" in price-fixing suit). In short, Plaintiffs' statistical evidence is not materially different than the type of evidence that would be used against Defendants in individual cases brought by each class member.

2. Plaintiffs' Representative Evidence Sufficiently Links Their Injuries to Their Theory of Antitrust Violation

Plaintiffs' representative evidence must also be consistent with their underlying theory of liability. *Comcast*, 569 U.S. at 35, 133 S.Ct. 1426 ("[A]ny model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation."). We have interpreted *Comcast* to require that plaintiffs "show that their damages stemmed from the defendant's actions." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015) (simplified). Put another way, the evidence must be capable of linking the harm from the defendant's conduct to the class members.

In this case, there is a sufficient nexus between Plaintiffs' representative evidence and their price-

fixing theory of liability. *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010). Dr. Mangum's regression model can show antitrust impact by isolating the but-for effect of the price inflation attributable to Defendants' alleged anticompetitive price list (the 10.28% average overcharge), and by using a regression model to calculate how much of the class would have been impacted by that overcharge. Plaintiffs thus present a "theory of injury and damages" that is "provable and measurable by an aggregate model relying on class-wide data." *In re Suboxone Antitrust Litig.*, 967 F.3d 264, 272 (3d Cir. 2020) (affirming representative evidence in an antitrust class action).

Accordingly, this is unlike cases where courts have disapproved of representative evidence. In *Comcast*, for example, the Court rejected representative evidence because the posited regression analysis showed common injury that did not track the plaintiffs' underlying theory of liability. 569 U.S. at 35–38, 133 S.Ct. 1426. There, the plaintiffs' regression model accounted for four different antitrust theories of harm, even though the district court had only allowed the plaintiffs to proceed on one of these theories. *Id.* at 31–32, 35, 133 S.Ct. 1426. Such a model "failed to measure damages resulting from the particular antitrust injury on which" the class premised its claim and "identifie[d] damages that are not the result of the wrong" suffered by the certified class. *Id.* at 36–37, 133 S.Ct. 1426. By contrast, here Plaintiffs' regression models test only one theory of liability: the but-for impact of Defendants' price-fixing conspiracy.

3. Plaintiffs' Use of Averaging Assumptions Does Not Defeat Predominance

Defendants also argue that the representative evidence at issue here is categorically impermissible because Plaintiffs' experts used averaging assumptions in their regression models. But the Supreme Court rejected "categorical exclusion" of representative evidence. *Tyson Foods*, 136 S. Ct. at 1046. Instead, *Tyson* approved the use of averaging assumptions so long as the statistical evidence was "reliable in proving or disproving the elements of the relevant cause of action." *Id*.

The use of averaging assumptions in a regression analysis may be inappropriate "where [a] small sample size may distort the statistical analysis and may render any findings not statistically probative." *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002). Indeed, Dr. Mangum's rebuttal to Dr. Johnson's testimony was that varying the overcharge value in his regression analysis resulted in too small sample sizes that were not statistically robust.

Here, we see no issue with Plaintiffs' use of averaging assumptions in its regression models. Dr. Mangum averaged the overcharge calculation using Defendants' own data, and then used that average in a regression model to calculate what percentage of the class was impacted. Presuming the reliability of Plaintiffs' statistical methodology (which we discuss later), the representative evidence can show that virtually all class members suffered an injury due to Defendants' alleged wrongdoing.

According to Defendants, Plaintiffs' averaging assumptions papered over the very individualized

differences that make classwide resolution of this case inappropriate. Defendants stress that "innumerable individualized differences" among the class members make it impossible to show class-wide impact through "common proof." For instance, direct purchasers often individually negotiate prices, and the prices retailers actually pay may vary based on purchasing power, retail price strategy, and other factors. Some retailers may have even sold Defendants' tuna products as a loss leader to drive customers to their stores. Defendants also contend that these averaging assumptions are even more inappropriate when applied to the indirect-purchaser class, which contains "even more disparate" class members, including millions of individuals who bought billions of tuna products from "countless stores across the country over a four-year period."

But even assuming the existence of these individualized differences, a higher initial list price as a result of Defendants' price-fixing scheme could have raised the baseline price at the start of negotiations and could have affected the range of prices that resulted from negotiation. Even Walmart, which as the largest retailer in the country would have had the strongest bargaining power of any class member, was shown to have suffered overcharges as a result of Defendants' conduct. This relieves concerns that the class members were not "similarly situated," and would allow the "reasonable inference of class-wide liability." *See Tyson Foods*, 136 S. Ct. at 1045 (citations omitted).

Moreover, even if class members suffered individualized damages that diverged from the average overcharge calculated by Plaintiffs' expert, "the presence of individualized damages cannot, by

itself, defeat class certification under Rule 23(b)(3)." *Leyva*, 716 F.3d at 514. Indeed, we have consistently distinguished the existence of injury from the calculation of damages. *See Vaquero*, 824 F.3d at 1155; *Senne*, 934 F.3d at 943. Consequently, individualized damages calculations do not, alone, defeat predominance—although, as we discuss below, the presence of class members who suffered *no injury at all* may defeat predominance.

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Because this type of representative evidence can be used to prove injury in individual antitrust suits, is consistent with Plaintiffs' underlying cause of action, and doesn't necessarily mask a lack of predominance, we hold it is permissible to rely on Plaintiffs' representative evidence at the class certification stage.

B. Whether the District Court Must Rule on the Presence of Uninjured Class Members

Even if Plaintiffs' representative evidence *could* be used to satisfy predominance, we cannot embrace their conclusions and averaging assumptions uncritically. Statistical evidence is not a talisman. Courts must still rigorously analyze the use of such evidence to test its reliability and to see if the statistical modeling does *in fact* mask individualized differences.

As stated earlier, reliability is the touchstone for establishing predominance through representative sampling. *See Tyson Foods*, 136 S. Ct. at 1046. It is thus necessary for courts to consider "the degree to which the evidence is *reliable* in proving or disproving" whether a common question of law or fact predominates over the class members. *Id.* (emphasis

added); *see also Vaquero*, 824 F.3d at 1155. To do so, courts must "resolve any factual disputes necessary to determine whether" predominance has in fact been met. *Ellis*, 657 F.3d at 982–84. In other words, the threshold predominance determination cannot be outsourced to a jury. *Lamictal*, 957 F.3d at 191 ("[T]he court must resolve all factual or legal disputes relevant to class certification[.]") (simplified).

When considering if predominance has been met, a key factual determination courts must make is whether the plaintiffs' statistical evidence sweeps in uninjured class members. As the district court recognized, Plaintiffs "must establish, predominantly with generalized evidence, that all (or nearly all) members of the class suffered damage as a result of Defendants' alleged anti-competitive conduct." *Packaged Seafood*, 332 F.R.D. at 320 (simplified). If a substantial number of class members "in fact suffered no injury," the "need to identify those individuals will predominate." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018); *see Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013). If injury cannot be proved or disproved through common evidence, then "individual trials are necessary to establish whether a particular [class member] suffered harm from the [alleged misconduct]," and class treatment under Rule 23 is accordingly inappropriate. *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013); *see also Tyson Foods*, 136 S. Ct. at 1045.[7]

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[7] The presence of uninjured parties in a certified class also raises serious standing implications under Article III. The federal court system is reserved only for those that have suffered

In this case, the district court abused its discretion in declining to resolve the competing expert claims on the reliability of Plaintiffs' statistical model. Defendants' expert provided testimony and alternative statistical modeling that suggested Plaintiffs' data was methodologically flawed and was unable to show impact for up to 28% of the class—not 5.5%, as Plaintiffs' expert insists. Rather than resolving the dispute, however, the district court merely considered whether Plaintiffs' statistical evidence was "plausibly reliable" and otherwise left determination of this question to the jury. It concluded that "determining which expert is correct is beyond the scope" of class certification and was "ultimately a merits decision" for the jury to decide.[8]

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an injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To that end, standing requires each plaintiff provide "a factual showing of perceptible harm." *Id.* A class action should be no different. *See Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."). Accordingly, as the Fifth Circuit recently expressed, we are skeptical that Article III permits certification of a class where "[c]ountless unnamed class members lack standing." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020). But we do not reach this issue because, as we lay out, class certification fails under Rule 23(b)(3), which is dispositive of the matter. *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 565 n.12 (9th Cir. 2019).

[8] Courts cannot relocate the predominance inquiry to the merits stage of the trial. Rule 23 requires this determination be made at the pre-trial stage. And for good reason. Suppose the jury ultimately decides Defendants' expert is right and Plaintiffs' model sweeps in 28% uninjured class members. Too late: the damage has been done. By then, Defendants would have possibly weathered years of litigation at untold costs, only to discover that the case never should have reached the merits

But resolving this dispute is of paramount importance to certification of the class. If Plaintiffs' model indeed shows that more than one-fourth of the class may have suffered no injury at all, the district court cannot find by a preponderance of the evidence that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

Rule 23(b)(3)'s choice of wording matters. The word "common" means "belonging to or shared . . . by all members of a group."[9] Meanwhile, "predominate" means "to hold advantage in numbers or quantity."[10] Similarly, when used as a noun, the word "predominance" means "the state of . . . being most frequent or common."[11] Thus, Rule 23(b)(3) requires that questions of law or fact be shared by substantially all the class members, and these common questions must be superior in strength or pervasiveness to individual questions within the class.

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at all. Rule 23's objective—that only cases suitable for class adjudication be certified—would have been effectively undermined.

[9] Common, Merriam-Webster's Collegiate Dictionary (11th ed. 2007).

[10] Predominate, Merriam-Webster's Collegiate Dictionary; *see also* Predominate, Oxford English Dictionary, https://www.oed.com/view/Entry/149893 (defining "predominate" as "[t]o have or exert controlling power; to be of greater authority or influence, to be superior").

[11] Predominance, Merriam-Webster's Collegiate Dictionary; *see also* Predominance, Oxford Online English Dictionary, https://www.oed.com/view/Entry/149888 (defining "predominance" as "preponderance, prevalence; prevailing or superior influence, power, or authority").

If 28% of the class were uninjured, common questions of law or fact would not be shared by substantially all the class members, nor would they prevail in strength or pervasiveness over individual questions. This would raise concerns that Plaintiffs' experts' use of average assumptions *did* mask individual differences among the class members, such as bargaining power, negotiation positions, and marketing strategies.

Although we have not established a threshold for how great a percentage of uninjured class members would be enough to defeat predominance, it must be *de minimis*. Even though "a well-defined class may inevitably contain some individuals who have suffered no harm," *Torres*, 835 F.3d at 1136, the few reported decisions involving uninjured class members "suggest that 5% to 6% constitutes the outer limits of a *de minimis* number," *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624–25 (D.C. Cir. 2019) (simplified) (finding no predominance where 12.7% of class members were conceded to be uninjured by plaintiffs' own expert). The First Circuit reversed certification where the district court had concluded that "around 10%" of the proposed class was uninjured. *See In re Asacol*, 907 F.3d at 47, 51–58. And even the district court recognized that the inclusion of 28% uninjured class members would "unquestionably" defeat predominance. *Packaged Seafood*, 332 F.R.D. at 325. Contrary to the dissent's suggestion, we do not adopt a numerical or bright-line rule today.[12] But under any rubric, if Plaintiffs' model

[12] The dissent also claims that we ignore Ninth Circuit case law. Dissent at 794–95. Not so. We agree with *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) that the mere

is unable to show impact for more than one-fourth of the class members, predominance has not been met.[13] While we do not set the upper bound of what is *de minimis*, it's easy enough to tell that 28% would be out-of-bounds.

The district court's gloss over the number of uninjured class members was an abuse of discretion. Rule 23(b)(3) requires courts "to make findings about predominance and superiority *before* allowing the class." *Wal-Mart*, 564 U.S. at 363, 131 S.Ct. 2541 (emphasis added). Deferring determination of classwide impact effectively "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). If "savvy crafting of the evidence" were enough to guarantee predominance, there would be little limit to class certification in our modern world of increasingly sophisticated aggregate proof." *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 103 (2009). In *Ellis*, we vacated the district court's certification of a class for the failure to resolve "critical factual disputes" in a "battle of the experts" regarding commonality. 657 F.3d at 982, 984. So too here, the

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presence of some non-injured class members does not defeat predominance, but we hold that the number of uninjured class members must be *de minimis*. As *Torres* stated, the "existence of large numbers of class members" who were never exposed to injurious conduct may defeat predominance. *Id.*

[13] This is over double the percentage of uninjured class members considered sufficient to defeat predominance in *In re Rail Freight* (12.7%), almost triple the percentage disapproved of in *In re Asacol* (10%), and around five times greater than the percentages at issue in the district courts cited (5–6%).

district court failed to resolve the factual disputes as to how many uninjured class members are included in Plaintiffs' proposed class—an essential component of predominance.

Plaintiffs emphasize that the district court stated its inquiry went beyond a *Daubert* analysis and that the court recognized it was required to determine whether the expert evidence was "in fact persuasive." The district court even walked through the strengths and weaknesses of the experts' competing testimony. Yet despite acknowledging there were "potential flaws" in the Plaintiffs' expert's methodology, the district court made no finding. A district court that "has doubts about whether the requirements of Rule 23 have been met should refuse certification until they have been met." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233–34 (11th Cir. 2016) (simplified).[14]

Despite admirably and thoroughly marshaling the evidence in this difficult case, the district court needed to go further by resolving the parties' dispute over whether the representative evidence swept in only 5.5% or as much as 28% uninjured DPP Class

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[14] Compounding these concerns, the burden of persuasion may have been improperly shifted to Defendants to affirmatively disprove the claims made by Plaintiffs' expert. In certifying the classes, the district court reasoned that "Defendants have not persuaded the Court that Dr. Mangum's model is unreliable." *Packaged Seafood*, 332 F.R.D. at 326. Additionally, the district court concluded that the predominance requirement was met because Defendants had not shown that Plaintiffs' models were "glaringly erroneous." *Id.* But the "party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of [Rule] 23." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

members. The district court also needed to make a similar determination for the other putative classes. Deciding this preliminary question is necessary to determine whether Plaintiffs have established predominance.

IV. CONCLUSION

Accordingly, we vacate the district court's order certifying the classes and remand with instructions to resolve the factual disputes concerning the number of uninjured parties in each proposed class before determining predominance.[15]

VACATED and REMANDED.

HURWITZ, Circuit Judge, concurring in part and dissenting in part:

The majority is faithful to the plain text of Rule 23 in concluding that the district court, not a jury, must resolve factual disputes bearing on predominance. *See* Fed. R. Civ. P. 23(b)(3) (permitting a class action to be maintained if "the *court* finds that the questions of law or fact common to class members predominate over any questions affecting only individual members") (emphasis added). I also agree with the majority that a district court's "rigorous analysis" of whether a putative class has satisfied Rule 23's requirements should proceed by a preponderance of the evidence standard. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). And, the majority correctly holds that the question for the district court is not whether common issues *could*

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[15] Pursuant to Federal Rule of Appellate Procedure 39(a) and Ninth Circuit General Order 4.5(e), each party shall bear its own costs on appeal.

predominate at trial; the court must determine that they *do* predominate before certifying the class. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). I therefore agree that remand is required.

I part company, however, with the majority's conclusion that, before certifying a class, the district court must find that only a "*de minimis*" number of class members are uninjured. The text of Rule 23 contains no such requirement, nor do our precedents. The majority's effective amendment of Rule 23 not only ignores our case law but also circumvents the established process for modifying a Rule of Civil Procedure—study and advice from the relevant committees, followed by the consent of the Supreme Court and Congress's tacit approval. *See* Rules Enabling Act, 28 U.S.C. § 2072; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010) (describing the Supreme Court's rulemaking power). I therefore respectfully dissent from Part III.B of the majority opinion.[1]

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[1] The majority also notes that "[a]cademic literature abounds observing that 'judges and jurors, because they lack knowledge of statistical theory, are both overawed and easily deceived by statistical evidence.' " *Op.* at 786 (quoting *United States v. Veysey*, 334 F.3d 600, 604 (7th Cir. 2003)). But even assuming that academic literature does so "abound," *see Op.* at 786–87, n.5, that doesn't establish that Article III judges in general, or the distinguished district judge in this case, are so easily fooled. The cited literature is, for better or worse, based on the observations of the authors, not on a rigorous scientific survey of the lack of knowledge of statistical theory by district judges (or even federal appellate judges).

I

As an initial matter, our caselaw squarely forecloses the majority's approach. The critical question is not what percentage of class members is injured, but rather whether the district court can economically "winnow out" uninjured plaintiffs to ensure they cannot recover for injuries they did not suffer. *See Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016). If the district court can ensure that uninjured plaintiffs will not recover, their mere presence in the putative class does not mean that common issues will not predominate. *See Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010).

The plain text of Rule 23 requires only that "questions of law or fact common to the class *predominate* over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). The noun "predominant" means "[m]ore powerful, more common, or more noticeable." *Predominant*, Black's Law Dictionary (11th ed. 2019). In Rule 23(b)(3), the subject of the verb "predominate" is "common questions of law or fact." The Rule therefore simply instructs the district court to determine whether common questions exceed others. *See Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989) (applying statutory interpretation maxims to a Federal Rule of Civil Procedure); *see also Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, ––– U.S. ––––, 139 S. Ct. 361, 368, 202 L.Ed.2d 269 (2018) (reading statutory text "[a]ccording to the ordinary understanding of how adjectives work" to determine how the statute "modif[ies] nouns").

We have therefore stressed that "[t]he potential existence of individualized damage assessments . . . does not detract from the action's suitability for class certification." *Yokoyama*, 594 F.3d at 1089; *see also* Advisory Comm. Note to 1966 Amendment, Rule 23 ("It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."). In *Leyva*, for example, we stated that although "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability," the presence of putative class members "allegedly entitled to different damage awards" did not defeat predominance. *Leyva v. Medline Indus.*, 716 F.3d 510, 513–14 (9th Cir. 2013); *see also Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016), *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015) (holding that *Comcast* did not disturb *Yokoyama*). Even in a properly certified class, "[d]amages may well vary, and may require individualized calculations." *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 943 (9th Cir. 2019).

Most importantly, we have held that because "even a well-defined class may inevitably contain some individuals who have suffered no harm," the same approach governs even if there are uninjured plaintiffs. *Torres*, 835 F.3d at 1136–37. Rather, the presence of some plaintiffs not harmed by the

defendants' conduct merely highlights the "possibility that an injurious course of conduct may sometimes fail to cause injury." *Id.* at 1136. And, no Ninth Circuit case imposes a cap on the number of uninjured plaintiffs as a prerequisite to class certification.

Our settled law is consistent with the basic principles underlying Rule 23. A class plainly may be certified solely on discrete issues. *See* Fed. R. Civ. P. 23(c)(4). So, in the case before us, the district court could well certify a class on liability, followed by a more narrowly defined class (or even individual trials, if necessary) on damages. As the majority recognizes, there is little dispute the defendants engaged in an antitrust conspiracy. I perceive no bar in Rule 23 to certifying a liability class, while leaving open which members of the class suffered damage from the defendants' illegal conduct.

As the Fifth Circuit has recognized, the predominance inquiry focuses on "what a class trial would look like." *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 375 (5th Cir. 2016). The crucial question, left to the district court's sound discretion, is whether "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931 (9th Cir. 2018). Certification should fail only when the individual questions "threaten to become the focus of the litigation." *Torres*, 835 F.3d at 1142.

II

A numerical cap on uninjured class members is not very helpful to district courts analyzing predominance. To be sure, a large percentage of

uninjured plaintiffs may raise predominance concerns. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 53–54 (1st Cir. 2018). Our cases plainly recognize that concern. *See Torres*, 835 F.3d at 1142.

But, as written, the Rule is not categorical with respect to the number of uninjured plaintiffs. If the questions of law or fact about whether a defendant breached a legal duty to a class are common, and identifying the uninjured members would be relatively simple, there is likely no reason to deny Rule 23 certification on liability. For example, if a telecommunications company were alleged to have erroneously charged many California customers double rates for certain interstate calls, a district court could certify a class of all the company's California customers even if an expert testified that only 80 percent of them were likely to have made the calls in question. Determining who did, which likely could be done from available records, could be left to a damages stage.

This variation among cases is why we review decisions on class certification for abuse of discretion. *Torres*, 835 F.3d at 1132. We give the district court "noticeably more deference" when it certifies a class than when it denies certification. *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (cleaned up). That deference is appropriate because Rule 23 certification is at bottom a trial management decision; it simply allows the class litigation to continue under the district court's ongoing supervision. The district court retains the power to alter or amend a class certification order at any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C).

I recognize that one of our sister Circuits has suggested that "5% to 6%" is the "outer limit[ ]" of an

acceptable number of uninjured class members. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019).[2] While disclaiming any particular numerical cap, the majority suggests that something between 5 and 10 percent approaches the outer limit. *Op.* at 792–93. But this effectively rewrites Rule 23. If the Supreme Court finds that approach wise, after the usual input and recommendations from the advisory committees, and Congress does not see fit to act to the contrary, then so be it. But we should not legislate from the appellate bench based on our personal concerns with the class action device. Under the Rule as currently written, we should instead leave fact-based decisions on predominance and case management to the sound discretion of the district courts.

Nor is a "*de minimis*" rule necessary to address Article III concerns. "[O]nly the representative plaintiff need allege standing at the motion to dismiss and class certification stages." *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020). Class members "must satisfy the requirements of Article III standing *at the final stage of a money damages suit* when class members are to be awarded individual monetary damages." *Id.* at 1017 (emphasis added). To be sure, *Torres* instructs the district court to "winnow out" uninjured class members, 835 F.3d at 1137, but their presence at the certification stage is

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[2] Although the First Circuit has adopted a "de minimis" rule, it has defined it in "functional terms," asking whether there is a "mechanism that can manageably remove uninjured persons." *Asacol Antitrust Litig.*, 907 F.3d at 53–54 (cleaned up). That rule corresponds in practical application to Ninth Circuit precedent. *See Torres*, 835 F.3d at 1137.

not a barrier to standing. Put simply, the *de minimis* rule is a solution in search of a problem.

III

Defendants may well be correct that Plaintiffs' data was "methodologically flawed and was unable to show impact for up to 28% of the class." *Op.* at 791. And, in the exercise of its discretion, the district court might find that such a large percentage of uninjured class members means that common issues of law or fact do not predominate in this case. But, by the same measure, the district court could find that Plaintiffs' aggregated proof could establish liability to a predominant portion of the class, and that uninjured members could be identified in future (perhaps non-class) proceedings. Because the majority removes from the district court the broad discretion Rule 23 provides and instead replaces it with a "*de miminis*" requirement found nowhere in the Rule or our precedents, I respectfully dissent from Part III.B.3 of the majority opinion.

United States District Court,
Southern District of California.

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION

Case No.: 15-MD-2670 JLS (MDD)

Signed July 30, 2019

332 F.R.D. 308

ORDER GRANTING MOTIONS FOR CLASS CERTIFICATION

(ECF Nos. 1130, 1140, 1143)

Hon. Janis L. Sammartino, United States District Judge

Presently before the Court are three Motions for Class Certification filed by the Direct Purchaser Plaintiffs ("DPPs") ("DPP Mot.," ECF No. 1140), Commercial Food Preparer Plaintiffs ("CFPs") ("CFP Mot.," ECF No. 1143), and End Payer Plaintiffs ("EPPs") ("EPP Mot.," ECF No. 1130) (together, the "Motions"). Also before the Court are Defendants' Responses in Opposition to the DPP Motion ("DPP Opp'n," ECF No. 1515), the CFP Motion ("CFP Opp'n," ECF No. 1409), and the EPP Motion ("EPP Opp'n," ECF No. 1413), as well as Plaintiffs' Responses in Support of their Motions ("DPP Reply," ECF No. 1707; "CFP Reply," ECF No. 1655; "EPP Reply," ECF No. 1703).

Having considered the Parties' arguments, the reports and testimony of the expert witnesses, the oral arguments presented, and the relevant legal authorities, the Court **GRANTS** the Motions for Class Certification.

BACKGROUND

Plaintiffs initiated this action in 2015, alleging an antitrust conspiracy by Defendants to fix and maintain prices above competitive levels in violation of state and federal antitrust laws. The various civil actions relating to this conspiracy were consolidated in a multidistrict litigation for centralized pretrial proceedings before this Court on December 9, 2015. *See* Transfer Order, ECF No. 1. Early in this multidistrict litigation, the Court divided Plaintiffs into four tracks: (1) Direct Action Plaintiffs ("DAPs"), who are direct purchasers proceeding individually against Defendants; (2) DPPs,[1] who are direct purchasers proceeding on behalf of a putative class; (3) CFPs,[2] who are indirect purchasers proceeding on behalf of a putative class; and (4) EPPs,[3] who are indirect purchasers proceeding on behalf of a putative class. Order Appointing Interim Lead Counsel 1–2,

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[1] The named DPPs are Olean Wholesale Grocery Cooperative, Inc.; Pacific Groservice Inc. d/b/a PITCO Foods; Piggly Wiggly Alabama Distributing Co., Inc.; Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc.; Trepco Imports and Distribution Ltd.; and Benjamin Foods LLC.

[2] The named CFPs are Thyme Café & Market; Simon-Hindi LLC, d/b/a Simon's; Capitol Hill Supermarket; Confetti's; Maquoketa Care Center, Inc.; A-1 Diner; Francis T. Enterprises d/b/a Erbert & Gerbert's; Groucho's Deli of Raleigh; Sandee's Catering; Groucho's Deli of Five Points; Rushin Gold d/b/a the Gold Rush; and Erbert & Gerbert's.

[3] At the time EPPs filed their Motion, the proposed EPP Class Representatives included 73 individual consumers. *See* Declaration of Betsy Manifold ("Manifold Decl."), ECF No. 1130-3, at 2.

ECF No. 119. The latter three tracks bring the current Motions.[4]

Defendants comprise the three largest domestic producers of packaged tuna products—Bumble Bee Foods LLC, Tri-Union Seafoods LLC d/b/a Chicken of the Sea ("COSI")[5] and StarKist Company—and their parent companies—Lion Capital LLP, Lion Capital (Americas), Inc., and Big Catch Cayman LP, owners of Bumble Bee; Dongwon Industries Co. Ltd., owner of StarKist[6]; and Thai Union Group Co. Ltd., owner of COSI.

Class Plaintiffs bring claims under federal and state antitrust laws, alleging that Defendants took part in various forms of anti-competitive conduct, including agreeing to fix certain net and list prices for packaged tuna, agreeing to limit promotional activity for packaged tuna, and agreeing to exchange sensitive or confidential business information for the purpose of facilitating the object of the conspiracy. Plaintiffs allege that the conspiracy began at least by November of 2010 and lasted until at least December 31, 2016. Plaintiffs felt the effects of this conspiracy in the form of supracompetitive prices paid for packaged tuna products.

Shortly after the commencement of this action, the U.S. Department of Justice ("DOJ") noticed the Court of pending investigations of the Defendants. Since

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[4] Although the DAPs are included in the DPP class definition, the DAPs have indicated they will opt-out of any class that is certified.

[5] Notice of settlements have been filed between COSI and the CFPs and COSI and the EPPs.

[6] Starkist was previously owned by Del Monte Food Company and H.J. Heinz Co.

that time, Defendants and individual employees have pled guilty and the DOJ has entered multiple indictments. As of the filing of this Order, Bumble Bee has pled guilty to price-fixing of packaged tuna products and been criminally fined. Two of Bumble Bee's senior executives have also pled guilty and its CEO has been indicted in the Northern District of California. StarKist has pled guilty and will be criminally fined, and one of its senior executives has also pled guilty. Chicken of the Sea has admitted to price fixing and is cooperating with the DOJ investigation.

Plaintiffs filed the current Motions in April 2018. To support their Motions and to prove impact to the Class members, the Class Plaintiff groups each enlisted econometric experts, each of whom submitted an expert report. The reports detail the canned tuna market characteristics and state the experts' findings regarding whether there is evidence to support that a conspiracy occurred; whether all, or nearly all, of the Class members suffered impact; and whether damages can reasonably be calculated. To make these findings, the experts each put forth regression models to show the impact to the Class members; it is these models that have become the main focus of Defendants' Oppositions to certification.

The Court heard testimony from the experts and counsels' oral arguments over a three-day period on January 14 through 16, 2019. Recognizing the importance of the experts' role in certifying the classes, the Court focused the hearing on the models each expert put forward to prove that common evidence could show impact to the Class members. Each day, both sides' experts offered direct testimony to explain and defend their respective findings

concerning the antitrust violations, injury, and damages, and each opposing side cross-examined those witnesses to expose any deficiencies that arguably render their findings unreliable.

LEGAL STANDARD

The party seeking to certify a class under Federal Rule of Civil Procedure 23 bears the burden of showing that they have satisfied each of the four requirements of Rule 23(a) and at least one of the three requirements of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). Rule 23(a) provides four requirements that must be met in any class action: (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).

As to Rule 23(b), a plaintiff need only show that any one of the three provisions is satisfied. Plaintiffs seek certification of the proposed classes pursuant to Rule 23(b)(3) and therefore must demonstrate that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Rather, "[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." *Id.* The Court must engage in a "rigorous analysis," often requiring some evaluation of the "merits of the plaintiff's underlying claim," before finding that the prerequisites for certification have been satisfied. *Id.*; *see also Comcast*, 569 U.S. at 33–34, 133 S.Ct. 1426. "Although some inquiry into the substance of a case may be necessary[,]" the court should not advance a decision on the merits at the class certification stage. *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003) (citations and internal quotation marks omitted). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013).

DISCUSSION

I. The DPPs' Motion for Class Certification

The DPPs seek to certify the following class:

> Direct Purchaser Plaintiff Class: All persons and entities that directly purchased packaged tuna products within the United States, its territories and the District of Columbia from any Defendant at any time between June 1, 2011 and July 1, 2015. Excluded from the class are all governmental entities; Defendants and any parent, subsidiary or affiliate thereof; Defendants' officers, directors, employees, and immediate families; any federal judges or their staffs; purchases of

tuna salad kits or cups; and salvage purchases.

Defendants opposition to the DPPs' proposed class focuses on just one of the Rule 23 prerequisites: Rule 23(b). Specifically, the majority of Defendants' arguments deals with whether common questions predominate. Nevertheless, the Court will address all of the Rule 23 requirements, starting with Rule 23(a) and then moving to Rule 23(b), focusing on the arguments and various sub-arguments raised by Defendants.

A. Rule 23(a) Requirements

1. Numerosity

Rule 23(a)(1) requires the party seeking certification to show the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While "[t]he numerosity requirement is not tied to any fixed numerical threshold[,] . . . [i]n general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 Fed. App'x 646, 651 (9th Cir. 2010).

The DPPs state that the proposed class includes "thousands of members, geographically dispersed throughout the United States." DPP Mot. at 20–21 (citing Declaration of Russell Mangum III ("Mangum Report"), ECF No. 1192-1 ¶¶ 77–80, 205). This large number of Class members spread across the country would make joinder impracticable, and thus numerosity is satisfied. *See Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051–52 (9th Cir. 2003) (finding numerosity satisfied where the "members exceed sixty, and the defendants never presented any reason

to the district court why they did not meet the numerosity requirement").

2. Commonality

The commonality requirement of Rule 23(a)(2) requires that "class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.' " *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541). The common issues do not need to be legally and factually identical. Rather, the "common questions may center on 'shared legal issues with divergent factual predicates [or] a common core of salient facts coupled with disparate legal remedies.' " *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)); *Dukes*, 564 U.S. at 359, 131 S.Ct. 2541 ("[E]ven a single common question will do."). In other words, the inquiry is whether resolution of a common issue will "drive the resolution of the litigation." *Jimenez*, 765 F.3d at 1165.

The Rule 23(a)(2) commonality and Rule 23(b)(3) predominance inquiries often overlap, creating a "fuzzy line" separating the two determinations. *See In re Capacitors Antitrust Litig.*, 17-md-2801 JD, 2018 WL 5980139, at *3 (N.D. Cal. Nov. 14, 2018). Both require a "rigorous analysis," which many courts have considered together, folding the two determinations into one. *See, e.g.*, *id.* Here, Defendants do not directly dispute commonality; instead they focus their arguments on predominance. Because the predominance inquiry "is even more demanding than Rule 23(a)," *Comcast*, 569 U.S. at 34, 133 S.Ct. 1426, the Court will focus its attention on

the predominance determination, noting that should the parties fail to meet the predominance requirement, the commonality requirement will likewise fail.

3. Typicality

Under Rule 23(a)(3), a party seeking class certification must show "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "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.' " *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

Based on the anti-competitive conduct alleged by the DPPs, which resulted in the same injury to the named and unnamed Plaintiffs, the typicality requirement is met. *See Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *5 (N.D. Cal. June 5, 2006) (noting the "substantial legal authority holding in favor of a finding of typicality in price fixing conspiracy cases, even where differences exist between plaintiffs and absent class members with respect to pricing, products, and/or methods of purchasing products").

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The adequacy inquiry turns on whether (1) the "named plaintiffs and their counsel have any

conflicts of interest with other class members" and (2) "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 1020. "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Ellis*, 657 F.3d at 980 (citing *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 617 (9th Cir. 2010)).

Defendants also do not contest adequacy and the Court finds that the DPPs' named representatives and counsel satisfy this requirement. There are no conflicts between the DPPs' interests and those of absent Class members, *see* DPP Mot. at 21; all Class members seek the same relief and thus share the same interest, *see id.*; and the named plaintiffs have actively participated in this litigation, *id.* at 22 (citing Declaration of Samantha Stein ("Stein Decl."), ECF No. 1138). As for Class counsel, the DPPs' counsel has vigorously prosecuted this action and no party has raised any conflicts.

B. Rule 23(b) Requirements

A class may be certified under Rule 23(b)(3) only if the Court finds that questions common to the class "predominate" over individualized questions and that using the class action device is "superior" to the individual pursuit of claims. Fed. R. Civ. Proc. 23(b)(3).

1. Predominance

Under Rule 23(b)(3), plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting

only individual members." Fed. R. Civ. P. 23(b)(3). Compared to the commonality requirement, the predominance standard is "even more demanding." *Comcast*, 569 U.S. at 34, 133 S.Ct. 1426. Class certification is appropriate when "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022.

When making the predominance determination, the Court begins by considering whether questions of law or fact predominate regarding the key elements of the claims alleged. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S.Ct. 2179, 180 L.Ed.2d 24 (2011). The key elements of the antitrust claims at issue are: "(1) whether there was a conspiracy to fix prices in violation of the antitrust laws; (2) the fact of plaintiffs' antitrust injury, or 'impact' of defendants' unlawful activity; and (3) the amount of damages sustained as a result of the antitrust violations." *In re Optical Disk Drive Antitrust Litig.*, No. 10-MD-2143-RS, 2016 WL 467444, at *4 (N.D. Cal. Feb. 8, 2016); *see also In re Qualcomm Antitrust Litig.*, 328 F.R.D. 280, 296–97 (N.D. Cal. 2018). With this standard in mind, the Court proceeds through each element in turn.

a. Violation of Antitrust Laws

At the class certification stage, plaintiffs "do not need to prove the fact of a conspiracy for certification, but only that the issue is common to the class and 'is capable of classwide resolution . . . in one stroke.' " *Capacitors*, 2018 WL 5980139, at *8 (quoting *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541). The DPPs contend that common evidence exists that would be used to prove the existence and scope of Defendants' price fixing conspiracy, including "the guilty pleas, and

other documents memorializing communications between competitors." DPP Mot. at 23.

The DPPs' expert econometrician, Dr. Russell Mangum III, also makes findings using common evidence that a price fixing conspiracy existed. *See* Mangum Report ¶ 5. Looking at the available data concerning the canned tuna market, Dr. Mangum concludes that the dominate share of the canned tuna market Defendants control, barriers to entry by potential competitors, the use of price lists, and several other factors make the canned tuna industry ripe for anti-competitive activity. Mangum Report ¶¶ 97–142. Dr. Mangum also makes detailed analyses regarding the record evidence, concluding that Defendants' behavior points to the existence of a cartel. *Id.*

Based on this evidence, "if each Class Member were required to prove its claim individually at trial, each would rely on the same proof to show that all of the Defendants participated in a conspiracy to fix, maintain[,] and increase prices for packaged tuna." DPP Mot. at 23. Thus, common questions predominate with respect to whether there has been an antitrust violation.

b. Impact

To show antitrust impact, plaintiffs "must establish, predominantly with generalized evidence, that all (or nearly all) members of the class suffered damage as a result of Defendants' alleged anti-competitive conduct." *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 567 (N.D. Cal. 2013). The DPPs primarily rely on the expert report of Dr. Mangum to meet their burden. Dr. Mangum uses several forms of evidence, including findings

concerning the canned tuna market in general, documentary evidence from the record, and most importantly—and most in contention—econometric analysis in the form of a regression model which purports to prove that the price-fixing conspiracy harmed all, or nearly all, of the Class members.

"[W]here plausibly reliable, [econometric analysis] should be allowed as a means of common proof. To rule otherwise would allow antitrust violators a free pass in many industries." *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 491 (N.D. Cal. 2008) ("*GPU*"). "But that does not mean certification is automatic every time counsel dazzle the courtroom with graphs and tables." *Id.* Indeed, the Court must "conduct[ ] a thorough review of [p]laintiffs' theory and methodology" to ensure they are "consistent with the requirement that the Court conduct a 'rigorous analysis' " and that "the predominance requirement is met." *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. at 567. Otherwise, "nearly all antitrust plaintiffs could survive certification without fully complying with Rule 23." *GPU*, 253 F.R.D. at 492; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013) ("It is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."). Put another way, the inquiry must be to determine if the proffered expert testimony has the requisite integrity to demonstrate class-wide impact.

Although the parties have not asked for the expert testimony to be stricken under Federal Rule of Evidence section 702, the court still must "ensure that any and all [expert] testimony . . . is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm.*, 509

U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Several courts have noted that where expert testimony is used to prove impact, the predominance and *Daubert* standards often overlap. *See, e.g.*, *Rail Freight Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 42 (D.D.C. 2017) ("[T]he line between *Daubert* and class-wide impact 'might prove somewhat illusory.' ") (quoting *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 416 (E.D. Pa. 2015)).

The starting threshold for the proffered testimony for these Motions is therefore whether the reports are reliable and relevant. But the *Daubert* standard is not the only hurdle for expert testimony at the class certification stage—the rigorous analysis required by Rule 23 may require the Court to determine whether the expert's evidence supporting certification is in fact persuasive, and may also require the Court to resolve factual disputes between dueling experts, if their disagreements pertain to whether the class plaintiffs can prove impact. *In re Korean Ramen Antitrust Litig.*, No. 13-cv-04115-WHO, 2017 WL 235052, at *9 (N.D. Cal. Jan. 19, 2017) (citing *Ellis*, 657 F. 3d at 983–84). The Court will first summarize Dr. Mangum's report and then address each of Defendants' objections.

i. Dr. Mangum's Impact Analysis

Dr. Mangum's report sets out to accomplish two tasks: (1) to determine whether the alleged cartel's pricing actions for packaged tuna would have a class-wide impact on direct purchasers; and (2) "[t]o specify a methodology that can be used to accurately determine the fact of and magnitude of class-wide impact, and to estimate damages." Mangum Report ¶ 1. Dr. Mangum considered a host of materials in preparing his report: litigation materials

including the Complaint, deposition transcripts, and interrogatory responses; Defendants' business records, including sales, costs, and other financial records; and publicly available information concerning the manufacture, sale, and consumption of packaged tuna. *Id.* ¶ 17.

In making his determinations, Dr. Mangum conducted both qualitative non-empirical work and empirical statistical analysis. Beginning with the non-empirical work, Dr. Mangum first considered the guilty pleas in which Defendants admitted participation in price-fixing conspiracy, finding the pleas both indicative of impact on all members of the class and informative in creating the parameters for his statistical models. *See id.* ¶ 139; Jan. 14, 2019 Hearing Tr., at 49–50, ECF No. 1801. Next, Dr. Mangum made extensive findings regarding the canned tuna market and Defendants' business practices, which Dr. Mangum found consistent with the alleged conspiracy. Mangum Report ¶¶ 97–142. This evidence includes the dominate level of market share Defendants control, *id.* ¶¶ 100–02; the barriers to entry because of the high capital investment costs, industry knowledge, distribution arrangements between Defendants, and brand awareness, *id.* ¶¶ 103–08; the collaborative relationship between Defendants and the ability to communicate with each other, *id.* ¶¶ 109–19; standardized products sold, and common costs shared, by all Defendants, *id.* ¶¶ 120–23; Defendants' use of price lists, *id.* ¶¶ 124–31; and the fact that tuna is a staple good with inelastic demand, *id.* ¶¶133–38.

Dr. Mangum then conducted statistical analysis in the form of correlation and regression models. First, Dr. Mangum performed a price correlation analysis

using Defendants' transactional data. *Id.* ¶¶ 144–53. Although price correlation models cannot prove a conspiracy's existence or common impact on its own, *id.* ¶ 144, this type of evidence can be helpful in understanding industry behavior and show a likelihood of common impact. *Id.* Dr. Mangum ran correlations across products, products and defendants, and customer types; in each case he found the correlation coefficients to be high and positive. *Id.* ¶¶ 150–53.

Finally—and most importantly for this Motion—to measure class-wide impact and damages on a common basis, Dr. Mangum uses a reduced-form regression model to estimate overcharges of canned tuna at the wholesale level. *Id.* ¶ 160. This approach is a "widely used econometric technique for determining whether prices were higher during a class period than they otherwise would have been without anti-competitive conduct." *Capacitors*, 2018 WL 5980139, at *6 (citing *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1260–61 (10th Cir. 2014); *GPU*, 253 F.R.D. at 495–96). The reduced form pricing equation estimates the conditional wholesale price of tuna products as a function of a series of explanatory variables relating to product characteristics, supply and demand factors, and the period of alleged conspiracy. Mangum Report ¶ 160. The conditional, or "but for" prices (what the prices would have been but-for the illegal conduct) during the class period are then compared to the prices during the clean, benchmark period to determine whether there is a statistically significant overcharge. *See id.* ¶ 110.

The benchmark, class, and held out periods are as follows:

Period of Time	Treatment in the Model	Star-Kist	Chicken of the Sea	Bumble Bee
Early Examined	Benchmark	01/2002 – 06/2008	01/2002 – 08/2008	01/2002 – 09/2010
Can Resize	Indicator Variable	07/2008 – 06/2010	09/2008 – 06/2010	10/2008 – 06/2010
Middle Competitive	Benchmark	07/2010 – 05/2011	07/2010 – 05/2011	07/2010 – 05/2011
Class Period	Class	06/2011 – 07/2015	06/2011 – 07/2015	06/2011 – 07/2015
Cool down	Indicator Variable	08/2015 – 01/2016	08/2015 – 01/2016	08/2015 – 01/2016
Late Competitive	Benchmark	01/2016 onwards	01/2016 onwards	01/2016 onwards

Id. ¶¶ 161–64.

As the table indicates, Dr. Mangum treats two periods of time differently from the benchmark periods in his analysis. Those periods are: (1) July, September, and October 2008, respectively, through June 2010; and (2) the post-damages period from August 2015 to January 2016. *Id.* Dr. Mangum does not include the "can resize" period in the benchmarks because he claims the evidence shows that an industry-wide tuna can resizing produced a shock to the market, which makes that period not conducive to

use as a benchmark. *Id.* The "cool down" period is excluded because the effects of the anti-competitive conduct during the class period still effect the data, making it necessary to omit it from the benchmark. *Id.* ¶ 169.

Dr. Mangum used both transactional data from Defendants and publicly available data in his regression model. *Id.* ¶¶ 181–84. To control for changes attributable to factors other than anti-competitive behavior, Dr. Mangum uses multiple explanatory variables, including product characteristics, input costs, customer type, and consumer preference and demand. *Id.* ¶¶ 175–80 & MCD 14.

Putting the data, variables, and time periods together, Dr. Mangum forms a base model to estimate whether Defendants overcharged the DPPs. This base overcharge model is a "Pooled Model," which uses data from all three Defendants together and creates one overcharge finding for all three Defendants. *Id.* ¶ 188. Under his base regression model, Dr. Mangum concludes that COSI, StarKist, and Bumble Bee charged prices above the level that legitimate competitive factors would explain and shows a statistically significant overcharge, likely caused by collusive behavior, at an estimate of 10.28%. *Id.* ¶¶ 190, 203–05.

To ensure the findings of Dr. Mangum's analyses "are not overly sensitive to the specific model [he] chose, [Dr. Mangum] subjected the base DPP Model to several robustness tests by introducing changes to the model's specifications." *Id.* ¶ 191. Dr. Mangum conducted robustness checks by estimating overcharges specific to each of the Defendants, as well as separately based on fish type, package type, and

for private label products. *Id.* ¶¶ 191–202. According to Dr. Mangum, these robustness checks "demonstrate the reliability and appropriateness of [his] Pooled DPP Model for estimating damages to direct purchasers in this case." *Id.* ¶ 202.

ii. Defendants' Opposition

Defendants contend that Dr. Mangum's model suffers from multiple deficiencies, rendering the model—and thus the DPPs' common evidence—incapable of proving common impact to the Class. Defendants employed their own expert, Dr. John Johnson, to analyze Dr. Mangum's model. *See generally* DPP Opp'n. After reviewing Dr. Mangum's report, Dr. Johnson concludes that the methodology proposed by the DPPs is not capable of establishing that all, or nearly all, direct purchasers sustained impact. Expert Report of Dr. John Johnson ("Johnson Report") ¶¶ 1–4, ECF No. 1517-5.

Based on Dr. Johnson's findings, Defendants specifically argue that: (1) Dr. Mangum's pooled regression model creates an average overcharge and thus assumes, rather than proves, impact to the class; (2) the model returns false positives and therefore is unreliable; and (3) the assumptions built into the model, including the selection of benchmark, class, and downsize periods, as well as the cost data used, are incorrect and bias the results of his model. DPP Opp'n at 16–30.

Pooled Regression Model: Defendants first contend that Dr. Mangum's pooled regression model is unreliable and not appropriate to use in this case because the single average overcharge masks differences of actual impact across the Class members. DPP Opp'n at 16–19. To highlight this

alleged deficiency, Dr. Johnson applies his own method that determines the overcharge co-efficient individually for each Class member. *See* Johnson Report ¶¶ 41–45. Dr. Johnson uses the same variables and all of the 1.5 million data observations that Dr. Mangum's model includes but allows the overcharge coefficient to vary for each Class member. *See id.* ¶ 43. When the overcharge is determined for each individual DPP class member—604 in all—Dr. Johnson claims his model finds that only 72% of the DPPs show a positive, statistically significant impact. *Id.*

At first glance, this seems to be a major flaw with the DPP's model. In the Ninth Circuit, district courts must "ensure that the class is not 'defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct.' " *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 2.3 (5th ed. 2012)). "[S]uch overinclusiveness" defeats class certification if "the uninjured parties represent [more than] a *de minimis* portion of the class." *In re Lidoderm Antitrust Litig.*, No. 14-md-0251-WHO, 2017 WL 679367, at *11 (N.D. Cal. Feb. 21, 2017); *see also In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018) (denying certification after finding 10% of class members uninjured was not *de minimis*). A model unable to show impact to over 28% of the class members would unquestionably surpass the *de minimis* standard.

In rebuttal, Dr. Mangum claims that Dr. Johnson's model suffers from insufficient sample sizes, rendering it unreliable. Reply Declaration of Dr. Russell Mangum ("Mangum Reply") ¶¶ 137–53,

ECF No. 1707-1. According to Dr. Mangum, although Dr. Johnson uses the same number of observations (over 1.5 million), because he allows the overcharge coefficient to vary by customer, the sample size becomes too small for many individual customers. Jan. 14 Hearing Tr., at 91. As Dr. Mangum explained at the hearing, "[a]ll of those observations went into [Dr. Johnson's] model" but, "since he required different overcharge estimates for every class member, in those instances you don't use all 1.5 million [observations]." *Id.* at 164. Instead, the model uses just the class member-specific observations, leading to a "very small number of observations, sometimes in the low single digits," for each customer in the model. *Id.*

To highlight this sample size problem, Dr. Mangum recreated Dr. Johnson's regression model.[7] The results show that the model is unable to create any result for 61 members of the proposed DPP Class,[8] Mangum Reply ¶ 138, and that, of the remaining DPP customers, only 442 in Dr. Johnson's model had data sufficient to result in statistically significant coefficients. *Id.* ¶ 149. Dr. Mangum notes that, looking at only the statistically significant results, 98% of the DPPs showed positive overcharges. *Id.* And, looking at all customers that

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[7] In his report, Dr. Johnson does not include the full results of his model run for each class member.

[8] "In a before and after dummy variable model, a customer must have (at least) one observation in the 'before' sample and (at least) one observation in the 'after' period; if this condition is not true, then the model cannot calculate an overcharge." Mangum Report ¶ 138. The 61 customers only bought canned tuna during the Class Period and, therefore, the model fails to compute results. *Id.*

produced any type of result in Dr. Johnson's model—statistically significant or not—94% had positive overcharges. *Id.* The 72% figure that Defendants point to is found only if one looks at only the positive, statistically significant overcharges and divides them by all Class members, whether or not the model produced statistically significant results—or, indeed, any result at all—for those Class members. *Id.*

Looking past the problem of small sample sizes, Defendants argue that the mere fact that Dr. Johnson showed that the model is unable to produce results for 61 Class members means that common issues do not predominate. Jan. 14 Hearing Tr., at 185–86. Without the results of the regression model, Defendants state that the Class members without sufficient data to produce results will have to prove their cases using evidence not common to the Class. *Id.* But these Class members would still be able to point to the same econometric model as it pertains to similarly situated Class members as proof. This, along with the record evidence, guilty pleas, and market characteristics, shows that all Class members will still use common evidence and that common questions will continue to predominate over the case.

Next, the Court turns to the Chow Test, a topic discussed at length during the hearing. Jan 14 Hearing Tr., at 41, 101–04, 142–48, 180–84, 188–90, 226. The Chow Test is a "[s]tandard statistical test . . . applied to test the stability of coefficients among subgroups of customers, products, time, geographies, or other subsamples . . . to determine whether it is appropriate to pool potential subgroups when estimating the average effect of the alleged conspiracy." American Bar Association,

Econometrics: Legal, Practical, and Technical Issues 358 (2nd ed. 2014) ("*Econometrics*").

According to Dr. Johnson, Dr. Mangum's pooled model is inappropriate because it fails the Chow Test in several ways. Johnson Report ¶¶ 43, 57, 81 & nn.72, 107, 112, 168. Dr. Johnson states that the Chow Test rejects the hypothesis that a single model can be applied to all Defendants because Defendants did not respond to the supply and demand factors in similar ways. Johnson Report ¶ 57. Dr. Johnson also asserts that the test rejects the assumption that the effects of the alleged conduct were the same across all direct purchasers or direct purchasers categorized by customer type (i.e., retail). *Id.* ¶¶ 43, 57, 81 & nn.72, 107, 112, 168.

Dr. Mangum disagrees with the conclusion that using a pooled model is inappropriate based on the Chow Test results. Dr. Mangum asserts that Dr. Johnson's Chow Tests were "designed to fail" because of the large number of coefficients tested, as well as the huge number of observations. Mangum Reply ¶¶ 71–87. Even more importantly, in both his Reply Report and during the hearing, Dr. Mangum gave persuasive reasons, grounded in economic theory, for why a pooled model is appropriate in this case. The issue of whether pooling is appropriate is therefore a "genuine conflict between the experts as to the proper approach" to the regression analysis and not a reason to reject Dr. Mangum's pooled model at the class certification stage. *See Vuyanich v. Republic Nat. Bank of Dallas*, 505 F. Supp. 224, 314 (N.D. Tex. 1980), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984) (finding that the question of whether expert pooling data was appropriate is not an issue for the court to decide where the plaintiff's regression

model failed a Chow Test). Indeed, "[w]here there is a rational basis for aggregation, as there is here, the Chow test is not a basis for categorically rejecting a model that does not meet its requirements." *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 122 (S.D.N.Y. 2015), *objections overruled*, 325 F.R.D. 55 (S.D.N.Y. 2018).[9]

The use of a single overcharge applied to all class members can be problematic in some cases. *See, e.g.*, *In re Plastics Additives Antitrust Litig.*, No. 03-CV-2038, 2010 WL 3431837 (E.D. Pa. Aug. 31, 2010). And when statistical tests are used to determine whether such a regression is appropriate, failure of that test "should be taken seriously, and the model should be rejected when it fails a test of a critical assumption, or it fails a large number of the specification tests to which it is subjected." *Econometrics*, at 324. But "virtually any regression model eventually will fail one or more tests if enough tests and specifications are run, even if nothing is wrong with the model." *Id.* The tests run by Dr. Johnson, that purport to reject

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[9] Multiple courts have addressed instances where a pooled regression model failed a Chow Test, yet still accepted those models. *See, e.g.*, *Chen-Oster*, 114 F. Supp. 3d at 122 (citing *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 43 (D.D.C. 2007)); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 157–58 (N.D. Cal. 2004), *aff'd,* 509 F.3d 1168 (9th Cir. 2007), *aff'd in part and remanded in part en banc,* 603 F.3d 571 (9th Cir. 2010), *rev'd on other grounds*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011); *Rossini v. Ogilvy & Mather, Inc.*, 615 F. Supp. 1520, 1522–23 (S.D.N.Y. 1985), *vacated and remanded on other grounds*, 798 F.2d 590 (2d Cir. 1986); *Vuyanich*, 505 F. Supp. at 299, 314; *but see Reed Constr. Data, Inc. v. McGraw-Hill Cos., Inc.*, 49 F. Supp. 3d 385, 405–07 (S.D.N.Y. 2014) (excluding expert report that aggregated data but failed Chow test).

the DPPs' model are ripe for use at trial but, at this stage, are not fatal to a finding of class-wide impact.

False Positives: Defendants next argue that Dr. Mangum's model is unreliable because it fails to distinguish price effects resulting from the alleged anti-competitive conduct from price effects resulting from unrelated, legal conduct. DPP Opp'n at 19–22. When Dr. Johnson applies the DPPs' class-member regressions to the sales of non-Defendant packaged tuna, the results show overcharges (i.e., false positives). *Id.* at 20–21. Dr. Johnson also contends that when he applies Dr. Mangum's method to the benchmark periods, it detects overcharges. *Id.* Defendants contend that these false positives show that Dr. Mangum's methodology is incapable of proving common impact because it is unreliable. *Id.*

The DPPs provide two answers to these criticisms. First, the DPPs point to the "umbrella theory," DPP Reply at 13, which is a market phenomenon that occurs when non-conspirators raise their prices in reaction to the above market prices of the cartel precisely because of the protection of the price umbrella the cartel created. American Bar Association, *Proving Antitrust Damages: Legal & Economic Issues* 246 (3d ed. 2017). Based on this effect, the purported false positives are in fact "showing an overcharge where the umbrella theory predicts there should be one." DPP Reply at 13 (quoting Mangum Report ¶ 70).

Second, Dr. Mangum argues that Dr. Johnson's analysis on this point is plainly incorrect. While Dr. Johnson claims that when the DPPs' model is applied to individual DPPs' (specifically Sysco, U.S. Foods, and Pitco) purchases of non-Defendant tuna, the model still shows overcharges, DPP Opp'n at 20–21,

Dr. Mangum argues that Dr. Johnson is mistaken because a large amount of the tuna purchased by Sysco and U.S. Foods that Dr. Johnson claims is non-Defendant tuna is in fact produced by Defendants. DPP Reply at 13. As for the Pitco purchases, Dr. Mangum claims this is just another instance of the "umbrella theory" at work. *Id.*

In support of their argument, Defendants cite to *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 for the proposition that false positives are fatal to a proposed methodology. The Court is not persuaded. In *Rail Freight*, railway freight customers brought an antitrust class action against four major rail freight shippers who allegedly had conspired to add a fuel surcharge. *Id.* at 247. Similar to here, the plaintiffs in *Rail Freight* provided a regression model seeking to demonstrate that the class could prove common injury through common proof. *Id.* at 250. The model turned out to be flawed, however, because it would have ascribed an injury to even those plaintiffs who had negotiated with the defendants "legacy" contracts, which were entered into before the alleged conspiracy period began and "guarant[eed] they would be subject to fuel surcharge formulae that predated the later charges." *Id.* at 248, 252–53. The D.C. Circuit vacated the certification of the class, finding that there was no explanation grounded in economic theory for why the model would find overcharges for those legacy contracts. *Id.* at 255.

Here, in contrast, there are no glaringly erroneous results that would render the model unreliable. While Defendants point to possible false positives, Dr. Mangum explains those results using sound econometric principles that are not obviously contrary to the theory of the case. Thus, Defendants have not

shown that the purported false positives undermine the model's finding of class-wide impact.

Selection of Time Periods: Defendants level several attacks on Dr. Mangum's selection of class, benchmark, and downsize periods. DPP Opp'n at 7. First, Defendants claim that Dr. Mangum's model is unreliable because the time periods used do not match the Class Period alleged in the DPPs' original complaint. *Id.* at 23. According to Defendants, the reason the DPPs narrowed the class period from the original complaint was solely to engineer an overcharge finding. *Id.* at 23 . Had the DPPs run the model using the original class period, the result would have been a negative overcharge for the class. *Id.* (citing Johnson Report ¶ 47 n.80).

According to the reports and testimony, the narrowing of the class period is based on Dr. Mangum's analysis of the record evidence in the case. Rather than being troubled by the narrowing of the class after consulting with their expert, the Court sees this as bolstering the reliability of the model. Dr. Mangum reviewed the evidence and consulted with counsel, leading the DPPs' counsel to determine that the period alleged in the Motion is appropriate. More importantly, the changes are "minor, require no additional discovery, and cause no prejudice to [D]efendants." *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 591 (N.D. Cal. 2010).

During the hearing, counsel for Defendants asked a series of questions attacking the appropriateness of using a benchmark period during which alleged anti-competitive activity occurred. *See* Jan. 14 Hearing Tr., at 106–28. Defendants ask this Court to find the model unreliable because the DPPs previously alleged that anti-competitive conduct had occurred during

the benchmark period. The Court cannot agree. If a benchmark is not reliable simply because a plaintiff previously alleged antitrust activity during that time—before discovery, expert findings, DOJ investigations, or a defendants' own denials—this would lead to plaintiffs having to prove their claims to a level of unattainable certainty before they even file a complaint.

Moreover, Defendants have denied the conspiracy even took place during this time period. Yet, during the hearing, Defendants faulted the DPPs for not proving the conspiracy *did not* take place during the benchmark period. Defendants are asking the DPPs to prove a negative, which is not their burden. And even if the Court were to "assum[e] that the benchmark period was not perfectly competitive, [Dr. Mangum's] damages calculation actually becomes a more conservative estimate. That is, if there was in fact collusion during the benchmark period, [Dr. Mangum's] but-for price estimate would be too high, causing his estimate of the overcharge (the difference between actual prices and but-for prices) to be too low." *In re Linerboard Antitrust Litig.*, 497 F. Supp. 2d 666, 675 (E.D. Penn. 2007).

Next, Defendants argue that using an indicator variable for the 2008 to 2010 can resize period—which removes it from consideration as a benchmark period—has no viable explanation grounded in economic theory.[10] DPP Opp'n at 24–25. Rather than

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[10] Defendants repeatedly state that Dr. Mangum *excluded* the can resize period altogether from his regression model. Dr. Mangum takes issue with this characterization and denies he excluded any data at all. *See* Mangum Reply at 15 n.18. Instead, he states that he added an indicator variable to the period, which

sound statistical practice, Defendants claim that Dr. Mangum added the variable to gerrymander the data to increase the finding of impact. *Id.* Dr. Mangum, however, did in fact give specific reasons for the use of an indicator variable, including his findings that the downsize period created a shock to the market that rendered it inappropriate to use as benchmark data. Mangum Reply ¶¶ 25–36. Defendants make no attempt to rebut these findings. Indeed, during the hearing, Defendants seemed to abandon this line of argument altogether. When pushed about the soundness of Dr. Mangum's model in this respect, Dr. Johnson conceded that he made no findings and did not take a position as to the soundness of using a variable for the 2008 to 2010 resize period. Jan. 14 Hearing Tr., at 212–13. In sum, nothing regarding the selection of time periods leads the Court to conclude the model is unreliable.

Cost Data: Finally, Defendants dispute the reliability of Dr. Mangum's model because he uses a cost index, rather than the actual accounting cost data supplied by Defendants, to build his model. DPP Opp'n at 25. According to Defendants, using the cost index wrongly assumes that "all three Defendants' prices responded to changes in supply factors in the same way" and that "actual costs for fish, labor, and other inputs were 'common across [all three Defendants]' and over the 15-year period from 2002 to 2016." *Id.* (citations omitted). Dr. Johnson argues

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still accounts for the data but does not treat the period as benchmark data. *Id.* Thus, this is not a case in which an expert excluded critical data wholesale. *Cf. In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 974 (C.D. Cal. 2012) (striking expert testimony that left out a years' worth of data completely from the regression model).

that the more appropriate method would be to use Defendants' actual cost data because this would allow the model to take into account differences in Defendants' costs structures. Johnson Report ¶¶ 64–74.

Dr. Mangum responds to these criticisms in two ways. First, he notes that his robustness testing for individual Defendants allows for unique cost structures and that the results of those tests confirm that the cost structures he used are appropriate. Mangum Reply ¶ 101. Second, Dr. Mangum notes that the accounting costs come from Defendants' sales databases, which include overhead and fixed costs in the "cost of goods sold" calculation. *Id.* at ¶ 104. Including overhead and fixed costs in the calculation can skew the data and distort the regressions' results. *Id.* For this reason, using accounting costs is problematic because it is potentially endogenous to the dependent variable (in this case the price), *id.* ¶ 105, and may also be endogenous to the effects of the conspiracy itself, *id.* at ¶ 106. Dr. Mangum claims that his cost indices do not suffer from these potential pitfalls and do a better job of determining the ultimate goal of the regression model—to determine competitive market prices that are based on market supply and demand conditions, not prices based on Defendant's "idiosyncratic accounting costs." DPP Reply at 16 (citing Mangum Reply ¶¶ 93–120).

In *Korean Ramen*, the district court addressed a similar argument leveled against Dr. Mangum, who also served as an expert in that case. 2017 WL 235052, at *13. There, the court found that "Defendants' criticisms as to Mangum's costs, and the role they play in setting his but-for price, rest primarily on disputes of fact and the reasonableness

of assumptions made by the experts on both sides. There is nothing in Mangum's approach that fatally undermines the reliability of his methodology or model such that Mangum's opinion should be excluded under *Daubert* or his determination of classwide impact significantly discounted." *Id.* Here, the Court agrees with this sound holding and finds that Dr. Mangum's use of costs in this case is reasonable.

iii. Impact Conclusion

Defendant's criticisms are serious and could be persuasive to a finder of fact. But determining which expert is correct is beyond the scope of this Motion. To determine whether class certification is appropriate, "the Court is only concerned with whether the method itself is *capable* of showing [impact] to all, or nearly all of the Class members—not that it does in fact show that the injury occurred." *Optical Disk*, 2016 WL 467444, at *11.

While Defendants' arguments are "characterized as a dispute over the very feasibility of [P]laintiffs' analysis," the Court believes that Defendants "are actually arguing that [P]laintiffs' multiple regression analysis, done a slightly different way (i.e., the 'right' or 'better' way), does not prove what they claim it proves." *See In re Ethylene Propylene Diene Monomer Antitrust Litig.*, 256 F.R.D. 82, 100 (D. Conn. 2009). "In essence, the defendants are asking the court to determine which multiple regression model is most accurate, which is ultimately a merits decision" and does not defeat predominance. *Id.* The "crucial point is that whether the [DPPs'] theory is right or wrong, it is something that can be decided on a class-wide basis." *Optical Disk*, 2016 WL 467444, at *11.

Ultimately, Defendants have not persuaded the Court that Dr. Mangum's model is unreliable or incapable of proving impact on a class-wide basis. The evidence put forward by the DPPs, including Dr. Mangum's regression model, supplemented by the correlation tests, the record evidence, and the guilty pleas and admissions entered in this case, is sufficient to show common questions predominate as to common impact. The DPPs have therefore met their burden.

c. Damages

To show that common questions regarding damages predominate, Plaintiffs must demonstrate the calculations proposed to determine damages use common evidence. *See Meijer, Inc. v. Abbot Labs.*, No. C 07-5985 CW, 2008 WL 4065839, at *7 (N.D. Cal. Aug. 27, 2008). Dr. Mangum proposes using the "overcharge derived from the pooled DPP model . . . to estimate Class-wide damages." Mangum Report ¶ 206. Defendants raise no arguments not already raised with regard to the reliability of Dr. Mangum's pooled DPP model. Having found the model reliable for purposes of this Motion, the Court finds that this methodology also satisfies Rule 23(b) for damages.

2. Superiority

The final requirement for class certification is "that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3). "In determining superiority, courts must consider the four factors of Rule 23(b)(3)." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001). The Rule 23(b)(3) factors are:

> (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 superiority inquiry focuses "on the efficiency and economy elements of the class action so that cases allowed under [Rule 23(b)(3)] are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190, *as amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) (internal quotation marks omitted). A district court has "broad discretion" in determining whether class treatment is superior. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975).

The DPPs maintain that class treatment is superior in this antitrust case because common issues predominate and the factors weigh in favor of class treatment.[11] The Court agrees. Any trial—whether it involves a single plaintiff or a class—will involve the same legal questions and evidence regarding Defendants' conduct. Thus, the superiority requirement is met.

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[11] Defendants raised a concern with superiority during the hearing, arguing for the first time in the last minutes of the hearing that because the largest DAPs have indicated they will opt out of the DPP class, the class vehicle is not superior to individual litigation. Defendants did not brief this issue but, in any event, the Court is not convinced that this issue would change the Court's decision on superiority.

C. Conclusion

In conclusion, the Court determines that the DPPs have met the Rule 23(a) and Rule 23(b) requirements, showing that a class action is superior to individual proceedings for the most prevalent questions of conspiracy, impact, and the fact of damages. The Court therefore **GRANTS** the DPPs' Motion for Class Certification.

* * *

II. The CFPs' Motion for Class Certification

The CFPs request the Court certify under California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*, the following proposed class:

> Commercial Food Service Product Class: All persons and entities in 27 named states and D.C.,[12] that indirectly purchased packaged tuna products produced in packages of 40 ounces or more that were manufactured by any Defendant (or any current or former subsidiary or any affiliate thereof) and that were purchased directly from DOT Foods, Sysco, US Foods, Sam's Club, Wal-Mart, or Costco[13] (other than inter-company purchases among these

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[12] The 27 states included in the class are: Arizona, Arkansas, California, Florida, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

[13] The Court refers to these six intermediaries collectively as the "Class distributors."

distributors) from June, 2011 through December, 2016.[14]

Defendants' opposition focuses on two Rule 23 prerequisites: (1) the adequacy of the CFPs' named representatives under Rule 23(a)(4), and (2) whether common questions predominate under Rule 23(b)(3).

A. Rule 23(a) Requirements

1. Numerosity, Commonality, and Typicality

Defendants do not dispute that the CFP Class meets the numerosity, commonality, and typicality requirements under Rule 23(a). *See generally* CFP Opp'n. The CFPs contend that the numerosity requirement is met because "the proposed class includes thousands of members." *See* CFP Mot. at 19. The CFPs also contend that there exist several common questions as to the CFPs' claims, including whether Defendants fixed prices, whether Defendants' conduct violated the law, and whether Defendants' conduct inflated prices above competitive levels, thus satisfying commonality. *See id.* at 19–20. And the named the CFP representatives assert that their claims, like those of the Class members, arise from Defendants' alleged price fixing, *see id.* at 20–21; Defendants do not contest these claims are not typical of the class and the Court finds no evidence to find otherwise. The Court therefore finds the CFPs' arguments persuasive and concludes the numerosity,

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[14] In the alternative, the CFPs seek certification of a class of purchasers from 10 states and the District of Columbia under the antirust and consumer protection statutes of the states in which the named Plaintiffs made their purchases. Because the Court certifies the CFPs' preferred class, the Court will not address the merits of this alternative class.

commonality, and typicality requirements under Rule 23(a) are satisfied.

2. Adequacy

Defendants do dispute whether the CFP Representatives meet the adequacy requirement under the Rule 23(a)(4). Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." As stated above, the adequacy inquiry turns on (1) whether the "named plaintiffs and their counsel have any conflicts of interest with other class members," and (2) whether "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." *Hanlon*, 150 F.3d at 1020. The adequate representation factors depend on "an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Ellis*, 657 F.3d at 980 (citing *Molski*, 318 F.3d at 955, *overruled on other grounds by Dukes*, 603 F.3d at 617).

When considering whether class representatives will vigorously prosecute the action, courts have refused class certification when the class representatives fail to show enough "knowledge of and involvement in the class action that they would be [ ]able and [ ]willing to protect the interest of the class against the possibly competing interest of the attorneys." *See Pryor v. Aerotek, LLC*, 278 F.R.D. 516, 529–30 (C.D. Cal. 2011). Lack of sophistication, however, is not a basis on which a court should deny class certification. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 376, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966) (affirming class certification where the named plaintiff knew nothing about the content of the suit but knew she was not getting her stock dividends).

"To be sure, the requirement is modest. . . . But the standard is not so low as to be meaningless." *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135 (S.D.N.Y. July 14, 2008) (citing *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000)) (internal quotation marks omitted).

Defendants argue that the CFP Class Representatives have not shown that they will vigorously prosecute the action. CFP Opp'n at 41–42. Defendants base this argument on their allegations that the CFP Representatives have exhibited little to no knowledge of the claims asserted or the procedural history of the action. *Id.* Evidence of this includes deposition transcripts that show the CFP Representatives had not read the initial complaint before it was filed or any filings since the initial complaint, were not aware that the motion for class certification alleges a narrower time period than the initial complaint, and have not tracked developments in the case or been involved in any material litigation decisions. *Id.* at 41.

After an examination of the evidence presented, the Court concludes that each Representative understands the general nature of the claims and their general responsibilities as a class representative. This sort of general understanding "is sufficient for purposes of adequacy, . . . particularly in a legally complex case such as this one." *See In re Northrop Grumman Corp. ERISA Litig.*, No. 06-CV-6213, 2011 WL 3505264, at *14 (C.D. Cal. Mar. 29, 2011) (collecting cases finding general knowledge suffices to show adequacy). While Defendants ask the Court to require more, detailed "knowledge of all the intricacies of the litigation is not required" to meet the adequacy requirement. *See* 7A Wright, Miller &

Kane, *Federal Practice and Procedure*, § 1766 at 367. In addition to maintaining a general knowledge of the claims, the CFP Representatives also have actively participated in discovery and sat for depositions. *See* CFP Mot. at 22. The Court therefore concludes that the CFP Representatives' knowledge of the claims and participation in this case "comports with what courts expect of class representatives." *See Northrop Grumman Corp.*, 2011 WL 3505264, at *15.

Defendants also specifically dispute named Plaintiff Thyme Market and Café's adequacy as a representative because its Rule 30(b)(6) deponent learned of the litigation from her cousin. CFP Opp'n at 43 (citing Maire Byrne Dep., Ex. J, Tr., 174:21–175:22). Defendants contend that this close, familial relationship creates a conflict that is sufficient to undercut the Representative's adequacy. *Id.* The Court disagrees. While a lead plaintiffs' selection of a family member as counsel is an indicator of the "plaintiffs' fitness" as a representative, it is a "relatively weak one" and does not by itself "support a finding that the presumptive lead plaintiff is inadequate to serve in that position." *In re Cavanaugh*, 306 F. 3d 726, 733 (9th Cir. 2002). The family relationship in this case is not one the Court finds disqualifying. The attorney-cousin is not serving as Class counsel and has no financial interest in the case. *See* CFP Reply at 44. And while the attorney-cousin did appear at a deposition, she did not do so on behalf of the CFP Class. *See id.*

The Court therefore concludes that (1) no conflicts have arisen, or are likely to arise, between the CFPs and proposed counsel and the Class; and (2) the CFPs and proposed counsel will prosecute this action vigorously. Accordingly, the CFPs satisfy

the adequate representation requirement of Rule 23(a)(4).

B. Rule 23(b)(3) Requirements

1. Predominance

As with the DPPs' Motion, Defendants have focused the lion's share of their arguments on whether the CFPs meet the Rule 23(b)(3) predominance requirement. The Court considers the predominance question for each of the elements necessary for an antitrust claim in turn while maintaining a view of the case as a whole.

a. Violation of Antitrust Laws

The CFPs argue that the adjudication of Defendants' violation will turn on legal and factual issues common to the entire class. These common factual issues include the multiple guilty pleas, documents, testimony, and various forms of economic analysis. *See* CFP Mot. at 30; *see also* Expert Report of Michael A. Williams, Ph.D ("Williams Report") ¶¶ 16–20, ECF No. 1141-1.

In an effort to prove there was a violation, the CFPs' expert economist, Dr. Michael A. Williams, sought to determine in his report whether "there exist[ ] well-accepted economic methodologies and other common evidence from which a fact-finder could determine the existence of an agreement among Defendants to fix prices for large-sized . . . packaged tuna products." Williams Report ¶ 6. In making this determination, Dr. Williams points to several industry characteristics that are indicative of an antitrust violation, such as high seller concentration, *id.* ¶¶ 21–23, a commodity-like product, *id.* ¶¶ 24–25, substantial antitrust barriers to entry, *id.* ¶¶ 26–28, and stable or declining demand. *Id.* ¶¶ 29–31.

According to Dr. Williams, economic evidence also shows that Defendants engaged in actions contrary to their independent self-interest and that those actions would be unlikely but for the existence of an antitrust agreement. *Id.* ¶¶ 32–49. Further, evidence that Defendants communicated with one another, monitored one another, and shared information with one another, as well as patterns of simultaneous and nearly identical price increase announcements, is all indicative of an antitrust violation. *Id.* This evidence would be common for each of the Class members and, thus, the Court finds that common questions will predominate with respect to the violation of antitrust laws element.

b. Impact

Because the CFPs proposed class consists of indirect purchasers, their burden to prove class-wide impact is two-fold. "Not only must they show that all or nearly all of the original direct purchasers [ ] bought at inflated prices, they must also show those overcharges were passed through all stages of the distribution chain." *Optical Disk*, 2016 WL 467444, at *4 (citing *GPU*, 253 F.R.D. at 499). To meet this burden, the CFPs turn to their expert, Dr. Williams. Like Dr. Mangum, Dr. Williams uses multiple forms of evidence, including factual findings about the canned tuna market and evidence from the record. And as with the DPPs' Motion, the issue most in contention here is Dr. Williams' use of regression models, which he puts forth as a viable methodology to prove that all, or nearly all, of the CFP Class members suffered harm because of the alleged price fixing conspiracy. The Court will summarize Dr. Williams' report and then turn to Defendants' arguments for why they believe his methodology fails.

i. Dr. Williams' Impact Analysis

Dr. Williams' assignment regarding antitrust impact was to determine: (1) "whether well-accepted econometric methodologies using common evidence demonstrate that the anti-competitive effects of the alleged agreement were widespread across members of the proposed [CFP] class, causing harm to virtually all of Class members," Williams Report ¶ 6, and (2) whether these methodologies and evidence "can be used to reliably quantify class-wide damages." *Id.*

To complete this assignment, Dr. Williams conducted a two-step methodology. "First, [he] determine[d] whether common evidence and analyses c[ould] be used to determine whether the agreement generally inflated prices to the Class above competitive levels." *Id.* ¶ 53. To complete this step, Dr. Williams used data sets produced by Bumble Bee, COSI, StarKist/Del Monte, Costco, Dot Foods, Sam's Club, Sysco, US Foods, and Walmart, *id.* ¶¶ 56–65, to determine whether Defendants' alleged illegal conduct elevated the prices paid by the direct purchaser distributors ("overcharge estimation"), *id.* ¶ 54, and, if so, whether these distributors passed Defendants' price increases through to the proposed Class members ("pass-through estimation"). *Id.*

For the overcharge estimation, Dr. Williams used a "widely accepted dummy variable regression methodology." Williams Report ¶ 66. The basic approach of this methodology is the same as the one used by Dr. Mangum: Prices during the period of alleged anti-competitive activity are compared to prices either before or after the alleged impacted period, while controlling for other factors that affect price differences. *Id.* ¶ 70. Like Dr. Mangum, Dr. Williams treats two time periods differently from the

benchmark periods because of alleged anti-competitive conduct. The benchmark, class, and contaminated periods are as follows:

Period of Time	Treatment in the Model	Star-Kist	Chicken of the Sea	Bumble Bee
Early Examined	Benchmark	01/2002 – 06/2008	01/2001 – 08/2008	01/2002 – 09/2010
Contaminated	Indicator Variable	07/2008 – 12/2010	09/2008 – 12/2010	10/2008 – 12/2010
Middle Competitive	Benchmark	01/2011 – 05/2011	01/2011 – 05/2011	01/2011 – 05/2011
Class Period	Class	06/2011 – 12/2016	06/2011 – 12/2016	06/2011 – 12/2016
Post Damages	Indicator Variable	01/2017 – present	01/2017 – present	01/2017 – present

Id.

Dr. Williams quantifies the impact on the CFPs by comparing the actual prices during the class-period to estimated but for prices during that same period. *Id.* ¶¶ 66, 68. To control for changes attributable to factors other than anti-competitive behavior, Dr. Williams uses several control variables. *Id.* ¶ 73. These include cost, demand, customer, package, product-state, and seasonal fixed effects variables. *Id.* ¶¶ 74–76. Dr. Williams ultimately concludes that COSI, StarKist, and Bumble Bee overcharged the

Class distributors by 16.6%, 18.2%, and 15.3%, respectively. *Id.* ¶ 78, Table 3.

Next, Dr. Williams calculated the pass-through estimation. The pass-through estimation is a regression used to calculate whether and how much of the overcharges the Class distributors passed on to the Class members. *Id.* ¶ 79. In other words, when Defendants raised the wholesale price paid by the Class distributors, did the Class distributors then pass through some or all of the overcharges? And if yes, how much of the overcharges did they pass through? The pass-through rates calculated reflect the answers to these questions—for example, if Defendants raised their wholesale price by one dollar, and a distributor then raised its price by 92 cents, the pass-through rate would be 92 percent. *See* Jan. 16, 2019 Hearing Tr., at 486:24–487:2, ECF No. 1803. To calculate the pass-through estimation, Dr. Williams used multivariate-regression models, which are similar to the regression model used to calculate the overcharge estimation. *Id.* ¶ 79. Dr. Williams concluded that that the Class distributers passed through the overcharges at rates ranging from 92% to 113%. *Id.* ¶ 81, Table 4.

For the second step of his impact methodology, Dr. Williams attempted to answer whether "common evidence and analyses can be used to determine whether any such general price inflation caus[ed] all[,] or virtually all[,] of [the CFPs] to pay more for at least one purchase of large sized packaged tuna than they would have paid without the agreement." *Id.* ¶ 53. Dr. Williams conducted two independent analyses in this endeavor: (1) various modified regressions coupled with market evidence, *id.* ¶¶ 83–

89; and (2) Class member-specific overcharge regressions, *id.* ¶¶ 99–108.

For Dr. Williams' first analysis, he started with the same regression model used to detect overcharges but modified the model to analyze class-wide impact on Class members empirically. *Id.* ¶ 86. The regressions were varied to compute overcharges by product, by large distributor, by state, by combinations of individual Defendants and individual Class distributors, and for each Class distributor by product or by state. *Id.* ¶¶ 86–87. Using these varied regressions, Dr. Williams found that Class members experienced overcharges at rates ranging from 95.7% to 100%. *Id.*, Figure 2, Figure 3.

Under this first analysis, Dr. Williams also looked to evidence concerning the canned tuna market generally. First, Dr. Williams found the combination of economically and statistically significant overcharges, as well as high and statistically significant pass-through rates, supported the finding of class-wide impact. *Id.* ¶ 84. According to Dr. Williams, the fact that the product is not altered in any way throughout the distribution chain supports a presumption of class-wide impact. *Id.* ¶ 89 & n.85 (citing *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1352–53, 235 Cal.Rptr. 228 (1987)). Next, Dr. Williams noted that the Class distributors operate in a competitive industry and that basic economic theory demonstrates that the more competitive an industry is, the higher the pass-through rate becomes. *Id.* ¶ 91. Finally, Dr. Williams found the fact that Costco, Sam's Club, and Walmart generally do not charge individualized prices to different customers to be significant evidence that supports a showing that the Class members

incurred overcharges. *Id.* ¶ 98. The combination of these general market factors in addition to the results of the varied regression models led Dr. Williams to conclude that all, or nearly all, of the CFPs were impacted by the anti-competitive conduct.

The second analysis Dr. Williams conducted to show class-wide impact consists of Class member specific regressions. *Id.* ¶¶ 99–108. Dr. Williams adapted his base overcharge regression model to evaluate overcharges for each proposed Class member as a further test to determine whether all, or nearly all, of the Class members suffered impact. *Id.* ¶ 99. These regressions only use data from two of the Class distributors: US Foods and Sysco.[15] *Id.* Using this method, Dr. Williams concluded that, based on the Sysco and US Foods data, 99.3% and 99.5% of customers experienced overcharges, respectively. *Id.* ¶¶ 101–02. Dr. Williams next determined that those percentages would likely hold for the remaining Class distributors, Walmart, Sam's Club, Costco, and Dot Foods. *Id.* ¶¶ 104–08.

ii. Defendants' Opposition

Defendants employed their own expert, Dr. Laila Haider, to analyze Dr. Williams' report. Dr. Haider concludes that the methodology proposed by Dr. Williams is not capable of establishing that all, or nearly all, indirect purchasers sustained impact. Expert Report of Dr. Laila Haider ("CFP Haider Report") ¶ 9, ECF No. 1409-3. The deficiencies of the

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[15] Dr. Williams did not use data from Walmart, Sam's Club, or Costco because the data does not contain customer information. *Id.* n.97. The Dot Foods sales data was not used because it started in January 2012—after the beginning of the damages period. *Id.*

methodologies, Defendants argue, show that common issues do not predominate and are thus fatal to the CFPs' Motion for Class Certification.

Many of Defendants' arguments for why the CFPs' methodology fails are the same as those raised in opposition to the DPPs' methodology. These include objections to the selection of the benchmark and contaminated periods for the overcharge model, CFP Opp'n at 15–21; Dr. Williams' use of average overcharges, *id.* at 24–26; and false positives. *Id.* at 26–27. While subtle differences exist, the same reasoning for why the Court rejected those arguments above applies with equal force here. Defendants also raise several new arguments with regard to the CFPs' Motion, which the Court addresses below.

Distributor Class Members: Defendants argue that the CFPs' class definition includes distributors who "presumably resold tuna and thus would have passed on some or all of the alleged overcharges to downstream customers." *Id.* at 22. This fact creates problems for the CFPs' ability to prove common impact, according to Defendants, because "to the extent that a distributor-class member passed on some or all of the overcharge, the impact of any overcharges to that class member would be very different to one that did not pass on any overcharge." *Id.* at 23.

Defendants state that the prominent example of this is the Class distributor Dot Foods. *Id.* at 22–23. Despite being a distributor in the Class definition, Defendants state that Dot Foods does not actually sell directly to commercial food preparers. *Id.* Instead, it buys products directly from food manufacturers; consolidates the products into truck-sized shipments; and then resells the products to smaller, regional

distributors. *Id.* at 23. Dot Foods' customers—who are Class members—then resell the product and thus pass on the overcharges they incurred. *Id.* This fact may require the Court to "scrutinize each transaction" to determine whether or not the distributors passed on the overcharge; Defendants argue this leads to individual issues predominating. *Id.*

The Court does not find persuasive Defendants' arguments that the pass-on issue leads to individual issues predominating. While the inclusion of the small distributors in the Class may ultimately require the Court to assess whether or not those Class members passed on the overcharges down the distribution chain, Defendants have not shown that these calculations will overwhelm the common issues and force the court to undertake a similar "retailer-by-retailer, manufacturer-by-manufacturer and product-by-product analysis of pass-through," *GPU*, 253 F.R.D. at 505, that other courts have rejected as problematic. *See, e.g.*, *In re Flash Memory Antitrust Litig.*, No. 07-CV-86-SBA, 2010 WL 2332081, at *12 (N.D. Cal. June 9, 2010). The distribution chain and product involved in this case is not complicated and the amount of potential sales passed through is relatively manageable. This issue therefore does not raise any concerns for the Court that the CFPs will be unable to establish antitrust impact on a "common, formulaic basis." *See id.* at *13.

Non-Defendant Tuna: Defendants next argue that Dr. Williams' model is unreliable because it fails to account for substantial amounts of food service size packaged tuna manufactured by non-Defendant suppliers during the proposed class period. CFP Opp'n at 27–28. In his report, Dr. Williams concluded

"the U.S. packaged tuna industry was highly concentrated during the alleged damages period" based on his estimate that Defendants' share of the in the packaged seafood industry exceeded 80 percent. Williams Report ¶¶ 22–23. But according to Dr. Haider, this estimate includes both consumer and food service sized packaged tuna. CFP Haider Report ¶ 34. By conflating the two sizes in his analysis, Dr. Williams fails to account for non-Defendant packaged tuna bought by the six distributors. CFP Opp'n at 28. The presence of non-Defendant tuna in the market is significant because the Class members may have been able to negotiate away price increases and avoid overcharges and thus not sustain impact from the alleged conduct. CFP Haider Report ¶ 30, 33, 36, 39. Overlooking these important "economic facts that are crucial" for determining whether the Class distributors suffered impact from the alleged conduct renders Dr. Williams' model "incapable of establishing whether all or virtually all members of the proposed CFP class sustained impact resulting from the alleged conduct." *Id.* at 35.

The CFPs provide three answers to these criticisms. First, the CFPs point out that Dr. Haider's characterization of what constitutes non-Defendant tuna is incorrect. CFP Reply at 24–25. What Dr. Haider characterized as "non-Defendant vendors" actually sold over $150 million of large-sized packaged tuna manufactured by Defendants; this tuna would therefore be subject to the effects of the alleged price fixing. *Id.* at 24 (citing Williams Rebuttal ¶¶ 34–35; Haider Dep. at 134:21–138:21).

Second, the CFPs contend that the anti-competitive conduct by Defendants also affected the price of non-Defendant manufactured tuna because

of the umbrella effect. *Id.* (citing American Bar Association, *Proving Antitrust Damages*, at 246).

Third, Dr. Williams indicates that his class-member-by-class-member, sale-by-sale regression analysis captures the effects of non-Defendant competition. CFP Reply at 25 (citing Williams Report ¶¶ 77–81). Indeed, Dr. Williams contends that any effect that non-Defendant tuna had on the prices examined is "completely reflected in the prices [he] examined." Jan. 16 Hearing Tr., at 504:1–7. "Whatever ability the six distributors or their customers had to substitute away from the [D]efendants' products" and buy tuna from non-Defendants, basic economic principles show they would have actually bought non-Defendant tuna. *Id.* The effects of non-Defendant tuna are therefore "reflected in the prices that [Dr. Williams] used in the overcharge regression." *Id.*

The possible presence of large amounts of non-Defendant Tuna sold could indeed raise plausible concerns about the data used and whether using the "correct" data could result in different overall conclusions. But these objections—like many of Defendants' objections—do not persuade the Court that the *methodology* put forward is unreliable or that it will create individualized issues that will overwhelm the common ones. Moreover, Dr. Williams provides reasons grounded in economic theory for why Defendants' concerns are misleading and incorrect. Defendants may fight this battle of the experts in a future motion or at trial, but, for purposes of this Motion, the Court determines that Dr. Williams' methodology is sufficient.

Pass-Through Analysis Assumes Overcharges: Defendants' final objection is that Dr.

Williams assumes an average pass-through rate across all Class members and therefore cannot actually prove impact. CFP Opp'n at 29. Defendants state that Dr. Williams assumed that the pass-through rates were the same for years both during and outside of the Class period. *Id.* Rather than looking at data only in the Class period to determine whether the Class distributors passed through the overcharges, Dr. Williams looked at all available data, which includes "periods well beyond the 5-year damages period." *Id.* (citing CFP Haider Report ¶ 82, n.94). This renders the model unreliable, according to Defendants, because it "does not allow for the possibility that the pricing behavior of the [Class distributors] might be different during the proposed class period." *Id.* (citing CFP Haider Report ¶ 82). "In other words, Dr. Williams does not test whether one of the six [Class distributors] chose to absorb an unexpected or temporary cost change." *Id.* Instead, he assumes that the distributors passed through the overcharges at the same rate. *Id.*

The Court believes this issue does not show flaws in the methodology, but merely disagreements among the experts about what data should be. Nothing about Dr. Williams' pass-through analysis raises concerns with the Court about the reliability of the methodology or its ultimate conclusions. Importantly, even assuming Dr. Haider is correct and that the data used should be limited, her model in fact still finds positive and statistically significant pass-through rates for all Class distributors when the data used is limited to the class period. Williams Rebuttal at ¶¶ 90–95. Accordingly, the Court finds this objection does not render the model unreliable. *See Optical Disk*, 2016 WL 467444, at *11 ("The crucial

point is that whether the [plaintiffs]' theory is right or wrong, it is something that can be decided on a class-wide basis.").

iii. Impact Conclusion

Defendants have not persuaded the Court that Dr. Williams' model is unreliable or incapable of proving impact on a class-wide basis. Several issues Defendants raise could ultimately give rise to individualized questions, but these questions do not overcome the common questions that predominate for the case as a whole. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134, 1136–37 (9th Cir. 2016) (holding the "predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized one"). The Court therefore finds the CFPs have met their burden as to impact.

c. Damages

Dr. Williams uses the average overcharges and the estimated pass-through rates to calculate total damages and damages for each Defendant separately. Williams Report ¶ 109. The damages are calculated by multiplying (a) actual revenues paid by proposed Class members, by (b) the product of the overcharge percentage and pass-through rate divided, by (c) one plus the overcharge percentage multiplied by the pass-through rate. *Id.* Defendants raise no objections to this methodology to calculate damages. *See generally* CFP Opp'n. So long as the earlier methodologies are sound, this calculation should also be accurate and capable of producing a damage estimate using common evidence. This methodology therefore satisfies Rule 23(b) for damages.

2. Superiority

The final Rule 23 requirement for class certification is "that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed R. Civ. P. 23(b)(3).

Here, Defendants make no argument concerning superiority. *See generally* CFP Opp'n. The CFPs maintain that Class treatment is superior in this anti-trust case because common issues predominate and the factors weigh in favor of Class treatment. The Court finds no reason to disagree. Any trial—whether it involves a single plaintiff or a class—will involve the same legal questions and evidence regarding Defendants' conduct. Thus, the superiority requirement is met.

C. Choice of Law

In a multi-state class action, the Court must consider the choice-of-law issue because "variations in state law may swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). "Under California's choice of law rules, the class action proponent bears the initial burden to show that California has 'significant contact or significant aggregation of contacts' to the claims of each class member." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (quoting *Wash. Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 921, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (2001)). Once the class action proponent meets that initial burden, the party requesting the Court to apply foreign law must show that the interests of other states applying their laws outweigh California's interest in having its law applied. *Id.* at 590. California choice-of-law analysis requires a three-step test to determine which state's

laws should apply. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 241–42, 110 Cal.Rptr.2d 145 (2001).

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different.
>
> Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists.
>
> Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

Mazza, 666 F.3d at 590 (quoting *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 87–88, 105 Cal.Rptr.3d 378, 225 P.3d 516 (2010)). Generally, the preference is to apply California law, rather than to choose the foreign law as a rule of decision. *Strassberg v. New England Mut. Life Ins. Co.*, 575 F.2d 1262, 1264 (9th Cir. 1978).

1. Material Differences in State Law

"The fact that two or more states are involved does not itself indicate that there is a conflict of law problem." *Wash. Mut. Bank*, 24 Cal. 4th at 919–20, 103 Cal.Rptr.2d 320, 15 P.3d 1071. "A problem only

arises if differences in state law are material, that is, if they make a difference in this litigation." *Mazza*, 666 F.3d at 590 (citing *Wash. Mut. Bank*, 24 Cal. 4th at 920, 103 Cal.Rptr.2d 320, 15 P.3d 1071).

Defendants raise three differences between California and foreign law that they argue are dispositive in this litigation: (1) the treatment of indirect purchaser standing, (2) temporal limitations on recovery by indirect purchasers, and (3) the availability of a pass-on defense. CFP Opp'n at 32–37. According to Defendants, the foreign jurisdictions have a real interest in applying these laws and their interests trump California's. *Id.* at 33. For their part, the CFPs contend that no material differences exist and, even if they do, California's interests are greater in this case. CFP Reply at 36–40.

a. Indirect Purchaser Standing

Defendants argue that at least nine of the relevant jurisdictions follow the federal prudential indirect purchaser standing test set forth in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("*AGC*"). Under *AGC*, the court must determine whether a plaintiff is a proper party to bring an antitrust claim by "evaluat[ing] the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535, 103 S.Ct. 897. To make this determination, the Supreme Court identified certain factors to consider, including:

> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative

> measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.

Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999). Courts must weigh the factors, giving the most weight to the nature of the plaintiffs' injury. *Id.* (citing *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997)). California does not impose this test as an additional burden on indirect purchaser plaintiffs, which, according to Defendants, creates a material difference. CFP Opp'n at 34.

The response by the CFPs is two-fold. First, they argue that Defendants have failed to meet their burden of showing this difference in the law is material. CFP Reply at 36–37. Second, they argue that, even if the Court were to apply the *AGC* test, it confirms that standing is appropriate. *Id.* at 37–39.

The Court agrees with Defendants that the laws of California and the *AGC* states do indeed differ as to the standing requirements for indirect purchasers. *See* CFP Opp'n at 32–34. But to meet their burden, it is not enough that Defendants show a difference in the law; the difference shown must be "material, that is, . . . [it must] make a difference in *this* litigation." *See Mazza*, 666 F.3d at 590 (emphasis added). Defendants do not actually address the five *AGC* factors and apply them to this case. *See generally* CFP Opp'n. On the other hand, the CFPs have persuasively shown that application of the *AGC* factors confirms the CFPs have antitrust standing. CFP Reply at 37–39.

Based on the facts before it, the Court finds that "the record does not support a conclusion that the outcome in [the *AGC*] jurisdictions would be

materially different under local law than under California law." *Optical Disk*, 2016 WL 467444, at *14, n.14. Thus, Defendants have not met their required burden to show that this difference in laws is material in this case.

b. Temporal Limitation

Defendants next argue that there exists a conflict between the laws of California and Rhode Island, which is a state included in the CFP proposed class. CFP Opp'n at 35–36. Rhode Island law does not permit recovery by indirect purchasers for pre-2013 conduct. *See* R.I. Gen. Laws § 6-36-7; *In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 759 (E.D. Pa. 2014). Defendants argue that this temporal limitation is in contrast with the availability of damages under California's Cartwright Act for the CFPs' class certification period of 2011–2016. *Id.*

The CFPs respond that the conflict is partial and limits only the damages the Rhode Island Class members could obtain; it would not change the outcome of this case. CFP Reply at 39. The Court agrees with the CFPs. "[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013). Dr. Williams has shown that he can calculate class-wide impact and damages using this limited time period for purchases in Rhode Island and the effect would not change his overall conclusions. CFP Reply at 39 (citing Williams Reb. ¶ 31). Thus, the Court finds this difference is not material.

c. Pass-On Defense

Defendants' final challenge concerns the availability of the "pass-on" defense. CFP Opp'n at

36–37. The so-called pass-on defense allows defendants to defeat antitrust claims when they can show the plaintiffs suffered no damages as a result of the plaintiffs "passing-on" any overcharges to their customers. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). Although California law generally precludes any pass-on defense, the California Supreme Court made clear in *Clayworth v. Pfizer*, 49 Cal. 4th 758, 111 Cal.Rptr.3d 666, 233 P.3d 1066 (2010), that there are certain exceptions to the rule. Relevant here, the pass-on defense is available when "multiple levels of purchasers have sued, or where a risk remains they may sue." *Id.* at 787, 111 Cal.Rptr.3d at 690, 233 P.3d 1066. "In such cases, if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted; defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages." *Id.*

Defendants have identified two states—Kansas and Wisconsin—which do not allow any pass-on defense. CFP Opp'n at 43 (citing *Cox v. F. Hoffman-La-Roche*, No. 00-1890, 2003 WL 24471996, at *3 (Kan. Dist. Ct. Oct. 10, 2003); *K-S Pharmacies Inc. v. Abbott Labs.*, No. 94-2384, 1996 WL 33323859, at *12 (Wis. Cir. Ct. May 17, 1996)). In these states, Defendants could not reduce their damages by showing that the overcharges were passed-on. This would allow the CFP Class members in those states to recover a higher damage award.

The CFPs argue that this difference is not material because the pass-on defense would not apply to this case. Although the California Supreme Court has yet to address the scope of the defense, *see*

Clayworth, 49 Cal. 4th at 787, 111 Cal.Rptr.3d at 690, 233 P.3d 1066, this case may fall within the exception. Multiple levels of purchasers—direct purchasers, indirect commercial foods purchasers, and end-payer purchasers—have sued in this case. Damages may be required to be allocated among the various levels of injured purchasers and, thus, the defense may apply. The Parties have not briefed whether the exception actually applies in this case and, therefore, the Court declines to make any such ruling at this point in the litigation. For purposes of this Motion, however, the Court assumes it does apply and finds this difference is material.

2. True Conflicts Analysis

"The second step of the governmental interest analysis requires [the Court] to examine 'each jurisdiction's interest in the application of its own law in the circumstances of the particular case to determine whether a true conflict exists.' " *McCann*, 48 Cal. 4th at 90, 105 Cal.Rptr.3d 378, 225 P.3d 516 (quoting *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107–08, 45 Cal.Rptr.3d 730, 137 P.3d 914 (2006)). It is a principle of federalism that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). "[E]very state has an interest in having its law applied to its resident claimants." *Mazza*, 666 F.3d at 592–93 (citing *Zinser*, 253 F.3d at 1187, *as amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001)). California law also acknowledges that "a jurisdiction ordinarily has 'the predominant interest' in regulating conduct that occurs within its borders."

McCann, 48 Cal. 4th at 97–98, 105 Cal.Rptr.3d 378, 225 P.3d 516 (citations omitted).

The only remaining law to consider at this point is the pass-on defense. Here, the Court finds that the foreign jurisdictions have an interest in applying their laws regarding the applicability of the pass-on defense to this case. By rejecting the pass-on defense, those states have made the determination to not diminish damages for indirect purchasers. Those states have resident plaintiffs in this action and have an interest in their law of apportioning damages apply. The Court also finds that California has an interest in this case as well. Both COSI and Bumble Bee are headquartered in California. California has an "interest in protecting [its] resident defendants from excessive financial burdens." *Hurtado v. Super. Ct.*, 11 Cal. 3d 574, 584, 114 Cal.Rptr. 106, 522 P.2d 666 (1974). Both the foreign jurisdictions and California have an interest and therefore a true conflict exists.

3. Impairments Test

Once the trial court "determines that the laws are materially different *and* that each state has an interest in having its own law applied, thus reflecting a true conflict, the court must take the final step and select the law of the state whose interests would be 'more impaired' if its law were not applied." *Wash. Mut. Bank, FA*, 24 Cal. 4th at 920, 103 Cal.Rptr.2d 320, 15 P.3d 1071. "In making this comparative impairment analysis, the trial court must determine 'the relative commitment of the respective states to the laws involved' and consider 'the history and current status of the states' laws' and 'the function and purpose of those laws.' " *Id.* (quoting *Offshore Rental Co. v. Cont'l Oil Co.*, 22 Cal. 3d 157, 166, 148

Cal.Rptr. 867, 583 P.2d 721 (1978)). "Accordingly, [the Court's] task is not to determine whether the [foreign state's] rule or the California rule is the better or worthier rule, but rather to decide—in light of the legal question at issue and the relevant [ ] interests at stake—which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case." *McCann*, 48 Cal. 4th at 97, 105 Cal.Rptr.3d 378, 225 P.3d 516.

Here, California's interest would be more impaired if the Court did not apply the pass-on defense. The pass-on defense protects California's resident businesses from what it perceives to be excessive damages. This interest is substantial. Indeed, "[w]hen a state adopts a rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises, . . . the state ordinarily has an interest in having that policy of limited liability applied." *Id.* at 91, 105 Cal.Rptr.3d 378, 225 P.3d 516.

The interest of the states identified by Defendant that do not allow the pass-on defense would also be impacted. These states have an interest in ensuring their residents are compensated for any loses. If the CFPs prevail, the pass-on defense may preclude indirect purchaser plaintiffs residing in other jurisdictions from receiving damages under California law. The purpose underlying antitrust laws—to punish the companies involved and deter future offenses—is still viable under California law, however. The pass-on defense would not completely undermine this interest because Defendants would still face substantial damages to direct purchasers and those Plaintiffs that can prove they did not pass

on the overcharges. After balancing each state's interest to determine which would be more impaired, the Court finds that the interest of California to protect its resident businesses outweighs the interest of the foreign states. This, coupled with the general preference to apply California law, persuades the Court that California law applies to this case.

D. Conclusion

Based on the above, the Court determines that the CFPs have met the Rule 23(a) and Rule 23(b) requirements and therefore **GRANTS** the CFPs' Motion for Class Certification.

* * *

III. The EPPs' Motion for Class Certification

The EPPs request the Court certify the following proposed class under California's Cartwright Act:

> Cartwright Act Class: All persons and entities who resided in one of the States described in paragraphs 113(b) to 113(gg) of the Fourth Consolidated Amended Complaint, specifically Arizona, Arkansas, California, the District of Columbia, Florida, Guam, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin, who indirectly purchased Packaged Tuna in cans or pouches smaller than forty ounces for end consumption and not for resale, produced by any Defendant or any current or former

> subsidiary or affiliate thereof, or any co-conspirator, during the period June 1, 2011 through July 1, 2015 (the "Class Period").

The class excludes purchases of meal kits and the Court. EPP Mot. at 17.

The EPPs also seek to certify a statewide damages class for each State, District, or Territory enumerated in paragraphs 113(b) to 113(gg) of the Fourth Consolidated Amended Complaint, which mirrors the above Cartwright Act Class definition:

> Individual State Class[es]: All persons and entities who resided in [State, District, or Territory], who indirectly purchased Packaged Tuna in cans or pouches smaller than forty ounces for end consumption and not for resale, produced by any Defendant or any current or former subsidiary or affiliate thereof, or any co-conspirator, during the period June 1, 2011 through July 1, 2015 (the "Class Period"). The class excludes purchases of meal kits. Also excluded from the Class is the Court.

In a now familiar order of operations, the Court will address all of the Rule 23(a) requirements, turning then to Defendants' arguments regarding predominance—once again the focus of attention—and choice of law considerations.

A. Rule 23(a) Requirements

Based on a review of the EPPs' Motion, the Court finds the EPPs' Cartwright Class meets the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy. Common sense indicates that the Class will be large and geographically widespread based on the "sale of billions of units"

throughout the states in the Class definition; these facts satisfy numerosity. *Id.* at 20–21. There exist common questions of law and fact, including "the identity of the conspirators, duration and terms of the conspiracy, and whether the conduct satisfies each claim alleged," all of which the EPPs will attempt to prove using common evidence, thus satisfying commonality. *Id.* at 22. The EPPs satisfy typicality because the claims of Class Representatives and Class members all arise from the same conduct: the purchase of Defendants' products at prices elevated above competitive levels as a result of Defendants' alleged price fixing conduct. *Id.* at 23–24. Finally, the EPP Class Representatives and Class counsel do not have any conflicts of interest with other Class members and the EPP Class Representatives, and Class counsel have shown they have prosecuted, and will continue to prosecute this action vigorously. *Id.* at 24–25. Defendants do not contest that the EPPs meet the Rule 23(a) requirements. *See generally* EPP Opp'n. Therefore, the Court finds that the EPPs' Cartwright Class meets the class certification standards of Rule 23(a).

B. Rule 23(b)(3) Requirements

1. Predominance

As it has done with the previous two motions, the Court will consider each element required to prove an antitrust claim to determine whether common questions of law and fact predominate.

a. Violation of Antitrust Laws

The EPPs argue that the adjudication of Defendants' alleged antitrust violations will turn on common legal and factual issues. EPP Mot. at 26. "Such common evidence will include guilty pleas by

Defendants' executives to price-fixing charges, Defendants' own written communications and in-person meetings in furtherance of the conspiracy, exchanges of confidential and commercially sensitive pricing information, and contemporaneous price and package-size announcements." *Id.*

The EPPs' expert, Dr. David Sunding, also makes findings that purport to establish an antitrust violation occurred. This evidence includes various market factors, such as a nationwide demand and Defendants' dominate share of the canned tuna market. Expert Report of Dr. David Sunding ("Sunding Report") ¶¶ 41–48, ECF No. 1703-2. Dr. Sunding also points to barriers to entry into the market and bilateral co-pack agreements between Defendants as further evidence that the canned tuna market is ripe for cartel behavior. *Id.* ¶¶ 49–63. Finally, Dr. Sunding conducted a detailed analysis of the discovery evidence, concluding that Defendants' behavior points to the existence of a cartel. *Id.* ¶¶ 64–90. This evidence would be common for each of the Class members. Thus, the Court finds that common questions will predominate with respect to this element.

b. Impact

To show that the direct purchasers paid inflated prices and that those overcharges were passed through to the Class members, the EPPs primarily rely on the expert report of Dr. David Sunding. Defendants argue that Dr. Sunding's findings are unreliable for a host of reasons, thus making class certification inappropriate. Following a brief overview of Dr. Sunding's report, the Court will analyze each of Defendants' specific arguments regarding impact not already addressed above.

i. Dr. Sunding's Impact Analysis

Dr. Sunding's assignment for this case was to "examine public documents and the discovery evidence in order to ascertain whether or not the [EPPs] suffered from class-wide damages from the alleged conspiracy." *Id.* ¶ 7. Dr. Sunding begins his impact analysis by considering general background evidence concerning the packaged tuna market and by examining the record evidence regarding Defendants' alleged anticompetitive behavior. *Id.* ¶¶ 12, 37–92. Dr. Sunding concludes that the "structural elements of the packaged tuna market indicate that [ ] Defendants had an incentive to collude and that a cartel would be profitable and enforceable," *id.* ¶ 12, all of which supports a finding of impact to the class.

To estimate overcharges of canned tuna at the wholesale level, Dr. Sunding uses a reduced-form regression model. *Id.* ¶ 102. "The reduced form pricing equation estimates the conditional wholesale price of tuna products as a function of a series of explanatory variables relating to product characteristics, supply and demand factors, and the period of alleged conspiracy." *Id.* The conditional prices during the class period are then compared to the clean, benchmark period to determine whether there is a statistically significant overcharge. *See id.* ¶ 110.

The benchmark, class, and held out periods are shown in the table below:

Period of Time	Treatment in the Model	StarKist	Chicken of the Sea	Bumble Bee
Early Competitive	Benchmark	Pre 07/2004	Pre 08/2004	Pre 07/2004
Early Examined	Benchmark	07/2004 – 07/2008	08/2004 – 09/2008	07/2004 – 09/2008
Can Resize	Held out	07/2008 – 05/2011	10/2008 – 05/2011	09/2008 – 05/2011
Class Period	Class	05/2011 – 07/2015	06/2011 – 07/2015	05/2011 – 07/2015
Cooldown	Held out	08/2015 – 12/2015	08/2015 – 12/2015	08/2015 – 12/2015
Late Competitive	Benchmark	01/2016 onwards	01/2016 onwards	01/2016 onwards

Id. Table 2.

Dr. Sunding uses both cost-side and demand-side variables to control for changes attributable to factors other than anti-competitive behavior. *Id.* ¶¶ 93, 102–06. The cost variables include the cost of fish, metal, labor, and electricity; the demand side variables include unemployment rates and the price of chicken (because it is a substitute protein). *Id.* ¶ 106.

Dr. Sunding concludes that StarKist, Bumble Bee, and COSI charged prices above a level that can

be explained by legitimate competitive factors at estimates of 4.5%, 9.4%, and 8.1%, respectively. *Id.* ¶ 110.

To test the accuracy of his overcharge results, Dr. Sunding performs several "sensitivity" tests. *Id.* ¶ 112; *see also* Jan. 15, 2019 Hearing Tr., at 273:10–274:25, ECF No. 1802 ("[Dr. Sunding did not] just assume overcharges are positive everywhere in the market"; instead he did a "reality check" to test his results). The sensitivity tests include a comparison of the overcharge percentages to Defendants' profit margins; regression models that evaluate whether the overcharge varied when focusing on specific products and package type; and whether the alleged collusion affected large customers, specifically Walmart. Sunding Report ¶ 112. The results of these analyses confirm the initial models' findings. *Id.*

To demonstrate that the impact affected all, or nearly all, of the Class members, Dr. Sunding provides expert opinions on qualitative, quantitative, and anecdotal and other record evidence "that support[ ] the pass-through of direct overcharges." EPP Mot. at 34. Regarding the qualitative evidence, Dr. Sunding notes that economic theory supports a finding that the distribution channels at issue have characteristics that make it likely pass-through of the overcharges occurred. *Id.* at 35. This includes evidence that the retail grocery business is highly competitive, making it highly probable retail purchasers would pass-through cost increases to the EPPs. *Id.*

Next, Dr. Sunding points to anecdotal evidence regarding pass-through. This evidence includes Defendants' documents and internal communications, which show that they were aware

any price increases would be passed through to consumers. *Id.* ¶¶ 140–44.

Finally, Dr. Sunding provides quantitative evidence in the form of multiple economic models to establish pass-through rates using retail scanner data from consumer purchases and data from individual retail firms. *Id.* ¶¶ 145–73. Dr. Sunding concludes that each model shows statistically significant results supporting the conclusion that direct purchasers passed the overcharges they paid on to the end payers.

ii. Defendants' Opposition

Defendants employed Dr. Laila Haider—the same expert employed by Defendants in response to the CFPs' expert's report—to analyze Dr. Sunding's model. Dr. Haider concludes that the methodology proposed by Dr. Sunding is not capable of establishing that all, or nearly all, indirect end-payer purchasers sustained impact. Expert Report of Dr. Laila Haider ("EPP Haider Report") ¶ 9, ECF No. 1409-3. The deficiencies of Dr. Sunding's methodologies, Defendants argue, show the EPPs are incapable of proving impact using a common, class-wide method.

Defendants attack Dr. Sunding's methodology on many of the same grounds as in the previous motions. Defendants attack Dr. Sunding's selection of time periods, EPP Opp'n at 22–31; use of average overcharge percentages, *id.* at 32–35; and the data sets used to construct the models, *id.* at 46–48. The Court will not rehash why those are not fatal to class certification and adopts its previous analysis here. The Court will, however, address the new issues raised by Defendants.

Absurd Results: Defendants first argue that Dr. Sunding's model produces "absurd" results and is thus unreliable. *Id.* at 24–25. Dr. Haider claims that the model produces results for the prices of pouched tuna packages that are highly inflated to a level that makes no economic sense. *Id.* According to Dr. Haider, the model's results also indicate that as several price indicators, such as cost of supplies and labor, go up, Dr. Sunding's model actually shows a decrease in price which is illogical and indicates unreliability. *Id.*

The EPPs respond by claiming that Dr. Haider simply miscalculated. EPP Reply at 22. The EPPs claim Dr. Haider misconstrues how the packaging type variable is entered into the model, *id.*; *see also* Jan. 15 Tr., at 277:1-7 (stating Dr. Haider "neglected to account for the fact that [Dr. Sunding's] packaging type variable enters more than once into the regression"), and that when the model is analyzed correctly, the price of pouched tuna products determined by the model is in line with market realities. *Id.*

After reviewing these contentions, the Court ultimately views Defendants' argument as a disagreement about the results of the model, rather than the viability of the model itself. That kind of contention does not defeat class certification. *See In re Ethylene Propylene Diene Monomer*, 256 F.R.D. at 96 ("[I]f the defendants' experts are merely disputing the results of the plaintiffs' experts' analysis rather than the feasibility of using a single formula methodology, that would be a merits issue, not a class certification issue."). Dr. Sunding provides viable explanations for the results with which Defendants disagree; whether Defendants or the EPPs are correct

is not for the Court to decide at this junction. *See In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 373–74 (C.D. Cal. 2011) ("[T]he Court is not supposed to decide at the certification stage which expert analysis or model is better.").

Pass-Through Model Ignores Important Factors: Defendants level a series of arguments regarding Dr. Sunding's pass-through model, asserting that Dr. Sunding ignores several important factors that affect the outcome of the model. EPP Opp'n at 37–48. Specifically, Defendants argue that Dr. Sunding's pass-through model ignores loss-leader pricing, *id.* at 38–40; focal point pricing, *id.* at 41–43; geographic location and product variation; *id.* at 43–44, and an entire link in the distribution chain, *id.* at 44–45. Defendants claim that because of these deficiencies, Dr. Sunding's model cannot show Defendants passed the overcharges on to all, or nearly all, of the EPPs.

The Court is not persuaded that any of Defendants' arguments regarding the EPPs' pass-through model defeat certification. Beginning with Defendants' contention that Dr. Sunding ignored loss-leader and focal point pricing, the Court notes that Dr. Sunding in fact discusses both in his report. *See* Sunding Report ¶¶ 127–30 (discussing use of loss-leaders for packaged tuna), ¶¶ 131–34 (discussing retail pricing approaches used for canned tuna). With regard to loss-leader specifically, Dr. Sunding tested his findings in his Reply Report after Defendants raised this issue to ensure his findings were correct—his tests confirm his initial conclusions. *See* Expert Reply Report of David Sunding ("Sunding Reply"), ¶¶ 53–58, ECF No. 1703-4.

Defendants' contention that Dr. Sunding ignored geographic location and product variation is equally unavailing. According to Dr. Haider, Dr. Sunding's model fails to account for different economic conditions between geographic areas, does not include "the variables necessary to account for differences in the prices paid across different locations," and relies on data from market research firm Information Resources, Inc. ("IRI") that masks variation in prices paid. EPP Opp'n at 43 (citing EPP Haider Report ¶ 64 & n.95). Together, Dr. Haider claims these flaws inflate the pass-through rates for a significant portion of the class. *Id.* Dr. Haider ran her own regression to account for these differences and determined that the pass-through effects decline for a significant portion of the class. EPP Haider Report ¶¶ 61–65.

The EPPs, however, have persuasive explanations for each of the purported deficiencies. The EPPs claim Dr. Haider's regression model is in fact unreliable because it reduces the sample size and increases multicollinearity. EPP Reply at 37–38. Accounting for these variables correctly, in the EPPs' view, leads to results similar to those from Dr. Sunding's analysis. *Id.* They also note Dr. Sunding's analysis includes "varying estimates at the geographic level of the individual store[,] . . . which were consistent with his state-by-state IRI analyses." EPP Reply at 36 (citing Sunding Reply ¶ 37). The robust studies relied on by Dr. Sunding, including two studies based on IRI data and seven studies based on retailer and distributor data, contrast with the sparse amount of data relied on by experts in cases other courts have found troubling. *See, e.g.*, *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 158 (E.D. Penn. 2015) (finding pass-through methodology

relying on single regression that used cost data from only one retailer flawed). The EPPs' rebuttals convince the Court that Dr. Haider's critiques do not reveal underlying problems with Dr. Sunding's pass-through analysis that preclude certification.

Finally, Defendants contend that Dr. Sunding fails to account for multi-outlet stores (i.e., grocery stores) in his analysis and that he assumes, rather than performs any testing to prove, that the distributors to these retail channels passed on any overcharges. EPP Opp'n at 44–45. But Dr. Sunding indicates that his model does in fact include analysis of a distributor that sells to grocery stores. Sunding Reply ¶ 62. This analysis, coupled with other common evidence provided, is enough for the Court to determine that the EPPs have provided a reasonable method to prove pass-through for these retail channels. *See* EPP Reply at 40.

iii. Impact Conclusion

After reviewing Defendants' objections, the Court concludes that the methodology put forward by Dr. Sunding is reliable and capable of proving impact. Defendants once again raise potential flaws in the methodology that could convince a finder of fact that the EPPs have not proven impact, however, the potential flaws raised are not so dramatic that the methodology must be thrown out and certification denied. At this point, all that is necessary is that the EPPs put forward "a sufficient basis from which to conclude that [the EPPs] would adduce common proof concerning the effect of Defendants' alleged price-fixing conspiracy." *In re Aftermarket Automotive Lighting Prods.*, 276 F.R.D. at 374. Dr. Sunding's report meets this threshold and, thus, the Court finds

common issues predominant in regard to impact to the class.

b. Damages

Dr. Sunding proposes using the overcharge estimates and the pass-through estimates using the IRI data model to calculate the total damages. Sunding Report ¶¶ 174–75. Defendants raise no objections to this methodology to calculate damages, and the Court finds this methodology sufficient to satisfy predominance.

2. Superiority

The EPPs maintain that Class treatment is superior in this anti-trust case because common issues predominate and the Rule 23(b) factors weigh in favor of Class treatment. EPP Mot. at 44–47. The Court agrees. A class action provides a superior method for the individual indirect purchasers—whose individual damages by themselves would be too small to justify litigation—to raise their claims and obtain meaningful redress. A class action would also be more manageable and more efficient than thousands of individual adjudications, all using common evidence. The Rule 23(b) superiority requirement is thus met. *See In re TFT-LCD*, 267 F.R.D. at 608 ("[I]f common questions are found to predominate in an antitrust action . . . courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied.") (quoting Wright, Miller & Kane, *Federal Practice and Procedure: Civil Procedure* § 1781, at 254–55 (3d ed. 2004)).

C. Choice of Law

Defendants argue that the EPPs' Cartwright Class is improper because (1) applying California law to the multistate class claims violates due process, EPP

Opp'n at 49–51; and (2) under California's choice of law test, California law should not apply because (a) there are multiple, material differences between the laws of California and other states; and (b) those other states' interests would be more impaired, *id.* at 51–58.

1. Due Process

When a class action proponent seeks to certify a multi-state class under the law of one state, the Court must ensure that the certification comports with due process. *Mazza*, 666 F.3d at 589–90. To satisfy due process in this case, California must have "significant contact or significant aggregation of contacts, creating interests, with the parties and the occurrence or transaction" such that application of California law "is neither arbitrary nor fundamentally unfair." *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1111, 1113 (9th Cir. 2013) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, 312–13, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981)). "Specifically, . . . the Cartwright Act can be lawfully applied without violating a defendant's due process rights when more than a *de minimis* amount of that defendant's alleged conspiratorial activity leading to the sale of price-fixed goods to plaintiffs took place in California." *Id.* at 1113.

Defendants contend that the EPPs fail to show that Defendants StarKist and Del Monte had sufficient contacts in California to satisfy due process.[16] EPP Opp'n at 50–51. The record evidence, however, shows otherwise: The deposition testimony and guilty pleas show that all Defendants carried out

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[16] Defendants do not contest that the remaining Defendants' contacts with California are sufficient to satisfy Due Process.

conspiracy related conduct in California. This, in addition to the fact that Defendants alleged conspiracy-related conduct caused harm to California residents, is sufficient contact with the State to satisfy due process. *See AT & T Mobility*, 707 F.3d at 1113 ("[A]nticompetitive conduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' establishes a 'significant aggregation of contacts, creating state interests.'").

2. California's Governmental Interest Test

Defendants raise many of the same differences between California and foreign law that the CFPs raised and the Court rejected above. These include the treatment of indirect purchaser standing, EPP Opp'n at 55–56, and temporal limitations on recovery by indirect purchasers, *id.* at 56–57. The same reasoning applies here, and the Court finds that, with regard to these differences, the comparative impairments test falls in favor of California law applying.

Defendants raise two additional, potential differences that the Court has not previously addressed. First, Defendants argue that because StarKist and Del Monte reside in Pennsylvania and Ohio, those states are "potentially affected jurisdictions" that must be considered in the choice of law analysis. *Id.* at 52. Both Pennsylvania and Ohio follow *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), meaning indirect purchaser claims are barred in those states. This Court previously found that this difference is material, that the foreign states have an interest in applying their legislative decisions regarding *Illinois Brick*, and that these states' interest would be more

impaired than California's interest if their laws were not applied. 242 F. Supp. 3d 1033, 1066–68 (S.D. Cal. 2017).

That finding, however, was based a nationwide putative class; the EPPs now seek a more limited class. The EPPs do not include Pennsylvania and Ohio in the class definition and, thus, no Class members reside in those states. For that reason, the retail transactions at issue did not occur in those states for purposes of this case. Further, the EPPs make no allegations that any conspiratorial activity took place in those states. Thus, "much, perhaps most of the actionable conduct in this case took place in [California]" and the other states included in the class definition—not in Ohio or Pennsylvania. *See In re TFT-LCD*, 2013 WL 4175253, at *2–3 (N.D. Cal. 2013). California's interests in punishing antitrust behavior for conduct that occurred within its borders would be more impaired than the interest of Pennsylvania or Ohio in applying their laws to conduct occurring outside their borders. California law should therefore apply.

Defendants' second argument concerns the consumer protection statutes of the other states in the Cartwright Class. This argument is misplaced. The EPPs' Cartwright Class would apply only the antitrust laws of California to the other states, not the consumer protection statutes. The differences between these laws are therefore not material in this case. Despite Defendants' contentions, *Mazza* is not to the contrary. 666 F.3d at 591. In *Mazza*, the plaintiffs attempted to certify a nationwide class under California's *consumer protection statutes*—not the Cartwright Act. *Id.* Thus, while the Ninth Circuit held that material differences exist between the

various state consumer protection laws, Defendants have not shown how that is relevant for the choice of law analysis for the Cartwright Act Class here. Because Defendants have failed to show that the antitrust laws of the various states conflict with California's Cartwright Act in a material way and that those states have a predominate interest, the Court must conclude that California law applies.

D. Statewide Classes

In addition to the Cartwright Class, the EPPs also ask this Court to certify thirty-two individual Statewide Classes under the antitrust and consumer protection laws of those states. Starting with Rule 23(a), the Court finds that the proposed classes meet the numerosity, commonality, typicality, and adequacy prongs. Numerosity is shown through the table of evidence provided in the Declaration of Betsy Manifold, Ex. 67, ECF No. 1130-8, which shows that, for each state, thousands of transactions occurred. Declarations by the EPP Representative from each state proves adequacy. *Id.* Commonality and typicality are satisfied in the same manner discussed above regarding the EPPs' Cartwright Class.

As for the 23(b) requirements, the Court finds that the same analysis undertaken for the Cartwright Class is largely applicable here as well. Defendants contend that the separate state laws will create manageability problems too great to support class treatment. EPP Opp'n at 59–61. Defendants fail to persuade the Court that these potential individualized issues overwhelm the common ones, making class treatment inappropriate. The differences in laws can be handled at trial through different jury instructions based on each of the separate state subclasses. *Cf. In re Hyundai and Kia*

Fuel Economy Litig., 926 F.3d 539, 563 n.7 (9th Cir. 2019). And multiple courts have certified similar classes. *See, e.g.*, *In re Static Random Access Memory Antitrust Litig.*, 264 F.R.D. 603, 617 (N.D. Cal. 2009) (certifying twenty-seven statewide damages classes in addition to nationwide injunctive relief class); *In re TFT-LCD*, 267 F.R.D. at 608–13 (certifying twenty-four statewide damages classes in addition to nationwide injunctive relief class). Based on a review of the superiority factors as a whole, the Court finds the superiority requirement satisfied.

E. Conclusion

The Court determines that the EPPs have met the Rule 23(a) and Rule 23(b) requirements and therefore **GRANTS** the EPPs' Motion for Class Certification.

CONCLUSION

Based on the foregoing, the Court **GRANTS** the DPPs' (ECF No. 1140), the CFPs' (ECF No. 1143), and the EPPs' (ECF No. 1130) Motions for Class Certification.

Previously, the Court appointed interim counsel for each tract. Their work in prosecuting this action has been effective and efficient and the Court believes they will fairly and adequately represent the Classes. Therefore, pursuant to Rule 23(g), the Court appoints Hausfeld LLP as Class counsel for the DPPs; Cuneo Gilbert & Laduca, LLP as Class counsel for the CFPs; and Wolf Haldenstein Adler Freeman & Herz LLP as Class counsel for the EPPs. Counsel for each tract is ordered to submit a proposed plan for dissemination to the Classes within thirty days of the electronic docketing of this Order.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., BEVERLY YOUNGBLOOD, PACIFIC GROSERVICE, INC., DBA Pitco Foods, CAPITOL HILL SUPERMARKET, LOUISE ANN DAVIS MATTHEWS, JAMES WALNUM, COLIN MOORE, JENNIFER A. NELSON, ELIZABETH DAVIS-BERG, LAURA CHILDS; et al., Plaintiffs-Appellees, and JESSICA DECKER, JOSEPH A. LANGSTON, SANDRA POWERS, GRAND SUPERCENTER, INC., THE CHEROKEE NATION, US FOODS, INC., SYSCO CORPORATION, GLADYS, LLC, SPARTANNASH COMPANY, BRYAN	No. 19-56514 D.C. No. 3:15-md-02670-JLS-MDD Southern District of California, San Diego ORDER

ANTHONY REO,
Plaintiffs,

v.

BUMBLE BEE FOODS LLC; et al.,

Defendants-Appellants,

and

KING OSCAR, INC.; et al.,

Defendants.

[Filed April 28, 2021]

Before: KLEINFELD, HURWITZ, and BUMATAY, Circuit Judges.

A judge of this court has called for a vote to determine whether this case should be reheard en banc. The parties are directed to file simultaneous briefs setting forth their respective positions as to whether this case should be reheard en banc. The parties should specifically discuss whether Federal Rule of Civil Procedure 23(b)(3) requires a district court to find that no more than a "de minimis" number of class members are uninjured before certifying a class. The briefs shall not exceed 15 pages or 4,200 words and shall be filed within twenty-one (21) days of the date of this order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., Beverly Youngblood, Pacific Groservice, Inc., dba Pitco Foods, Capitol Hill Supermarket, Louise Ann Davis Matthews, James Walnum, Colin Moore, Jennifer A. Nelson, Elizabeth Davis-Berg, Laura Childs; Nancy Stiller; Bonnie Vanderlaan; Kristin Millican; Trepco Imports and Distribution, Ltd.; Jinkyoung Moon; Corey Norris; Clarissa Simon; Amber Sartori; Nigel Warren; Amy Joseph; Michael Juetten; Carla Lown; Truyen Ton-Vuong, aka David Ton; A-1 Diner; Dwayne Kennedy; Rick Musgrave; Dutch Village Restaurant; Lisa Burr; Larry Demonaco; Michael Buff; Ellen Pinto; Robby Reed; Blair Hysni; Dennis Yelvington; Kathy Durand Gore; Thomas E. Willoughby III; Robert Fragoso; Samuel Seidenburg; Janelle Albarello; Michael Coffey; Jason Wilson; Jade Canterbury; Nay Alidad; Galyna Andrusyshyn; Robert Benjamin; Barbara Buenning; Danielle Greenberg; Sheryl Haley; Lisa Hall; Tya Hughes; Marissa Jacobus; Gabrielle Kurdt; Erica Pruess; Seth Salenger; Harold Stafford; Carl Lesher; Sarah Metivier Schadt; Greg Stearns; Karren Fabian; Melissa Bowman; Vivek Dravid; Jody Cooper; Danielle Johnson; Herbert H. Kliegerman; Beth Milliner; Liza Milliner; Jeffrey Potvin; Stephanie Gipson; Barbara Lybarger; Scott A. Caldwell; Ramon Ruiz;

Thyme Cafe & Market, Inc.; Harvesters Enterprises, LLC; Affiliated Foods, Inc.; Piggly Wiggly Alabama Distributing Co., Inc.; Elizabeth Twitchell; Tina Grant; John Trent; Brian Levy; Louise Adams; Marc Blumstein; Jessica Breitbach; Sally Crnkovich; Paul Berger; Sterling King; Evelyn Olive; Barbara Blumstein; Mary Hudson; Diana Mey; Associated Grocers of New England, Inc.; North Central Distributors, LLC; Cashwa Distributing Co. of Kearney, Inc.; URM Stores, Inc.; Western Family Foods, Inc.; Associated Food Stores, Inc.; Giant Eagle, Inc.; McLane Company, Inc.; Meadowbrook Meat Company, Inc.; Associated Grocers, Inc.; Bilo Holding, LLC; Winndixie Stores, Inc.; Janey Machin; Debra L. Damske; Ken Dunlap; Barbara E. Olson; John Peychal; Virginia Rakipi; Adam Buehrens; Casey Christensen; Scott Dennis; Brian Depperschmidt; Amy E. Waterman; Central Grocers, Inc.; Associated Grocers of Florida, Inc.; Benjamin Foods LLC; Albertsons Companies LLC; H.E. Butt Grocery Company; Hyvee, Inc.; The Kroger Co.; Lesgo Personal Chef LLC; Kathy Vangemert; Edy Yee; Sunde Daniels; Christopher Todd; Publix Super Markets, Inc.; Wakefern Food Corp.; Robert Skaff; Wegmans Food Markets, Inc.; Julie Wiese; Meijer Distribution, Inc.; Daniel Zwirlein; Meijer, Inc.; Supervalu Inc.; John Gross & Company; Super Store Industries; W Lee Flowers & Co Inc.; Family Dollar Services, LLC; Amy Jackson; Family Dollar Stores,

Inc.; Katherine McMahon; Dollar Tree Distribution, Inc.; Jonathan Rizzo; Greenbrier International, Inc.; Joelyna A. San Agustin; Alex Lee, Inc.; Rebecca Lee Simoens; Big Y Foods, Inc.; David Ton; Kvat Food Stores, Inc., dba Food City; Affiliated Foods Midwest Cooperative, Inc.; Merchants Distributors, LLC; Brookshire Brothers, Inc.; Schnuck Markets, Inc.; Brookshire Grocery Company; Kmart Corporation; Certco, Inc.; Rushin Gold, LLC, dba The Gold Rush; Unified Grocers, Inc.; Target Corporation; Simon-Hindi, LLC; Fareway Stores, Inc.; Moran Foods, LLC, dba Save-A-Lot; Woodman's Food Market, Inc.; Dollar General Corporation; Sam's East, Inc.; Dolgencorp, LLC; Sam's West, Inc.; Krasdale Foods, Inc.; Walmart Stores East, LLC; CVS Pharmacy, Inc.; Walmart Stores East, LP; Bashas' Inc.; Wal-Mart Stores Texas, LLC; Marc Glassman, Inc.; Wal-Mart Stores, Inc.; 99 Cents Only Stores; Jessica Bartling; Ahold U.S.A., Inc.; Gay Birnbaum; Delhaize America, LLC; Sally Bredberg; Associated Wholesale Grocers, Inc.; Kim Craig; Maquoketa Care Center; Gloria Emery; Erbert & Gerbert's, Inc.; Ana Gabriela Felix Garcia; Janet Machen; John Frick; Painted Plate Catering; Kathleen Garner; Robert Etten; Andrew Gorman; Groucho's Deli of Five Points, LLC; Edgardo Gutierrez; Groucho's Deli of Raleigh; Zenda Johnston; Sandee's Catering; Steven Kratky; Confetti's Ice Cream Shoppe; Kathy Lingnofski; End Payer Plaintiffs; Laura Montoya; Kirsten

Peck; John Pels; Valerie Peters; Elizabeth Perron; Audra Rickman; Erica C. Rodriguez, Plaintiffs-Appellees,

and

Jessica Decker, Joseph A. Langston, Sandra Powers, Grand Supercenter, Inc., The Cherokee Nation, US Foods, Inc., Sysco Corporation, Gladys, LLC, Spartannash Company, Bryan Anthony Reo, Plaintiffs,

v.

BUMBLE BEE FOODS LLC; StarKist Co.; Dongwon Industries Co., Ltd., Defendants-Appellants,

and

King Oscar, Inc.; Thai Union Frozen Products Pcl; Del Monte Foods Company; Tri Marine International, Inc.; Dongwon Enterprises; Del Monte Corp.; Christopher D. Lischewski; Lion Capital (Americas), Inc.; Big Catch Cayman LP, aka Lion/Big Catch Cayman LP; Francis T Enterprises; Glowfisch Hospitality; Thai Union North America, Inc., Defendants.

No. 19-56514

FILED August 03, 2021

5 F.4th 950

D.C. No. 3:15-md-02670-JLS-MDD, Southern District of California, San Diego

ORDER

THOMAS, Circuit Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc

pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion is vacated.

Judges McKeown, Wardlaw, Berzon, Owens, Miller, Collins, Bress, and Forrest did not participate in the deliberations or vote in this case.

U.S. Const. art. III, §§ 1-2

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

15 U.S.C. § 15

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for

dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28.

28 U.S.C. § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

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.

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

(1) *Certification Order*.

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

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

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

(2) *Notice*.

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

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

(i) the nature of the action;

(ii) the definition of the class certified;

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

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

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

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

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

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

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

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

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

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

(d) CONDUCTING THE ACTION.

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

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

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

(i) any step in the action;

(ii) the proposed extent of the judgment; or

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

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

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

(E) deal with similar procedural matters.

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

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

(1) *Notice to the Class.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to

individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

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

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

(i) forgoing or withdrawing an objection, or

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

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

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

States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

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

(A) must consider:

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

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

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

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

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

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

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

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

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only

if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

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

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

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

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

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

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

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