No. _____

# In the Supreme Court of the United States

META PLATFORMS, INC., FKA FACEBOOK, INC.,

*Petitioner*,

v.

DZ RESERVE; CAIN MAXWELL, DBA MAX MARTIALIS,

*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

In recent years, the Ninth Circuit has embraced a permissive approach to class actions that flouts Federal Rule of Civil Procedure 23 and this Court's precedent, and makes class certification the norm rather than the exception. This case implicates two key features of that approach.

First, the decision below announced a defendant-focused "common course of conduct" test for assessing predominance under Rule 23(b)(3). That test authorizes certification when the defendant makes the same allegedly fraudulent representations to all members of the class, while ignoring individualized issues bearing on essential elements of the claim, including materiality and reliance.

Second, the decision applied the Ninth Circuit's asymmetric abuse-of-discretion standard of appellate review, under which district court decisions certifying class actions are given "noticeably more deference" than decisions denying certification.

On each issue, the Ninth Circuit's approach sharply splits from other circuits and will attract forum-shopping plaintiffs seeking to certify sweeping, nationwide fraud class actions.

The questions presented are:

1. Whether the Ninth Circuit's "common course of conduct" test improperly dilutes Rule 23(b)(3)'s predominance requirement by ignoring differences among class members as to key elements of the claim.

2. Whether the Ninth Circuit's asymmetric standard of review violates Rule 23 by giving district court rulings granting class certification "noticeably more deference" than rulings denying class certification.

## RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Meta Platforms, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

## RELATED PROCEEDINGS

The proceedings directly related to this case are:

*DZ Reserve v. Meta Platforms, Inc.*, No. 22-15916, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 21, 2024; rehearing denied August 8, 2024.

*DZ Reserve v. Meta Platforms, Inc.*, No. 3:180-cv-04978-JD, U.S. District Court for the Northern District of California. Judgment entered March 29, 2022.

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## PETITION FOR A WRIT OF CERTIORARI

Meta Platforms, Inc., fka Facebook, Inc. ("Meta"), respectfully petitions 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 decision of the court of appeals (App.1a-54a) is published at 96 F.4th 1223. The court's denial of rehearing en banc (App.79a-80a) is unreported. The decision of the district court (App.55a-78a) is not published but available at 2022 WL 912890.

## JURISDICTION

The court of appeals entered judgment on March 21, 2024. App.1a-54a. Meta's rehearing petition was denied on August 8, 2024. App.79a-80a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RULES INVOLVED

Relevant rules are reproduced in the petition appendix. App.81a-82a.

## INTRODUCTION

Over a decade ago, the Ninth Circuit wrongly certified what was then "one of the most expansive class actions ever"—a nationwide class of 1.5 million Wal-Mart employees. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342 (2011). The certified class in this consumer-fraud case dwarfs the *Wal-Mart* class, sweeping in many millions of businesses, from multinational corporations to corner stores, that advertised through Meta over the course of nearly a decade. Plaintiffs allege that when Meta gave advertisers individualized estimates of the audience that met the criteria for their specially targeted ad campaigns, Meta misleadingly expressed those estimates—known as Potential Reach—as the number of potentially reachable *people*, rather than the number of potentially reachable *accounts*, for each campaign.

The Ninth Circuit found Rule 23(b)(3)'s stringent predominance requirement satisfied even though each individual class member received a unique, personalized Potential Reach estimate, with the discrepancy between people and accounts differing substantially as to each advertiser. These differences directly affect whether Meta's alleged conflation of "people" and "accounts" was objectively material as to each class member, and also whether each class member actually relied on the supposed misrepresentation when buying advertising.

Despite these individualized differences, the Ninth Circuit majority found predominance by applying its so-called "common course of conduct" test. App.1a-2a. That test focuses on the defendant's conduct, while discounting differences in how that

conduct affects individual class members. App.9a-18a. Here, the court concluded that the "'class [was] united by a common interest in determining whether [Meta's] course of conduct [was] in its broad outlines actionable.'" App.13a-14a. As Judge Forrest explained in dissent, such "a common but superficial thread connecting class members" falls far short of satisfying Rule 23(b)(3). App.40a (Forrest, J., dissenting in part).

The Ninth Circuit's decision in this case lacks any grounding in Rule 23 or this Court's precedent, and it implicates two important questions on which the circuits are sharply divided. This Court should now grant certiorari to resolve those questions.

*First*, the Ninth Circuit's "common course of conduct" test for predominance misinterprets Rule 23(b)(3) and ignores key differences among absent class members bearing on (1) whether the alleged common misrepresentation was material, and (2) whether individual class members actually relied on that misrepresentation. The Ninth Circuit's test shifts the focus of the predominance inquiry away from the similarities or dissimilarities between class members, and towards the conduct of the defendant. It also improperly subjects common-law fraud actions to the special rules courts have developed for assessing materiality and reliance in the very different context of "fraud-on-the-market" securities class actions.

The Ninth Circuit's approach diverges from at least three circuits that have squarely rejected the "common course of conduct" test and equivalent efforts to gloss over critical differences among class members. It also flouts the Advisory Committee's warning that "although having some common core, a

fraud case may be unsuited for treatment as a class action" if there was "material variation" as to "the kinds or degrees of reliance by the persons to whom [those misrepresentations] were addressed." Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment.

*Second*, the decision below applied the Ninth Circuit's one-sided standard of review giving "'noticeably more deference'" to district court decisions granting class certification than to those denying class certification. App.4a. That standard finds no support in Rule 23 or this Court's precedent, and it squarely conflicts with the evenhanded approach applied by all other courts of appeals except the Second Circuit.

This Court should now bring clarity to these critically important aspects of class action law. The Ninth Circuit's flawed ruling continues its broader trend of eroding Rule 23's bedrock requirements, bucking this Court's precedent, and departing from its sister circuits on critical issues of class certification. And because plaintiffs seeking to bring nationwide fraud class actions are frequently able to choose where to bring their claims, the Ninth Circuit's outlier status will invite forum shopping and "unleash a tidal wave of monstrously oversized classes designed to pressure and extract settlements" from defendant-businesses. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685, 692 (9th Cir. 2022) (en banc) (Lee, J., dissenting). Certiorari is needed to restore nationwide uniformity

in class action law, and bring the Ninth Circuit back in line with this Court's precedent.

## STATEMENT OF THE CASE

### A. Factual Background

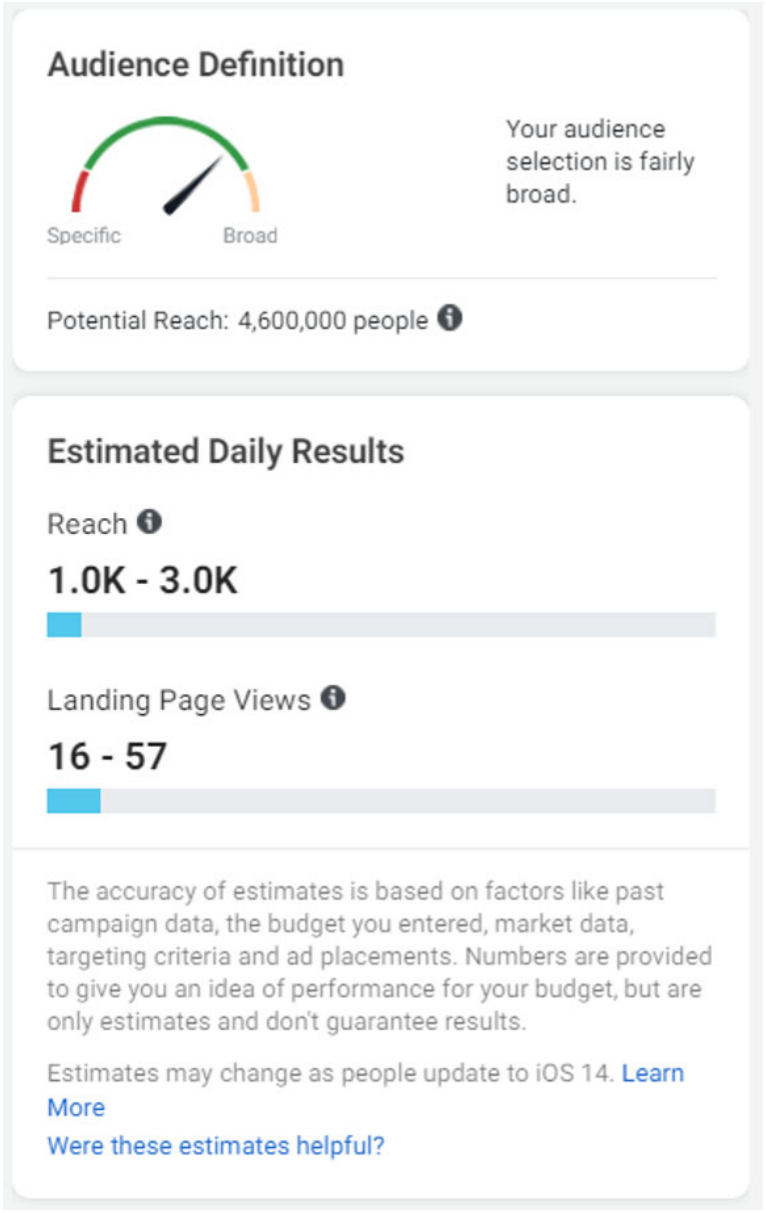
This is a class action lawsuit brought by two plaintiffs on behalf of a highly diverse class of at least three million advertisers who purchased ads through Meta's self-service ad creation interface, Ads Manager, between 2015 and the present day.

Plaintiffs' claims arise from one of various customized estimates Meta displayed on Ads Manager to help advertisers plan their campaigns. That estimate, known as "Potential Reach," was a "unique calculation" giving each advertiser an individualized "estimation of how many people are in an ad set's target audience." 2-ER-82-83 & Fig. 4; *see also* 2-ER-159. According to Plaintiffs, Meta calculated Potential Reach by estimating the number of active accounts in that audience. *See* 2-ER-89, 92. It is undisputed that in calculating Potential Reach estimates, Meta sought to deduplicate Instagram accounts linked to Facebook accounts, and to remove fake and abusive bot and spam accounts. App.2a-3a; 2-ER-161–63; 4-ER-365, 426–31, 433–44.

During the ad creation process, Ads Manager's dynamic display showed a default Potential Reach estimate, which then updated in real time as advertisers selected from hundreds of thousands of advertiser-specific targeting and placement criteria, including demographics (*e.g.*, age, gender, location), interests (*e.g.*, dogs, the San Francisco 49ers), and platform (*e.g.*, Facebook, Instagram). *See* 4-ER-422–24. Potential Reach estimates differed for each ad campaign based on the particular targeting and

placement criteria selected by each advertiser. *See* 5-ER-520, 531–34, 666–68; 4-ER-422–24, 428–29, 509; 2-ER-149–50.

Meta did not charge advertisers based on Potential Reach, 5-ER-525, and it cautioned that Potential Reach was *not* an estimate of how many people would actually see or otherwise take action in connection with an ad. 2-ER-177–79, 158. Instead, Potential Reach was simply an initial estimate of the number of users who met a given set of targeting criteria. By contrast, a different estimate called "Estimated Daily Results" displayed a "Reach" estimate of the number of people who would actually see an ad each day. *See* 2-ER-163; *see generally* 2-ER-94–146. An advertiser's Estimated Daily Results were virtually always substantially smaller than the Potential Reach estimate, because the metric turned on an advertiser's budget and other advertiser-specific factors impacting how frequently its ads would be displayed. *See, e.g.*, 5-ER-668. When creating a campaign, an advertiser saw the following interface that included Estimated Daily Results and Potential Reach, among other estimates:




2-ER-157.

After an ad launched, the advertiser could track actual results in real time, including the number of

displays of the ad that reached the intended audience and the number of times the ad was clicked on, in order to gauge their return on investment and immediately adjust their campaigns. 2-ER-169–73; 5-ER-517, 525–27, 536–37.

Although Meta took steps to increase the accuracy of Potential Reach as an estimate of the number of people who met an ad set's target audience, Potential Reach remained just that: an *estimate*. In prominent disclosures, Meta told advertisers that Potential Reach estimates were "not designed to match population or census estimates." 2-ER-176; *see also* 2-ER-82, 181; 5-ER-532. During the class period, Meta further disclosed that estimates "may differ" depending on "[h]ow many accounts are used per person," 2-ER-177; 2-ER-183, and that actions by the same person on separate accounts, as well as fake accounts, could influence Potential Reach estimates, 2-ER-178–79.

**B. The Class Certification Ruling**

1. In 2018, Plaintiffs brought this suit on behalf of millions of advertisers. They alleged that Meta had misleadingly "inflated" Potential Reach estimates by presenting them in terms of "people in an advertisement set's target audience," when the estimates actually corresponded to "accounts" rather than "people." 2-ER-80, 89, 92 (emphasis omitted). Plaintiffs posited that the "inflated" estimates caused advertisers to set higher budgets and buy more ads than they otherwise would have. 2-ER-93.

As relevant here, Plaintiffs asserted common-law claims of fraudulent misrepresentation and concealment under California law. They sought to certify a damages class of all United States residents

who purchased at least one advertisement on Meta's services from August 15, 2014 to the present. App.57a-58a.

Plaintiffs' proposed class was one of the largest fraud classes in the Ninth Circuit's history, encompassing millions of diverse advertisers ranging from sole proprietors to Fortune 500 companies—with a correspondingly wide range of advertising budgets. Meta opposed certification, explaining that class treatment was inappropriate because, among other reasons, Plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement. Meta explained that the class claims could not be proven through common evidence given substantial variation among advertisers with respect to critical elements of their claims, including falsity, materiality, and reliance.

As to falsity and materiality, Meta showed that although all class members allegedly received a Potential Reach estimate based on accounts not people, the discrepancy between accounts and people varied widely across the class (and by ad campaign). Meta's expert concluded that the discrepancy was *de minimis* for targeted ad campaigns, 4-ER-457–60, 465–70, while Plaintiffs' expert conceded it was as low as 10% for some class members and over 50% for others, 5-ER-638–40, 644–47. Given that five-fold variation in inflation, Meta explained, Plaintiffs could not prove falsity and materiality through common evidence.

Meta also presented evidence that reliance would require highly individualized inquiries, because advertisers were differently situated in important respects. For example, many advertisers made decisions based on "conversion" metrics, such as whether a person clicked through to their website or

purchased their product, and thus did not rely on Potential Reach. As one advertiser explained, "I do not use or rely on Potential Reach estimates because I am not focused on the number of people that my ads could potentially reach." 2-ER-97; *see also* 2-ER-99–146 (additional advertiser declarations).

Further, many large advertisers used sophisticated professional consultants and ad agencies with access to vast historical advertising data and additional expertise, and thus did not rely on Meta's Potential Reach estimates in making their purchasing decisions. *See* 5-ER-537–39. Tellingly, Plaintiffs' own expert found that 21% of advertisers actually set *lower* budgets when Potential Reach was *higher*—the opposite of what would be expected under Plaintiffs' theory that advertisers were increasing their budgets due to inflated Potential Reach estimates. 2-ER-54.

2. In March 2022, the district court certified Plaintiffs' proposed damages class, explaining that "all class members were exposed to a similar representation about the ability of Potential Reach to reach 'people,' namely unique individuals." App.67a. The court acknowledged Meta's argument that "the discrepancy between [the number of] people and accounts . . . varied across advertisers," altering the significance of Meta's description of Potential Reach across the class. App.68a. But, in the court's view, "the question of whether Meta made misrepresentations to all class members" was common because "Potential Reach was always expressed as a number of 'people,' and the discrepancy between people and accounts made the number inaccurate, even if the numerical value of the inaccuracy varied across advertisers." *Id.*

The court assessed materiality and reliance in a single paragraph. App.69a. It held broadly that in common-law fraud cases, those elements "do not necessarily undermine predominance and commonality" because a presumption of reliance arises under California law where the misrepresentation is material. *Id.*

**C. The Ninth Circuit's Ruling**

1. The Ninth Circuit granted Meta's Rule 23(f) petition for review, and a divided panel affirmed. App.1a-2a.

At the outset, the majority noted that the Ninth Circuit "'accord[s] the district court noticeably more deference'" when "reviewing an order granting class certification" than when reviewing a denial. App.4a. The majority remarked that fraud claims are "particularly well suited to class treatment under Rule 23(b)(3)" because they "often involve similar misrepresentations" to a "large number of victims." App.9a. The panel reasoned that the court's "'consistent[]'" practice of certifying securities-fraud claims "applies equally well to consumer protection laws" because consumers "often present a 'cohesive group.'" App.9a-10a.

The majority then applied what it called a "common course of conduct" test to assess commonality and predominance. The court reasoned that common questions predominated because Plaintiffs' claims "'stem[] from a "common course of conduct"'" by Meta—that is, Meta's "'centrally orchestrated strategy'" to defraud. App.10a. The majority concluded that Meta's alleged course of conduct in presenting Potential Reach as an estimate of people, rather than accounts, "clearly satisfied [the

circuit's] 'common course of conduct' test" for predominance. App.13a.

As to Meta's argument that the materiality of the alleged misrepresentations varied across advertisers, the majority cited this Court's decision in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 459-60 (2013), a securities-fraud class action, for the proposition that because materiality is "an objective inquiry," whether materiality exists must be "the same for every class member." App.12a. It thus deemed materiality a common question and asserted that "identification of a common question is all that is required" at "the class certification stage." App.12a-13a.

The majority was similarly categorical as to reliance. The majority held that "[b]ecause Meta communicated the same misrepresentation to all class members . . . the class is entitled to an inference of reliance" under California law. App.16a. Again citing a securities-fraud decision by this Court, the majority held that "[t]he *purpose* of the presumption of reliance is to avoid precluding all fraud class actions." App.17a (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988)) (emphasis added). Although acknowledging that defendants have the right to rebut California's presumption of reliance, the majority believed that "if the availability of rebuttal defeated commonality, the presumption would be pointless." *Id.* It thus refused to consider Meta's evidence indicating that advertisers did not uniformly rely on Potential Reach estimates. *Id.* The majority accordingly held that reliance presented a common question. App.18a.

Having determined that there was "a common question" that could be identified with respect to each

element, the majority concluded in a single paragraph that the district court properly held that common issues predominated. *Id.* In assessing predominance, the majority did not weigh the common questions it had identified against the individualized questions that could arise; nor did it consider whether class members would "prevail or fail in unison" with respect to the essential elements of their claims. *Amgen*, 568 U.S. at 460.

2. Judge Forrest dissented. She began by explaining that the majority's statement that consumer-fraud claims are "'particularly well suited'" for class treatment "runs in the face of the [Rule 23 Advisory] Committee's cautionary understanding" that the "class-action mechanism . . . often is *ill*-suited to fraud claims"—an understanding "that . . . sister circuits have consistently recognized." App.35a n.2 (Forrest, J., dissenting in part) (emphasis added) (quoting App.9a).

Applying this cautionary understanding, Judge Forrest determined that the questions of misrepresentation, materiality, and reliance each posed individualized issues. She noted that the fact that "Meta provided a common description of Potential Reach does not automatically establish that this description was a *misrepresentation* as to all class members," much less a material one. App.40a. Under class action law, she explained, "[p]redominance requires more than a common but superficial thread connecting class members." *Id.* And here, Meta's common description applied to estimates where the discrepancy between the number of people and accounts "range[d] from 1% to 50%," meaning that a reasonable factfinder "could conclude that some, but not all, Potential Reach calculations presented to the

class members were fraudulently misleading." App.42a, 44a.

Judge Forrest further challenged the majority's invocation of securities-fraud cases and its conclusion that "materiality always satisfies predominance because it is governed by an objective standard." App.46a. Judge Forrest explained that the rule that materiality generally does not present individualized issues in securities cases "makes sense" given that the allegedly fraudulent statements "are released to and impact the market" uniformly. *Id.* But "nothing in *Amgen* commands that materiality, no matter the context, necessarily is provable with class-wide evidence and, therefore, satisfies the predominance requirement." *Id.* To the contrary, even though materiality is an objective inquiry, the "proper focus" is on how a reasonable person would view a representation "received in [a] *specific* transaction[], based on the total mix of information available at the time of purchase." App.52a (citing *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 977-98 (1997)). That is why "California courts applying that state's law have recognized that materiality cannot be resolved on a class-wide basis where this issue inevitably depend[s] on individualized questions." App.46a (citing *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009)).

Here, Judge Forrest explained, "determining the objective perspective of a reasonable advertiser is made difficult by the breadth of Plaintiffs' proposed class," with "millions of advertisers of all types conducting advertising campaigns ranging from millions of dollars to tens of dollars." App.49a. She explained that the materiality analysis was further complicated by Meta's "evolving disclosures" and

advertisers' receipt of "individualized information beyond Potential Reach," including "Estimated Daily Reach." App.50a-52a. Because these varying disclosures impacted how advertisers understood Potential Reach, she concluded that materiality could not be resolved on a class-wide basis. App.50a (noting that this case was a "far cry" from "the objective class-wide materiality analysis that was appropriate in *Amgen*").

Likewise, as to reliance, Judge Forrest explained that the district court erred in applying California's presumption of reliance, without rebuttal, in light of individualized issues as to each advertiser's reliance on Potential Reach estimates. App.52a-54a.

3. The Ninth Circuit denied Meta's petition for panel rehearing and rehearing en banc. App.79a-80a. Judge Forrest would have granted rehearing.

## REASONS FOR GRANTING THE WRIT

This case implicates two important questions on which the Ninth Circuit has sharply diverged from this Court's precedent and that of its sister circuits. First, the decision below adopted a "common course of conduct" test for predominance that has no basis in this Court's case law and has been rejected by other circuits. Second, the Ninth Circuit applied a one-sided deference regime that stacks the deck in favor of class certification, in conflict with all other circuits (apart from the Second). Taken together, these legal rules erode Rule 23's critical limits on class certification and make the Ninth Circuit a magnet for baseless consumer-fraud class actions. This Court's intervention is needed to prevent forum shopping and clarify the proper standards governing Rule 23 certification.

## I. The Ninth Circuit's "Common Course Of Conduct" Test Warrants Certiorari

The Ninth Circuit's "common course of conduct" test focuses the predominance analysis on the defendant's alleged fraudulent conduct, while ignoring key differences as to how that conduct affects individual class members. In doing so, it departs from this Court's interpretation of Rule 23(b)(3) and splits from multiple other circuits and the Advisory Committee.

### A. The Ninth Circuit's Test Flouts This Court's Jurisprudence

1. Rule 23(b)(3) is "an 'adventuresome innovation'" that permits aggregation of claims where "'class-action treatment is not . . . clearly called for,'" subject to the Rule's "greater procedural protections." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011). Chief among those protections is Rule 23(b)(3)'s "demanding" predominance requirement, which mandates that a party seeking certification show that "'questions affecting only individual members'" do not predominate over questions common to the class. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (quoting Fed. R. Civ. P. 23(b)(3) advisory committee note to 1966 amendment).

Accordingly, while Rule 23(a)'s commonality requirement requires only a single common question of law or fact (*i.e.*, a question that can be answered on behalf of the entire class with common evidence), *Wal-Mart*, 564 U.S. at 359, predominance asks whether such common questions predominate over, or outweigh, individualized ones. The focus of this balancing inquiry is whether the proposed class is "sufficiently cohesive to warrant adjudication by

representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). It is thus insufficient to look only to the defendant's conduct; instead, a sufficiently cohesive class is one where class members "will prevail or fail in unison"—based on common evidence—as to essential elements of their claims. *Amgen*, 568 U.S. at 460.

For common-law fraud claims, Rule 23(b)(3) demands consideration of how a defendant's alleged misrepresentation would be "understood" by each individual class member in the context in which they received it. App.52a (Forrest, J., dissenting in part); *see, e.g.*, *Grovatt v. St. Jude Med., Inc. (In re St. Jude Med., Inc.)*, 522 F.3d 836, 839 (8th Cir. 2008) (predominance lacking where consumers received alleged misrepresentation in "different ways"). Such claims cannot be established without proof that the misrepresentation was objectively material in the particular circumstances of "the transaction in question." Restatement (Second) of Torts § 538 (1977); *see also* App.51a-52a (Forrest, J., dissenting in part). Nor can fraud claims be established absent proof that each plaintiff actually relied on the misrepresentation.

Given the need for such individualized plaintiff-by-plaintiff inquiries, courts and commenters alike have long recognized that fraud cases are "often . . . ill-suited" to class treatment. App.35a (Forrest, J., dissenting in part); *see, e.g.*, *Hudock v. LG Elecs. U.S.A., Inc.*, 12 F.4th 773, 776 (8th Cir. 2021) ("[F]raud cases often are unsuitable for class treatment . . . ."). As the Rule 23 Advisory Committee explained, even where a fraud case has "some common core" of alleged wrongdoing, "material variation in the representations made or in the kinds

or degrees of reliance by the persons to whom they were addressed" may render the case unfit to proceed as a class action. Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment; *see also Miller v. National City Bank of N.Y.*, 166 F.2d 723, 728 (2d Cir. 1948) (cited by Advisory Committee, and rejecting class-action treatment because "[r]eliance is a factor personal to each [victim]").

In short, even where *commonality* under Rule 23(a) may be satisfied because the defendant's conduct presents some common question, *predominance* will often be lacking due to individualized questions about the effect of that conduct on each particular class member.

2. The Ninth Circuit's defendant-focused "common course of conduct" test collapses this distinction between commonality and predominance, and allows certification even when there are significant differences among class members.

Instead of asking whether common questions predominate as to the *plaintiffs'* claims, the Ninth Circuit asks whether the *defendant* engaged in a "common course of conduct." App.10a-18a. According to the court, individualized "'[d]ifferences in class members' positions'" do not matter, so long as "'the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable.'" App.13a-14a. But that common interest does not and cannot prove predominance, let alone substitute for the common evidence necessary to prove the specific elements of the plaintiffs' claims. If it did, nearly every fraud class would be certified. After all, any competently drafted class action complaint will identify a common course of conduct by the defendant: the asserted fraud. But that says

nothing about whether the essential elements of the plaintiffs' claims will "prevail or fail in unison." *Amgen*, 568 U.S. at 460.

In papering over individualized variation in the class members' claims, the Ninth Circuit analogized heavily and uncritically to securities law, where materiality and reliance virtually always raise common questions. As to materiality, for example, the Ninth Circuit relied on *Amgen* to conclude that because materiality is an objective inquiry, it necessarily raises a common question. App.12a-13a.

That statement might make sense as to securities class actions proceeding on the fraud-on-the-market theory. In such cases, the materiality analysis focuses on whether the company's misstatement was material to the market as a whole, such that it was capable of affecting the company's stock price. *Amgen*, 568 U.S. at 459. But the same logic does not carry over to common-law fraud claims. Although materiality remains an objective inquiry, it turns on the particular circumstances of each representation. As the Restatement explains, materiality depends on whether "a reasonable man would attach importance to [the misrepresentation] in determining his choice of action *in the transaction in question*." Restatement (Second) of Torts § 538(2)(a) (emphasis added); *see also Engalla*, 15 Cal. 4th at 977.

Because this inquiry is transaction-specific, whether a common representation is uniformly material across an entire proposed class will depend on whether there were differences in how the misrepresentation was made or received as to individual class members. Indeed, California courts have regularly held that materiality does *not* present a common issue where victims were differently

situated in ways that render the statements more or less objectively significant to different consumers.[1] For example, individuals who saw different disclosures would objectively perceive the statement in different ways. The Ninth Circuit concluded otherwise by porting over the rules governing fraud-on-the-market securities class actions, App.12a-13a, without considering how common-law fraud claims are different.

The Ninth Circuit made similar errors with respect to reliance. Actual reliance is an element of both federal securities fraud and California common-law fraud. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014); *Conroy v. Regents of the Univ. of Cal.*, 45 Cal. 4th 1244, 1256 (2009). In addressing the latter, the Ninth Circuit uncritically applied case law governing the former, without considering the significant differences between the two types of claims.

In the securities-fraud context, courts may presume reliance based on the "'fraud-on-the-market' theory, which holds that 'the market price of shares traded on well-developed markets reflects all publicly

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[1] *See, e.g.*, *In re Vioxx*, 180 Cal. App. 4th at 132, 134 (materiality of drug-related representations not common where differences in "resources and the ability to conduct [one's] own research" rendered materiality "a completely different inquiry" across consumer populations and where physicians considered "myriad sources" and "patient-specific factors" in making prescribing decisions); *Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544, 565-66 (2011) (materiality of representation as to permanence of insurance not common where "many" class members did "not have an expectation one way or the other as to policy permanence" and purchased insurance for different reasons).

available information, and, hence, any material misrepresentations.'" *Halliburton*, 573 U.S. at 268 (quoting *Basic*, 485 U.S. at 245-46). That presumption of reliance is rebuttable. *Id.* But as this Court explained in *Halliburton*, the theoretical possibility of rebuttal does not preclude class certification, because outlier investors who do not rely on the stock price in their decisionmaking are exceedingly rare. *Id.* at 273, 277. While it is possible to imagine such an investor—say, "the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning," *Amgen*, 568 U.S. at 469—the mere possibility that a defendant could "pick off" those class members through individualized rebuttal does not "cause individual questions to predominate," *Halliburton*, 573 U.S. at 276.

Here, the Ninth Circuit imported *Halliburton*'s conclusion directly into the consumer-fraud context. The Ninth Circuit acknowledged that California's reliance presumption is rebuttable, but it held that, under *Halliburton*, rebuttal evidence was irrelevant to the predominance analysis. App.16a-17a. In doing so, it ignored the fact that—unlike investors who almost uniformly rely on price when deciding whether to buy stock—consumers purchase goods and services for vastly different reasons. There is often "'no single, logical explanation'" for consumers' behavior. 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 5:55 (20th ed. Oct. 2023 online update). That is undoubtedly true here, where the class includes an astounding range of advertisers with vastly different budgets (an arguably even more diverse group than consumers of standard retail products). And where, as here, the defendant can

present individualized evidence rebutting the presumption of reliance for substantial portions of the class, doing so will necessarily overwhelm the common issues in the case.

The Ninth Circuit categorically treats reliance as a class-wide issue whenever California's presumption of reliance applies. It thus adopts a rule of law that permits class certification even though the record evidence shows that the case will necessarily devolve into thousands of mini-trials on individual class members' reliance. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454 (2016) (explaining that under the Rules Enabling Act, defendants must be afforded the opportunity to "litigate" their "defenses to individual claims"). That result is fundamentally incompatible with Rule 23.

In short, the Ninth Circuit's test provides a shortcut for certifying sprawling consumer-fraud cases whenever a defendant has allegedly engaged in a centrally orchestrated scheme. So long as a plaintiff can identify a common aspect of a defendant's statement, class certification is virtually assured. That common aspect automatically renders materiality "common," and it also triggers a functionally irrebuttable presumption of reliance that eliminates individualized issues from the predominance calculus. As a result, no defendant could ever defeat class certification once a "common course of conduct" is found. The Ninth Circuit's test thus systematically glosses over the critical Rule 23(b)(3) inquiry: whether the class is "sufficiently cohesive" to allow for the sensible, efficient, and fair adjudication of millions of claims at once. *Amchem*, 521 U.S. at 623.

### B. The Ninth Circuit's Test Diverges From Multiple Circuits

The Ninth Circuit's "common course of conduct" test diverges from the tests of multiple circuits, all of which have recognized the difficulties of certifying consumer-fraud class actions where there are material differences among class members. Specifically, the Second and Eighth Circuits have rejected the "common course of conduct" approach to predominance, while the Fourth and Eighth Circuits have rejected the Ninth Circuit's related assertion that a state-law presumption of reliance automatically satisfies predominance.

#### 1. The Second And Eighth Circuits Reject The Defendant-Centric "Common Course Of Conduct" Approach

Contrary to the Ninth Circuit, the Second Circuit has squarely held that "a common course of conduct is not enough to show predominance" in a consumer-fraud action, because "a common course of conduct is not sufficient to establish liability of the defendant to any particular plaintiff." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002) (Sotomayor, J.).

In *Moore*, the plaintiffs submitted "substantial evidence" that the defendant had engaged in a "centralized sales scheme" to sell life insurance by making it seem like a financial investment akin to an IRA rather than, "simply, life insurance." *Id.* at 1255-56. Despite this common scheme, then-Judge Sotomayor's opinion for the Second Circuit concluded that class certification was not appropriate.

As she explained, proof of a "common course of conduct" is not enough to establish liability on a class-wide basis. *Id.* "Rather, to recover for a defendant's

fraudulent conduct, even if that fraud is the result of a common course of conduct, each plaintiff must prove [1] that he or she personally received a material misrepresentation, and [2] that his or her reliance on this misrepresentation was the proximate cause of his or her loss." *Id.* at 1253. Because the defendant's insurance brokers had "not adopt[ed] a materially uniform approach in their individual sales presentations," different class members had received different representations. *Id.* at 1256. Thus, individualized trials would be necessary to determine whether each class member had received a material misrepresentation on which he or she actually relied.

The Second Circuit's analysis sharply diverges from the Ninth Circuit's view that allegations of a defendant's "'centrally orchestrated strategy'" to commit fraud establish predominance, even where the evidence shows that different class members received the alleged misrepresentation in different contexts that bear on materiality and reliance in different ways. App.10a. By ignoring the ways in which different class members "personally received" Meta's alleged misrepresentations in this case, the decision below directly conflicts with the Second Circuit's governing standard. *Moore*, 306 F.3d at 1255.

The Eighth Circuit has likewise rejected the Ninth Circuit's "common course of conduct" test. In *St. Jude*, the Eighth Circuit held that even where there is a "common core" to a fraud claim, individualized questions "concerning what representations were received, and the degree to which individual persons relied on the representations," may still prevent class certification. 522 F.3d at 838. There, the plaintiffs alleged that the

defendant hospital had made misrepresentations regarding a heart valve. The hospital responded by submitting evidence that many class members did not recall hearing the alleged misrepresentations and many doctors did not rely on the alleged misrepresentations in recommending the heart valves. *Id.* at 838-39. The Eighth Circuit concluded that these individualized issues prevented class certification. *Id.*

Again, the Ninth Circuit's decision stands in sharp contrast. Because the Ninth Circuit required only that Plaintiffs identify a "common course of conduct," the court justified ignoring myriad individualized issues, including testimony from many class members that they did not rely on Potential Reach at all, and evidence that the magnitude of the discrepancy between accounts and people varied drastically from class member to class member, impacting materiality. Had Plaintiffs brought this case in the Second or Eighth Circuits, these individualized issues would have prevented class certification. That divergence warrants this Court's intervention.

### 2. There Is A 3-2 Split On Whether A State-Law Presumption Of Reliance Automatically Satisfies Commonality And Predominance

The Ninth Circuit's "common course of conduct" approach also implicates a circuit conflict over whether a state-law presumption of reliance automatically satisfies commonality and predominance in a consumer-fraud class action. The Fourth and Eighth Circuits hold that a state-law presumption of reliance does *not* automatically render

reliance a common question. *See St. Jude*, 522 F.3d at 838-42; *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 434-38 (4th Cir. 2003). By contrast, the Ninth, Sixth, and Eleventh Circuits hold that a state-law presumption of reliance *does* automatically make reliance a common question. *See* App.16a-18a; *Tershakovec v. Ford Motor Co.*, 79 F.4th 1299 (11th Cir. 2023); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015).

In *St. Jude*, the district court certified a class based on Minnesota's presumption of reliance despite the defendant's evidence that numerous patients and doctors did not actually rely on the alleged misrepresentations regarding the heart valves. 522 F.3d at 839. The Eighth Circuit reversed. Considering the hospital's rebuttal evidence, the court concluded that class certification was not appropriate, because the district court would have to proceed on a "plaintiff-by-plaintiff" basis to determine whether the presumption had been rebutted in each individual case. *Id.* at 840-42. Thus, common questions did not predominate. The Eighth Circuit has continued to apply this holding in subsequent cases. *See, e.g.*, *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 985 (8th Cir. 2021) (relying on *St. Jude* and explaining that "fraud cases are ill-suited for class actions because they require individualized findings on whether the plaintiffs actually relied on the alleged misrepresentation").

Similarly, in *Gunnells*, the Fourth Circuit held that a district court had abused its discretion in certifying a fraud class action because "even if actual, justifiable reliance could be presumed" under state law, the defendants "would still be permitted to introduce evidence to rebut this presumption with

respect to individual plaintiffs," rendering reliance an individualized question. 348 F.3d at 434-38. Thus, the Fourth Circuit concluded that the mere existence of a state-law presumption of reliance does not automatically suffice to show commonality and predominance.

By contrast, the Ninth, Sixth, and Eleventh Circuits assert that a presumption of reliance automatically renders reliance a common question for consumer-fraud cases. In this case, the Ninth Circuit held that reliance was a common question and that common questions predominated because California's presumption of reliance applied. App.16a-18a. The court acknowledged Meta's right to rebut that presumption, but concluded that no rebuttal evidence could ever render the question individualized, reasoning that "if the availability of rebuttal defeated commonality, the presumption would be pointless." App.17a. Thus, the court held that because California's presumption of reliance applied, commonality and predominance were satisfied.

Similarly, in *Rikos*, the Sixth Circuit concluded that because consumers had all been exposed to a material misrepresentation that the defendant's supplement promoted digestive health, "reliance and causation" could be presumed under state law and therefore presented common questions. 799 F.3d at 512-18. The court held that "individual issues would not predominate" given that a jury could "'legitimate[ly] infer[] [reliance class-wide] based on the nature of the alleged misrepresentations at issue.'" *Id.* at 518 (alterations in original).

Finally, in *Tershakovec*, a divided Eleventh Circuit panel concluded that reliance was a common question supporting a finding of predominance where

a state-law presumption of reliance applied. 79 F.4th at 1314-15. Facing a class action with plaintiffs from seven different states, the majority held that class certification was appropriate in the states where reliance was not a required element of the fraud claim or where a presumption of reliance applied. *Id.* at 1310-12, 1314-15. Judge Tjoflat disagreed, emphasizing that even where a presumption applied, "each individual case would still need to be tried by a jury to determine (1) if [the defendant] presented sufficient evidence to rebut the presumption, and (2) if each individual plaintiff ultimately proved his or her case." *Id.* at 1331 (concurring in part and dissenting in part).

Thus, the circuits are split over whether a state-law presumption of reliance automatically suffices to show commonality and predominance. In the Ninth, Sixth, and Eleventh Circuits, the presumption alone renders reliance a "common" issue—removing reliance as an obstacle to certification no matter the extent of the differences among class members. By contrast, in the Fourth and Eighth Circuits, sufficient rebuttal evidence can defeat class certification. This divergence warrants this Court's intervention.

### C. This Case Perfectly Illustrates The Pitfalls Of The Ninth Circuit's Test

This case is an ideal vehicle for reviewing the Ninth Circuit's "common course of conduct" test for predominance. Indeed, the facts here starkly demonstrate how that test ignores compelling evidence of individualized differences among class members and allows certification even though neither materiality nor reliance can be determined through common evidence on a class-wide basis. This Court

should seize this opportunity to reject the Ninth Circuit's approach and clarify how the predominance inquiry should work.

As to materiality, the significant differences in the context in which each class member viewed their Potential Reach estimate—that is, each "*specific* transaction[]" at issue, App.52a (Forrest, J., dissenting in part)—necessarily impacted whether Meta's alleged conflation of people and accounts was materially misleading.

Judge Forrest meaningfully engaged with the actual evidence in the record and recognized that describing an advertiser's Potential Reach estimate in terms of "people" instead of "accounts" is materially "misleading only if there is a significant deviation between the number of accounts and the number of people that may see ads." App.37a; *see also* App.48a & n.10. "If these two populations neatly correlate, characterizing Potential Reach as a calculation of people is accurate." App.37a. And here, "the class includes advertisers who received targeted Potential Reach estimates with a discrepancy between people and accounts that could range from 1% to 50%." App.42a. In addition, the class includes advertisers who saw varying disclosures regarding Potential Reach, from the statement that Potential Reach was "not designed to match population or census estimates," to later disclosures that Potential Reach depended on "[h]ow many accounts are used per person" and that "the presence of fake accounts" could impact Potential Reach estimates. App.43a (alteration in original) (quoting record).

As Judge Forrest noted, these differences make it impossible to consider materiality on a class-wide basis, because "the factfinder could conclude that

some, but not all" class members received a materially misleading statement. App.44a. For example, a jury might conclude that an objective, reasonable advertiser who saw a Potential Reach estimate of 1,000 "people," with a 20% discrepancy from the number of accounts, would find Meta's misrepresentation material, whereas an advertiser who saw a Potential Reach estimate of millions of "people," with only a 2% discrepancy, might not. App.43a-45a. There is no way to ask whether the divergence between the terms "people" and "accounts" is material in the abstract; materiality necessarily depends on the extent of the numerical divergence.

Moreover, each advertiser's objective perception of whether the particular divergence in their case was material would further depend on the disclosures they saw. For instance, a reasonable advertiser who knew that Potential Reach could be inflated by the presence of fake or duplicate accounts would understand that the estimate would not be a perfectly precise calculation of the target audience size. Again, the factfinder could reach disparate results as to different class members. Accordingly, materiality cannot be determined "in one stroke" for all class members, *Wal-Mart*, 564 U.S. at 350, and the class members' claims as to materiality will not necessarily "prevail or fail in unison." App.40a (Forrest, J., dissenting in part) (quoting *Amgen*, 568 U.S. at 460).

The same is true for reliance. It was undisputed that many members of the class did not actually rely on the alleged misrepresentations in making their ad purchases. *See, e.g.*, 2-ER-94–146. As one Meta advertiser testified, "I do not use or rely on Potential Reach estimates because I am not focused on the number of people that my ads could potentially

reach . . . . What I care about with my Facebook ads is whether people are engaging with my posts and coming to my classes or events . . . ." 2-ER-97. That advertiser is far from an outlier: As Meta showed, many advertisers want their ads delivered to users most likely to take desired actions, like clicking through to a website and making a purchase, and they focus on metrics tracking such click-throughs or purchases over potential reach. *See* 5-ER-528–31, 575–79; 4-ER-406–07, 420–22; *see also* 2-ER-135–36.

Plaintiffs' own expert analysis confirmed that reliance varies substantially within the class. Although Plaintiffs alleged that advertisers increased their budgets due to inflated Potential Reach estimates, their expert initially found that nearly half of advertisers increased their budgets if shown a *lower* Potential Reach. 2-ER-77. And even after modifying the analysis to try to avoid this result, the expert still found that 21% of advertisers set *lower* budgets when Potential Reach was *higher*. 2-ER-54. That is the opposite reaction one would expect if the advertisers relied on Potential Reach to set their budgets. And because Meta is entitled to litigate the actual reliance of each class member, individualized issues will unquestionably overwhelm the class.

The plaintiff-by-plaintiff differences as to materiality and reliance should have—and, in other circuits, would have—precluded class certification. *See supra* at 23-28. But, under the Ninth Circuit's flawed approach to Rule 23(b)(3), the decision below instead upheld a sprawling class of "millions of advertisers of all types." App.49a (Forrest, J., dissenting in part). If a class with this many differences can be certified, it is hard to imagine any fraud class that would not be certified under the

Ninth Circuit's test. The sweeping implications of the decision below—and the disparity between the circuits—confirm the need for this Court's review.

## II. The Ninth Circuit's Asymmetric, Pro-Plaintiff Standard Of Review Warrants Certiorari

This case also implicates an entrenched circuit split between the Ninth and Second Circuits, on the one hand, and all other circuits, on the other, over the standard of review for class certification decisions. The Ninth and Second Circuits apply an asymmetric abuse-of-discretion test under which a ruling granting class certification receives "'noticeably more deference'" than one rejecting certification. App.4a. This Court should reject that test.

1. The Second Circuit originally adopted its asymmetric standard of review in *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (per curiam). The Ninth Circuit followed suit nearly two decades later in *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010). But in the years since, neither court has provided any explanation for the rule whatsoever. *See, e.g.*, *White v. Symetra Assigned Benefits Serv. Co.*, 104 F.4th 1182, 1191 (9th Cir. 2024) (citing standard uncritically and without justification); *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 (9th Cir. 2023) (same); *see also Salatino v. Chase*, 939 A.2d 482, 485 & n.2 (Vt. 2007) (rejecting Second Circuit rule and noting that no case offers "any reason that a denial of class certification should be scrutinized more closely than a grant").

No such justification exists. Rule 23 is "neutral" between the parties, granting plaintiffs and

defendants an equal opportunity to challenge a district court's certification order. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 740 (2013); David C. Miller, *Abuse of Discretion and the Sliding Scale of Deference: Restoring the Balance of Power Between Circuit Courts and District Courts for Rule 23 Class Certification Decisions in Oil and Gas Royalty Litigation*, 103 Iowa L. Rev. 1811, 1825 (2018). There is no textual basis for systematically favoring class-action plaintiffs.

Indeed, the notion that a district court decision granting certification should categorically receive less scrutiny than a decision denying certification turns Rule 23 on its head. Class adjudication is the "exception," not the rule, in an adversarial system designed to protect the rights of individual litigants. *Wal-Mart*, 564 U.S. at 348. Yet by easing the standard of review when the district court grants class certification, the Ninth and Second Circuits treat class certification as the rule rather than the exception. That is contrary to this Court's repeated command that courts must conduct "a rigorous analysis" to determine whether "the prerequisites of Rule [23] have been satisfied." *Comcast Corp.*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350-51).

Unsurprisingly, commentators have widely criticized the Second and Ninth Circuits' approach as having "no[ ] apparent" justification, Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. Pa. L. Rev. 1897, 1903-04 (2014), and being "a vestige of [a] certification-friendly approach" that "must be considered obsolete under the Supreme Court's recent pronouncements," 2 *McLaughlin on Class Actions* § 7:15. Indeed, a recent Second Circuit

panel has even questioned the test, acknowledging that it seems to have arisen "from a misreading of earlier Second Circuit cases" and is "out of step with recent Supreme Court authority." *In re Petrobras Sec.*, 862 F.3d 250, 260 n.11 (2d Cir. 2017).

2. The Ninth and Second Circuits stand alone in applying their one-sided standard. Every other circuit applies an evenhanded abuse-of-discretion test that does not vary depending on whether the district court granted or denied certification. *See, e.g.*, *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) ("We review the grant or denial of class certification for abuse of discretion."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (same); *Bridging Communities, Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1124 (6th Cir. 2016) (same); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019) (same).

The circuit split is widely recognized in the leading class-action treatises. *See* 3 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 7.53 & n.7 (6th ed. June 2024 online update) ("Two circuits (the Second and the Ninth) show more deference to a grant of class certification than a denial of class certification."); 2 *McLaughlin on Class Actions* § 7.15 & nn.30-32 (noting the Second and Ninth Circuits' rule and stating that "[o]ther courts do not employ a less deferential standard to a denial of certification"); *see also* 5 James Wm. Moore, *Moore's Federal Practice – Civil* § 23.88[5] & n.43 (3d ed. 2024 online). Scholars have highlighted the split as well. *See* Wolff, *supra*, at 1903-04; Miller, *supra*, at 1828.

Only this Court can resolve this entrenched circuit conflict. Although a Second Circuit panel questioned

this asymmetric standard of review, *In re Petrobras Sec.*, 862 F.3d at 260 n.11, other panels continue to apply the test without criticism or scrutiny. *See Haley v. Tchrs. Ins. & Annuity Ass'n of Am.*, 54 F.4th 115, 120 (2d Cir. 2022); *Barrows v. Becerra,* 24 F.4th 116, 130 (2d Cir. 2022). Meanwhile, the Ninth Circuit shows no sign of correcting course, and has treated the standard as outcome-determinative. *See, e.g.*, *Owino v. CoreCivic, Inc.*, 60 F.4th 437, 441, 444 (9th Cir. 2022) (emphasizing the "significant deference we owe to the district court when reviewing a class certification" and highlighting the "highly deferential" standard of review). This Court's intervention is warranted.

## III. The Ninth Circuit's Misinterpretations Of Rule 23 Are Important And Should Be Addressed In This Case

1. The Ninth Circuit's distorted interpretations of Rule 23 are critically important and warrant this Court's review. On both questions presented, the Ninth Circuit has adopted standards that make it far too easy to certify a class action—virtually eliminating the predominance requirement for consumer-fraud class actions and declaring such actions "particularly well suited to class treatment under Rule 23(b)(3)," App.9a, and then tipping the scales in favor of upholding class certification on appeal through a skewed standard of review.

Those holdings will have striking consequences if left undisturbed. The Ninth Circuit is the federal judiciary's leading class-action court. In recent years, the Ninth Circuit has resolved more than one third of all Rule 23(f) petitions filed in the United States. *See*

Duane Morris LLP, *Class Action Review 2024* at 52, https://online.flippingbook.com/view/954167557/61.

The Ninth Circuit is also quickly becoming a "'magnet jurisdiction[]'" for consumer-fraud class actions "due to [its] tendency to issue favorable rulings on class certification motions." Duane Morris LLP, *The Consumer Fraud Class Action Review – 2023* at 9 (2023), https://online.flippingbook.com/view/371890845/10. Its resolutions are disproportionately plaintiff-friendly. The Ninth Circuit grants more Rule 23(f) petitions from plaintiffs than defendants. Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. App. Prac. & Process 283, 310 tbl. 5 (2022).[2] And on the merits, the Ninth Circuit is more likely to reverse when a plaintiff is the appellant. *See id.* at 311 tbl. 6.

Many Ninth Circuit judges have sounded alarms over the court's permissive certification standards, warning that potentially "catastrophic" consequences and "staggering" settlements will follow from the court's failure to rigorously apply the requirements of Rule 23. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (en banc) (Lee, J., dissenting); *see also Owino*, 60 F.4th at 456 (VanDyke, J., dissenting from denial of rehearing en banc, joined by five judges) (arguing that panel majority "created a new rule of commonality" and "chart[ed] an attractive and sure-to-be-followed path for those seeking an easy class action certification"); *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 962-63 (9th Cir. 2019)

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[2] Indeed, the Ninth Circuit is less likely than nearly every other circuit to grant a Rule 23(f) petition submitted by a defendant. *See* Lammon, *supra,* at 310 tbl. 5.

(Ikuta, J., dissenting) (chiding panel majority for "attempting to sidestep" predominance analysis).

Those predictions are not fanciful. In 2023, district courts in the Ninth Circuit oversaw five of the top ten consumer-fraud class-action settlements of the year (in terms of dollar value), with the largest settlement overseen by the Northern District of California. *Class Action Review 2024*, *supra*, at 144. Similarly, in 2022, courts in the Ninth Circuit oversaw three of the top ten settlements, with the largest settlement once again arising out of the Northern District of California. *The Consumer Fraud Class Action Review – 2023*, *supra*, at 22-23.

The Ninth Circuit's divergence from other circuits on both questions presented here cements its position as the premier location for forum-shopping plaintiffs seeking to certify nationwide consumer-fraud class actions. And by pronouncing fraud cases "particularly well suited to class treatment under Rule 23(b)(3)," App.9a, the decision below sends a clear signal to district courts that certification of fraud classes is the rule, not the exception, in the Ninth Circuit. That approach will unquestionably exacerbate the trend of forcing businesses to settle meritless cases brought in the Ninth Circuit rather than "'incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Amgen*, 568 U.S. at 474.

These problems are especially acute as to consumer-fraud class actions, which account for more than 20% of the class actions filed in the United

States today.[3] Unlike securities class actions, state consumer-fraud claims are not subject to special rules imposing "'heightened pleading requirements,'" mandating "'sanctions for frivolous litigation,'" and "curtail[ing] plaintiffs' ability to evade . . . limitations on federal securities-fraud litigation by bringing class-action suits under state rather than federal law." *Id.* at 475-76. In the absence of such protections, this Court's intervention is especially needed.

2. This is the right case for this Court to rein in the Ninth Circuit's expansive approach. Over Meta's objections, the Ninth Circuit applied its "common course of conduct" test to affirm certification of a sweeping class encompassing millions of disparate advertisers, from multinational corporations to sole proprietorships. It also relied on its lopsided, plaintiff-friendly standard of review to justify affirmance. On each of these points, the Ninth Circuit's approach systematically—and improperly—favors class actions.

Meta properly preserved both questions below, and there are no alternative grounds on which to uphold the district court's class certification order. The Court should use this case to reject the Ninth Circuit's flawed approach to Rule 23.

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[3] *See* Carlton Fields, *2023 Carlton Fields Class Action Survey* 7 (2023), https://www.carltonfields.com/getmedia/d71bff8d-56f9-4448-89e1-2d7ee3f8fe6a/2023-carlton-fields-class-action-survey.pdf (21.7% in 2023).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2, 2024

# APPENDIX

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

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**DZ RESERVE; Cain Maxwell, DBA Max Martialis, Plaintiffs-Appellees,**

**v.**

**META PLATFORMS, INC., FKA Facebook, Inc., Defendant-Appellant.**

**No. 22-15916**

Filed March 21, 2024

Before: J. Clifford Wallace, Sidney R. Thomas, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Sidney R. Thomas;

Partial Dissent by Judge Forrest

## OPINION

S.R. THOMAS, Circuit Judge:

Meta Platforms, Inc. (Meta), formerly known as Facebook, appeals the district court's order certifying two classes of advertisers who paid Meta to place advertisements on its social media platforms—a damages class and an injunction class. The advertisers allege that Meta fraudulently misrepresented the "Potential Reach" of advertisements on its platforms by stating that Potential Reach was an estimate of *people*, although it was actually an estimate of *accounts*. As to the damages class, the primary issue on appeal is whether that misrepresentation constitutes a

"common course of conduct" under our test for determining whether common issues predominate among the class. We conclude that it does. Because the district court did not abuse its discretion in determining that Federal Rule of Civil Procedure 23(b)(3) was satisfied, we affirm the certification of the damages class. However, we vacate the certification of the Rule 23(b)(2) injunction class for the district court to reconsider whether the named Plaintiffs have standing to seek an injunction.

I

Meta owns and operates several online social media and messaging platforms and applications, including Facebook, Instagram, and WhatsApp. As with many social media companies, Meta "generates substantially all of its revenue from advertising."

In 2018, a nationwide class of advertisers ("Plaintiffs") filed this action against Meta, alleging that Meta had misrepresented the Potential Reach of advertisements on its platforms. Meta tells advertisers that "Potential Reach estimates how many people your ad could potentially reach depending on the targeting and ad placement options you select while creating an ad." Each time that an advertiser designs a Meta advertising campaign, Meta's self-service advertisement creation interface, known as the Ads Manager, displays the campaign's Potential Reach.

Plaintiffs assert that Potential Reach is misleading because it actually measures social media accounts, not living humans. Meta has taken steps to increase the accuracy of Potential Reach by working to remove fake and duplicate accounts, as well as by updating the calculation of Potential Reach to include

only accounts that were shown an advertisement in the last thirty days. Nevertheless, throughout the class period, the number of accounts was always larger than the number of people because non-human entities like businesses and clubs have accounts, some people have multiple accounts, and some people and bots create fake accounts.

Each advertiser views a different Potential Reach for each campaign dependent on that campaign's unique targeting criteria, so the discrepancy between people and accounts varies by campaign. The parties disagree as to the size of this discrepancy. The district court noted this evidentiary dispute but concluded that Meta's criticism of Plaintiffs' expert evidence "does not foreclose classwide proof of injury." Plaintiffs allege that because of the misrepresentation of Potential Reach, they purchased more Meta advertisements and paid more for those advertisements than they would have with accurate information.

The named Plaintiffs are two former Meta advertisers, DZ Reserve and Cain Maxwell. DZ Reserve was an e-commerce business that spent over $1 million on 740 Meta advertising campaigns. Maxwell operated an online firearm mount store and spent approximately $379 on 11 Meta advertising campaigns. DZ Reserve has ceased operations since the filing of the complaint, and it is unclear from the record whether Maxwell's business is still operating.

Following motion practice and the filing of several amended complaints, the district court sustained three of Plaintiffs' claims under California state law: fraudulent misrepresentation, fraudulent concealment, and violation of California's Unfair Competition Law ("UCL"). Plaintiffs then moved to

certify the following class under Federal Rule of Civil Procedure 23: United States residents who purchased at least one advertisement on Meta's platforms from August 15, 2014 to the present, excluding advertisers who used certain specialized purchasing methods or who were shown a Potential Reach lower than 1,000. The district court certified the class under Rule 23(b)(3) seeking damages for fraudulent misrepresentation and concealment, and under Rule 23(b)(2) seeking injunctive relief under the UCL.

II

We have jurisdiction pursuant to 28 U.S.C. § 1292(e) and Rule 23(f) of the Federal Rules of Civil Procedure. We review a district court's decision to certify a class for abuse of discretion. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (en banc). "A class certification order is an abuse of discretion if the district court applied an incorrect legal rule or if its application of the correct legal rule was based on a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 (9th Cir. 2023) (internal quotation marks and citation omitted). "When reviewing an order granting class certification, we accord the district court noticeably more deference than when we review a denial." *Jabbari v. Farmer*, 965 F.3d 1001, 1005 (9th Cir. 2020). "We review the district court's determination of underlying legal questions de novo, and its determination of underlying factual questions for clear error." *Olean*, 31 F.4th at 663 (citations omitted).

III

A

Before certifying a class, the district court must ensure that the plaintiffs have made two showings, one under Rule 23(a) and one under Rule 23(b). *Olean*, 31 F.4th at 663.

First, the proposed class action must satisfy four prerequisites under Rule 23(a):

> (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).

The district court must perform a "rigorous analysis" of these prerequisites, which frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). That being said, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013).

Second, the class must fit into at least one of three categories outlined in Rule 23(b). *Olean*, 31 F.4th at 663. Here, the district court certified the class under

Rule 23(b)(3), which enables the potential recovery of damages and requires both that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The district court also certified the class under Rule 23(b)(2), which requires "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." Fed. R. Civ. P. 23(b)(2). We address certification of the damages class under Rule 23(b)(3) and certification of the injunction class under Rule 23(b)(2) in turn.

B

We need not analyze all of the criteria required for certification of a damages class, because Meta challenges only the district court's findings regarding the predominance of common factual or legal issues under Rule 23(b)(3) and typicality and adequacy of representation under Rule 23(a)(3) and (4). The district court did not abuse its discretion in concluding that Plaintiffs have sufficiently demonstrated predominance, typicality, and adequacy, and so we affirm certification of the damages class under Rule 23(b)(3).

1

The requirement under Rule 23(b)(3) that common questions predominate over individual ones "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*

*Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

The predominance inquiry is "more demanding" than the commonality inquiry. *Id.* at 624, 117 S.Ct. 2231. Contrary to Meta's contentions, predominance is not more demanding because the common issues must in some way be "more common" than would be required under Rule 23(a)(2). Rather, predominance is more demanding because not only must there be common issues, but the common issues must predominate. "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, in order to prove that such common questions predominate over individualized ones." *Olean*, 31 F.4th at 664 (cleaned up).

To clarify the inquiry, we proceed with the predominance analysis in three steps. First, we identify which questions are central to the plaintiffs' claim. Second, we determine which of these questions are common to the class and which present individualized issues. Third, we analyze whether the common questions predominate over the individual questions.

Under step one, we must identify which questions are central to the plaintiffs' claim, which "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). The proposed class under Rule 23(b)(3) seeks damages for fraudulent concealment and fraudulent misrepresentation under California law, both of which require a showing of five elements: "(a) misrepresentation (false representation,

concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997), *as modified* (July 30, 1997) (internal quotation marks and citation omitted).

Under step two, we determine which of those elements are "common"—which means they are "capable of being established through a common body of evidence, applicable to the whole class." *Olean*, 31 F.4th at 666. Because this standard is identical to the analysis under Rule 23(a)(2)'s commonality requirement, "courts must consider cases examining both subsections in performing a Rule 23(b)(3) analysis." *Id.* at 664.

The district court properly determined that each of the five elements of fraud under California law is capable of classwide resolution. Meta has only legitimately challenged the district court's findings regarding misrepresentation and justifiable reliance. On appeal, Meta does not dispute the district court's conclusion that the knowledge and intent elements present common issues. Although Meta does appeal the district court's damages finding, we decline to consider Meta's damages argument because it was not raised before the district court.[1] Accordingly, we

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[1] "[A]n issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014) (internal quotation marks and citation omitted). Before the district court, Meta relied exclusively on criticisms of Plaintiffs' experts' damages modeling techniques and inputs. Meta's argument on appeal is altogether different, as Meta now contends not that the model itself is deficient, but that it is not

concentrate our analysis on the elements of misrepresentation and justifiable reliance.

Where, as in this case, a defendant has uniformly represented that a certain metric means something that it does not, the element of misrepresentation presents a common question. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557–65 (9th Cir. 2019) (en banc); *In re First All. Mortg. Co.* (*First Alliance*), 471 F.3d 977, 990–91 (9th Cir. 2006); *Blackie v. Barrack*, 524 F.2d 891, 902–05 (9th Cir. 1975).

Class action fraud claims often involve similar misrepresentations that cause a large number of victims to each suffer a small financial loss. Fraud claims are thus particularly well suited to class treatment under Rule 23(b)(3), which was designed "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617, 117 S.Ct. 2231 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). We have "consistently upheld" the availability of the class action to address mass frauds perpetrated through similar misrepresentations in the securities context "in large part because of the substantial role that the deterrent effect of class actions plays in accomplishing the objectives of the securities laws." *Blackie*, 524 F.2d at 903. That reasoning applies equally well to consumer protection laws, and we have explained that consumer fraud victims often present a "cohesive group" because "[i]n many consumer fraud cases, the crux of each consumer's claim is that a

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possible to use such a model at all. Because Meta did not raise this argument before the district court, we consider it waived.

company's mass marketing efforts, common to all consumers, misrepresented the company's product . . . ." *Hyundai*, 926 F.3d at 559. In sum, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud . . . ." *Amchem*, 521 U.S. at 625, 117 S.Ct. 2231.

In determining whether a misrepresentation presents a common question, we generally categorize the misrepresentation as falling into one of two groups. On the one hand, a "fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action . . . ." *First Alliance*, 471 F.3d at 990 (quoting Fed. R. Civ. P. 23, Advisory Committee Notes to 1966 Amendments, Subdivision (b)(3)). Accordingly, "this court has followed an approach that favors class treatment of fraud claims stemming from a 'common course of conduct.' " *Id.* A "common course of conduct" refers to a defendant's "centrally orchestrated strategy" to defraud, whereby "[e]ach plaintiff is similarly situated with respect to" that scheme. *Id.* at 991 (internal quotation marks and citation omitted). On the other hand, "a case may be unsuited for class treatment 'if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed . . . .'" *Id.* at 990 (quoting Fed. R. Civ. P. 23, Advisory Committee Notes to 1966 Amendments, Subdivision (b)(3)).

In this case, the claimed misrepresentation is the one that the district court described in its certification order: "[T]he ability of Potential Reach to reach 'people,' namely unique individuals" when the metric was "actually . . . an estimate of 'accounts' reached."

Meta misstates the misrepresentation at issue, insisting that the misrepresentation is the numerical discrepancy between people and accounts, rather than the fact that Meta substituted people for accounts. Under its theory, Meta contends the misrepresentations materially varied because the numerical value of the discrepancy differed for each individual advertiser based on its advertising budget and targeting, and thus there was no common misrepresentation among the class. We disagree.

In *Blackie*, we rejected a similar strategy to create the illusion of variation in a claimed misrepresentation by mischaracterizing the nature of the misrepresentation at issue. *See Blackie*, 524 F.2d at n.20. There, a class of stockholders alleged that the Ampex Corporation uniformly misapplied an accounting principle, which resulted in overstatements of various financial estimates. *Id.* at 902–05. Like Meta, Ampex argued that the misrepresentation was the numerical discrepancy in each financial estimate, such that there was material variation in the exact numerical discrepancies. *Id.* at 904 n.20. We rejected that argument and affirmed class certification, stating that "plaintiffs are complaining of abuses of accounting principles, not estimates." *Id.* Likewise, we will not opine on the viability of Meta's alternative misrepresentation theory—the numerical discrepancy between people and accounts—because it is not the theory presented to us.

Meta's insistence that the misrepresentation must be the numerical discrepancy between people and accounts is based partly on its suggestion that the substitution of people for accounts is not itself material. However, we have previously affirmed both

class certification and ultimate liability based on similar facts. In *First Alliance*, we affirmed class certification and a finding of class-wide fraud where a bank induced borrowers to agree to unconscionable loan terms by having loan officers "point to the 'amount financed' and represent it as the 'loan amount.'" *See* 471 F.3d at 985, 990–92. We did not focus on the numerical difference between the amount financed and the loan amount for each individual borrower, but instead concluded that the overall scheme was fraudulent. *Id.*

More importantly, proof of materiality "is not a prerequisite to class certification." *Amgen*, 568 U.S. at 459, 133 S.Ct. 1184. As the Supreme Court has instructed:

> Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class. Because materiality is judged according to an objective standard, the materiality of [defendant's] alleged misrepresentations and omissions is a question common to all members of the class [named plaintiffs] would represent . . . . As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison.

*Id.* at 459–60, 133 S.Ct. 1184.

Because materiality is an objective inquiry, differences in the size and sophistication of the advertisers in the class are irrelevant. Here, the question is the same for every class member: Would substituting people for accounts in Potential Reach be material to the reasonable consumer? At the class certification stage, identification of a common

question is all that is required. The district court properly concluded that issue was a matter for trial.

Given the claimed misrepresentation to be the substitution of people for accounts, Plaintiffs have clearly satisfied our "common course of conduct" test. It is undisputed that Potential Reach was shown to every advertiser on Meta's Ads Manager, Potential Reach was always expressed as a number of people, and Potential Reach always estimated a number of accounts. Class members were thus exposed to uniform misrepresentations about the potential reach of their advertisements.

Meta raises two additional arguments against a finding of Potential Reach estimates being a common misrepresentation. First, Meta disputes that the misrepresentation was uniform because Plaintiffs viewed Potential Reach alongside other metrics, namely "Estimated Daily Reach." While Potential Reach represents how many people meet a campaign's targeting criteria, Estimated Daily Reach factors in an advertiser's budget and past performance.

These slight differences do not defeat commonality under our "common course of conduct" test. As we have previously explained, "[t]he class action mechanism would be impotent if a defendant could escape much of his potential liability for fraud by simply altering the wording or format of his misrepresentations across the class of victims." *First Alliance*, 471 F.3d at 992. Consequently, "[c]onfronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course

of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions . . . ." *Blackie*, 524 F.2d at 902 (collecting cases).

We have consistently held that similar contextual differences do not constitute material variations. In *Blackie*, we held that there was commonality where defendants uniformly misapplied an accounting principle in some forty-five different documents, even though the resulting financial estimates fluctuated over time. *Id.* In *First Alliance*, we applied *Blackie* to hold that borrowers exposed to similarly misleading sales presentations represented a cohesive class, even though the exact wording of the sales presentations and individual loan specifics varied. *First Alliance*, 471 F.3d at 990–91. Most recently, we affirmed a class of car purchasers exposed to uniform fuel economy misrepresentations, even though some purchasers viewed the misrepresentations on stickers placed on the vehicles, while others were only exposed to the misrepresentations through nationwide marketing. *Hyundai*, 926 F.3d at 560–61.

Here, the variations in Estimated Daily Reach and disclosures accompanying Potential Reach are no more material than the fluctuating estimates, differently worded sales pitches, and disparate modes of exposure considered in our prior cases.

Second, Meta contends that any misrepresentations differed among class members because it updated its disclosures about Potential Reach twice during the class period. In September 2017, Meta disclosed that Potential Reach "[e]stimates are based on the placements and targeting criteria you select," and are "not designed to match population or census estimates." In June 2020,

Meta disclosed that "[t]hese metrics are considered estimated and sampled, and depend on factors such as how many accounts are used by each person on Facebook Company Products."

We have determined that there were individualized questions where "explicit signs or explicit verbal advice would negate the claimed misrepresentation" for some class members. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 582 U.S. 23, 137 S.Ct. 1702, 198 L.Ed.2d 132 (2017). However, unlike the situation in *Berger*, none of the disclosures here negated the misrepresentation, which would have required a clear statement that Potential Reach measures accounts. Instead, Meta essentially argues that Plaintiffs should have known better than to rely on Potential Reach. But as the district court found, several documents offered by Plaintiffs show that Meta intended for advertisers to rely on its Potential Reach numbers. Thus, "[w]e find unpersuasive in this case the defense that plaintiffs should not have relied on statements that were made with the fraudulent intent of inducing reliance." *First Alliance*, 471 F.3d at 992.

In support of its disclosure argument, Meta also relies on *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), *overruled on other grounds by Olean*, 31 F.4th 651. Disclosures were not at issue in *Mazza.* Instead, *Mazza* held that an inference of reliance was inappropriate because "it is likely that many class members were never exposed to the allegedly misleading advertisements." *Id.* at 595. Unlike *Mazza*, here it is undisputed that all class members were exposed to Potential Reach.

Given that all class members encountered the same misrepresentation about Potential Reach—the nucleus of the fraud—the slight variations in the other information available on the Ads Manager do not defeat the commonality of the misrepresentation.

ii

The district court properly determined that the element of justifiable reliance is capable of classwide resolution. Under California law, "*when the same material misrepresentations have actually been communicated to each member of a class*, an inference of reliance arises as to the entire class." *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095, 23 Cal.Rptr.2d 101, 858 P.2d 568 (1993). Because Meta communicated the same misrepresentation to all class members—that Potential Reach measures people when it really measures accounts—the class is entitled to an inference of reliance. Meta's argument to the contrary rests on its theory that Plaintiffs were not exposed to a uniform misrepresentation, which we have rejected.

Despite California's presumption of reliance, Meta argues that reliance is always an individualized inquiry because defendants have a right to rebut the presumption of reliance. As a practical matter, Meta's argument that reliance can never be a common question is incompatible with the voluminous caselaw from both the United States and California Supreme Court certifying fraud class actions. *See Basic Inc. v. Levinson*, 485 U.S. 224, 242, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (explaining the utility of the presumption of reliance in the federal security fraud context and stating that "[r]equiring proof of individualized reliance . . . effectively would have prevented

respondents from proceeding with a class action . . . ."); *see also Vasquez v. Superior Ct.*, 4 Cal. 3d 800, 814–15, 94 Cal.Rptr. 796, 484 P.2d 964 (1971) (discussing California's presumption of reliance for common law fraud and analogizing to the presumption in federal securities fraud cases). The purpose of the presumption of reliance is to avoid precluding all fraud class actions. *See Basic*, 485 U.S. at 242, 108 S.Ct. 978. Accordingly, if the availability of rebuttal defeated commonality, the presumption would be pointless. While rebuttal "has the effect of leaving individualized questions of reliance in the case, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014) (internal quotation marks and citation omitted).

Meta finally argues that the Rules Enabling Act prohibits application of California's presumption of reliance here. The Rules Enabling Act instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Meta argues that application of the presumption of reliance amounts to lessening a plaintiff's burden of proving reliance in a class action case. However, California's presumption of reliance also applies in individual fraud actions. *Engalla*, 15 Cal. 4th at 977, 64 Cal.Rptr.2d 843, 938 P.2d 903. Failing to apply the presumption of reliance would thus amount to abridging a substantive right, as the presumption would apply in individual cases but not in federal class actions. Contrary to Meta's contention, the Rules Enabling Act *requires* application of California's presumption of reliance.

Because the presumption of reliance applies to each member of the class, reliance presents a common question provable by common evidence. *See Vasquez*, 4 Cal. 3d at 814, 94 Cal.Rptr. 796, 484 P.2d 964 ("If [Plaintiffs] can establish without individual testimony that the representations were made to each plaintiff and that they were false, it should not be unduly complicated to sustain their burden of proving reliance thereon as a common element.").

iii

Having arrived at step three, our analysis in this case is a simple one. "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, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016) (internal quotation marks and citation omitted). Although predominance does not require that all questions be common, *Hyundai*, 926 F.3d at 557, predominance is necessarily satisfied if all questions are common. Because the district court properly concluded that each of the five elements of fraud presents a common question, the district court did not abuse its discretion in holding that common issues predominated.

2

Meta argues the named Plaintiffs are not typical or adequate because they suffer from credibility problems that expose them to individualized defenses related to reliance. The district court did not clearly err in finding that the named Plaintiffs' credibility was not vulnerable to attack. Accordingly, we affirm

the district court's holding that the requirements of typicality and adequacy are satisfied.

Although Meta names both typicality and adequacy in its argument, its contention that Plaintiffs will be preoccupied with unique defenses falls within our typicality caselaw. Under Federal Rule of Civil Procedure Rule 23(a), class plaintiffs must demonstrate, among other things, that the named plaintiffs are typical class representatives. *See Olean*, 31 F.4th at 663 (citing Fed. R. Civ. P. 23(a)). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*, 564 U.S. at 338, 131 S.Ct. 2541 (quoting Fed. R. Civ. P. 23(a)(3)). A named plaintiff is not typical if "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)). We will affirm a district court's typicality determination if "[t]he district court did not commit a clear error of judgment in concluding that . . . [the named plaintiff] would not be subject to unique defenses such that typicality would be defeated . . . ." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017).

The district court did not clearly err in finding no danger that the named Plaintiffs would be preoccupied with unique defenses. Meta insists that the named Plaintiffs are not typical because, unlike other class members, neither named Plaintiff actually

relied on the Potential Reach estimates. We have "emphasize[d] that the defense of non-reliance is not a basis for denial of class certification" and reliance is more appropriately considered at the merits stage. *Hanon*, 976 F.2d at 509. Even so, the record supports the district court's finding at the certification stage that the named Plaintiffs relied on Meta's misrepresentations.

Meta argues that DZ Reserve's owner dishonestly testified that the Potential Reach misrepresentation deterred him from buying Meta advertisements, and that Maxwell dishonestly claimed to have relied on Potential Reach. The district court rejected these contentions by pointing to evidence that DZ Reserve had been deterred from using Meta advertisements, Maxwell relied on Potential Reach, and both named Plaintiffs would have spent less money on Meta advertisements had they known that Potential Reach was a misrepresentation. The record supports the district court's conclusion that the named Plaintiffs have no credibility issues that would destroy their typicality.

Even if DZ Reserve and Maxwell faced credibility questions, those issues would not destroy typicality. Credibility issues only destroy typicality in "unique situation[s]" where "it is predictable that a major focus of the litigation will be on a defense unique" to the named plaintiff. *Id.* at 509. We have found such unique situations where a named plaintiff in a securities action was a serial litigant who purchased stock solely to facilitate litigation, *id.* at 508, or where the named plaintiff insisted that he was not really deceived by the alleged misrepresentation. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011), *abrogated on other grounds by Comcast Corp.*

*v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). Neither of those situations apply here, where the named Plaintiffs are not serial litigants and presented evidence that they both actually received and relied upon the alleged misrepresentation.

3

In sum, for the foregoing reasons, we conclude that the district court did not abuse its discretion in certifying the damages class under Rule 23(b)(3).

C

Meta appeals the district court's order certifying an injunction class under Rule 23(b)(2) on the basis that the named Plaintiffs lack Article III standing to seek injunctive relief under California's UCL. Meta did not present this theory before the district court. However, an objection that a federal court lacks subject-matter jurisdiction "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). As we explain below, DZ Reserve did not submit any evidence that would support its standing to seek injunctive relief. However, Maxwell's standing is a closer call and may require additional factual development. Therefore, we remand the question of Maxwell's standing to seek injunctive relief to the district court for its consideration in the first instance.

"In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). In order to establish Article III standing, "the plaintiff must have suffered an injury in fact—a

concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 600 U.S. ——, 143 S.Ct. 2355, 2365, 216 L.Ed.2d 1063 (2023) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Thus, the fact that the named Plaintiffs have standing to seek damages does not mean that they automatically have standing to seek injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 436, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021) ("[A] plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages.").

In order to establish standing for injunctive relief, "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) (citing *Friends of Earth*, 528 U.S. at 180–81, 120 S.Ct. 693). "The plaintiff must demonstrate that he has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will

again be wronged in a similar way." *Bates*, 511 F.3d at 985 (citations and quotation marks omitted). "Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010). "Nor does speculation or 'subjective apprehension' about future harm support standing." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 184, 120 S.Ct. 693 and citing *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130).

Consumer fraud plaintiffs can satisfy the imminent injury requirement by showing they "will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although [they] would like to." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018).

The plaintiff bears the burden of establishing the elements of standing. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. A plaintiff must also demonstrate Article III standing at each stage of the litigation, including on appeal. *Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1211–12 (9th Cir. 2018). Standing must be proven, "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. Thus, although standing may be established at the pleading stage through allegations in the complaint, the plaintiff must prove the elements of standing at each successive stage. *Id.* Because the preponderance of the evidence standard applies at the class certification stage, standing at the time of class certification must be established by a preponderance of the evidence. *See Olean*, 31 F.4th at 664–65.

With these general principles in mind, we examine the standing of the named Plaintiffs to assert claims for injunctive relief.

1

DZ Reserve does not have standing to seek injunctive relief. DZ Reserve did not submit any evidence of a threat of suffering "actual and imminent" future injury that was concrete and particularized, and that could be redressed by injunctive relief. Nor did DZ Reserve demonstrate a sufficient likelihood that it would again be wronged in a similar way. Rather, the owner of DZ Reserve simply testified that he would have spent less on Meta advertisements *in the past* had he known the truth about Potential Reach. He did not testify about his desire to purchase Meta advertisements in the future. Further, as we have noted, DZ Reserve is no longer operating as a business. Thus, DZ Reserve lacks standing to assert a claim of injunctive relief.

2

We remand the question of whether Maxwell has adequately pled an injury sufficient to confer standing to seek injunctive relief. In so doing, we note that there are two issues for the district court to consider.

The first question is whether Maxwell's testimony that he "think[s] [he] would" purchase Meta advertisements in the future satisfies *Davidson*, which relied on a plaintiff's more direct assertion that she "desires to purchase" and "would purchase" a product if she was able to trust the product's advertising. 889 F.3d at 970–71.

The second question is how to square Maxwell's testimony with the evidence suggesting that Maxwell no longer has a business to advertise. A plaintiff

typically loses standing to challenge a policy affecting businesses when the plaintiff has ceased operating an affected business, unless the challenged policy caused the business's closure. *See City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001); *see also San Lazaro Ass'n, Inc. v. Connell*, 286 F.3d 1088, 1096 (9th Cir. 2002); *Clark v. City of Lakewood*, 259 F. 3d 996, 1007–08 (9th Cir. 2001). Maxwell's business ceased operations sometime in 2019. He testified that he stopped operations because he "ran out of inventory." The record does indicate that Maxwell has not officially dissolved the business and that his associated tax ID remains active. The record does not indicate whether Maxwell has continued to pay taxes associated with the business. It will be difficult for Maxwell to establish an imminent injury if he has no business to advertise, or in the alternative, if he does not offer a compelling explanation for why he would purchase advertisements without a business.

The district court has had no occasion to consider the record or to analyze Meta's argument against Maxwell's standing to seek injunctive relief. Moreover, Maxwell did not have the opportunity to present arguments concerning his standing to seek injunctive relief directly to the district court. Therefore, we remand the question of standing to seek injunctive relief to the district court for its consideration in the first instance.

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In sum, we affirm the district court's certification of the damages class. We vacate the district court's certification of the injunction class and remand for

further proceedings consistent with this opinion. Each party should bear its own costs on appeal.

**AFFIRMED in part; VACATED AND REMANDED in part.**

FORREST, J., dissenting in part:

I agree that the district court's certification of Plaintiffs' Rule 23(b)(2) injunction class must be vacated and remanded for the district court to reconsider whether Plaintiff Cain Maxwell has standing to pursue that claim. I disagree, however, that the district court properly certified Plaintiffs' Rule 23(b)(3) damages class because Plaintiffs cannot satisfy the predominance requirement where there are individual questions that must be answered related to multiple elements of Plaintiffs' fraud-based claims. Therefore, I respectfully dissent in part.

## I. BACKGROUND

Defendant-Appellant Meta Platforms, Inc. (Meta), one of the world's largest social media companies, owns and operates Facebook and Instagram, among other platforms. Meta claims that more than two billion people use Facebook every month, with over 200 million monthly active users in the United States alone. Because of its large user base, Meta's platforms are attractive to prospective advertisers, ranging from Fortune 500 companies and government agencies to small businesses and individual proprietors. And Meta "generates substantially all of its revenue from advertising."

### A. Meta's Advertising System

Most advertisers purchase ads from Meta through its online self-service ad creation interface, known as "Ads Manager." Advertisers "have a wide range of different advertising objectives, which influences how they set up their ads and assess ad performance." When developing an ad campaign in Ads Manager, advertisers specify their objective. Advertisers who want to generate awareness of their product or service, and who want Meta to show their ad "the largest number of times to the largest number of people in a given audience," may choose "brand awareness" or "reach" as their advertising objective. Other advertisers "are interested in 'performance advertising,' or driving specific actions with their ads, such as clicks and conversions"—*i.e.*, prompting users to visit a website or purchase a product. These advertisers "are typically focused on trying to identify or have their ads delivered to specific users likely to take a desired action," and a large audience size is less important.

Ads Manager provides several planning tools to help advertisers design their ad campaigns and target their desired audience. First (and relevant here) is Potential Reach, which is defined as "an estimation of how many people are in an ad set's target audience" based on statistical sampling and modeling. A default Potential Reach automatically displays in Ads Manager, and it updates dynamically in real time as an advertiser tailors its ad campaign using numerous targeting and placement criteria, such a demographics (*e.g.*, age, gender, location, education), interests (*e.g.*, sports teams, dogs), and the platform where the ads will be shown (Facebook, Instagram, etc.). The "default" Potential Reach displayed to each

advertiser during the class period was between 200 to 250 million, purportedly reflecting the number of people in the United States between 18 and 65 years old who use Meta's platforms. As an advertiser selects targeting criteria, the Potential Reach recalculates, and a color-coded dial shows whether the target audience is "fairly broad," "defined," or "too specific." Each advertiser sees a different Potential Reach estimate for each ad campaign they run because the non-default—or targeted—Potential Reach estimate is calculated based on the advertiser's selected criteria.

Potential Reach is "not an estimate of how many people will actually see [an advertiser's] ad" or how many people may click on an ad or take any other action with respect to an ad. That data is provided in separate Estimated Daily Results metrics, which are displayed adjacent to Potential Reach in Ads Manager. Estimated Daily Reach is part of the Estimated Daily Results and is the estimated number of people that an ad actually will reach per day based on the advertiser's selected criteria, budget, and past ad performance. Advertisers are not charged based on the Potential Reach calculation.

Once an ad launches, advertisers can track their results in real time. Based on detailed performance data, such as the number of times an ad was shown and clicked on, advertisers can assess the success of their campaign and return on investment and adjust their campaign and budget as they see fit. Advertisers are not shown Potential Reach as part of the post-ad purchase results.

### B. Changes to Potential Reach Calculation

Potential Reach has always been displayed to advertisers as an estimate, but during the class period Meta changed how it calculates Potential Reach and updated its disclosures in Ads Manager accordingly. In September 2017, Meta introduced an "information" icon in Ads Manager explaining that Potential Reach "[e]stimates are based on the placements and targeting criteria you select," and are "not designed to match population or census estimates." A year and a half later in March 2019, Meta changed its calculation methodology to count only those people who had actually seen an ad on Meta's platforms in the last 30 days, rather than those who were active on a Meta platform and *could* have seen an ad. Lastly, in June 2020, Meta "added disclosures to explain that 'people' is an 'estimated and sampled' metric, which depends on 'factors such as how many accounts are used by each person on [Meta's products]." Throughout the class period, Meta also undertook efforts to remove fake accounts and de-duplicate accounts across platforms—*i.e.*, counting separate Instagram and Facebook accounts belonging to the same person as only one person in Potential Reach estimates.

### C. Plaintiffs' Lawsuit

In 2018, Plaintiffs sued Meta alleging the Potential Reach calculation is materially misleading because it exceeds the actual number of people in an ad's target audience, causing advertisers to purchase more ads and pay higher prices for ads than they otherwise would have. Named Plaintiffs DZ Reserve, an e-commerce business, and Cain Maxwell are former Meta advertisers. Between December 2017

and December 2018, DZ Reserve spent over $1 million on 740 ad campaigns comprising approximately 26,000 ads. Maxwell (d/b/a Max Martialis) operated an online store and spent approximately $400 on 11 ad campaigns comprising 28 ads between September 2018 and May 2019. Named Plaintiffs alleged that they viewed and relied on Potential Reach in purchasing Meta ads.

Plaintiffs proceeded on three California state-law claims: (1) fraudulent misrepresentation, (2) fraudulent concealment, and (3) injunctive relief under California's Unfair Competition Law (UCL). And they sought to certify a class related to each claim encompassing the millions of advertisers (persons or entities) in the United States who paid to place at least one ad on Meta's platforms from August 2014 to the present. Plaintiffs asserted that Potential Reach is a material misrepresentation because Meta characterizes it as a calculation of "people," which Meta knows is inaccurate because it is a calculation of accounts, and because Potential Reach is always significantly more than the number of people. Plaintiffs further claimed that the inflation of the Potential Reach calculation is susceptible to proof through common evidence because their statistics expert, Dr. Charles Cowan, established that the default Potential Reach shown to advertisers is always inflated by at least 33% and the targeted Potential Reach is always inflated by at least 10%. Through a conjoint survey, Plaintiffs' expert, Dr. Greg Allenby, further determined that Potential Reach inflation, as found by Dr. Cowan, has "a statistically significant impact on consumer demand for [Meta] advertisements."

Meta opposed class certification, arguing, among other things, that Plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement because each class member received a fundamentally different Potential Reach estimate and the class members varied in multiple ways that are material to whether the elements of Plaintiffs' claims can be met—including the varying disclosures that advertisers may have viewed, the advertisers' objectives for their ad campaign, and the mix of information each advertiser had access to or relied on in purchasing ads.

Over Meta's objection, the district court certified two classes: a Rule 23(b)(3) damages class for Plaintiffs' common law fraud claims and a Rule 23(b)(2) class for Plaintiffs' UCL injunction claim.[1] The district court evaluated Rule 23(a)'s threshold commonality requirement and Rule 23(b)(3) predominance requirement "in tandem." It determined that all class members were exposed to a similar misrepresentation and that "whether Meta made misrepresentations to all class members [could] be shown through common evidence" because Potential Reach was represented as an estimate of "people" when it really was "an estimate of 'accounts,'" and "the number of unique accounts and unique people were different." It further reasoned that materiality and reliance do "not necessarily undermine predominance" in fraud cases because, under California law, a "presumption, or at least an inference, of reliance arises wherever there is a

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[1] The class includes only those who purchased ads through Ads Manager under Meta's standard contract, and for which Meta provided a Potential Reach of 1,000 of greater.

showing that a misrepresentation was material." Rather, materiality and reliance could be established "through common evidence" because "Potential Reach metrics were shown to all advertisers," it was "an important number for advertisers," and "[a] majority of advertisers rely on Potential Reach as a metric for their advertisements."

This court granted review of the district court's class certification decision under Federal Rule of Civil Procedure 23(f).

## II. ANALYSIS

We review the district court's class certification decision for abuse of discretion. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC* (*Olean*), 31 F.4th 651, 663 (9th Cir. 2022) (en banc). The district court "abuses its discretion only if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors." *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 965 (9th Cir. 2019). The district court's determination of underlying legal questions is reviewed de novo, and its determination of underlying factual questions is reviewed for clear error. *Olean*, 31 F.4th at 663. "An error of law is a per se abuse of discretion." *B.K.*, 922 F.3d at 965. A factual finding is clearly erroneous if it is illogical, implausible, or "without support in inferences that may be drawn from the record." *Id.* at 965–66.

Federal Rule of Civil Procedure 23 governs class certification. Plaintiffs, as the party seeking class certification, bear the burden of demonstrating that the requirements of Rule 23 are satisfied. *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1066 (9th Cir. 2021). "As a threshold matter, a class must first meet the

four requirements of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Id.* Additionally, "the class must meet the requirements of at least one of the 'three different types of classes' set forth in Rule 23(b)." *Id.* (citation omitted).

Relevant here, Plaintiffs must satisfy the requirements of Rule 23(b)(3) for a damages class. Certification under this provision is appropriate only where "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The goal of Rule 23(b)(3) is well-established—by adding the predominance (and superiority) requirements, the Advisory Committee intended to "achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons *similarly situated*, without sacrificing procedural fairness." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (emphasis added) (quoting Advisory Committee Notes). Thus, predominance is established where the proposed class is "sufficiently cohesive" to justify class-wide adjudication. *Id.* at 623, 117 S.Ct. 2231. This required cohesion exists where there are common questions capable of class-wide resolution. *Olean*, 31 F.4th at 663. Or, stated another way, where common questions of law or fact "can be determined in one stroke." *Id.* at 664. Conversely, individual questions dominate where evidence will inevitably vary from class member to class member. *Id.*

Plaintiffs must establish that the preponderance requirement is met by a preponderance of the evidence. *Id.* at 665. Rule 23 "does not set forth a mere pleading standard," but instead requires that

the district court conduct "a rigorous analysis" to ensure that the party seeking certification has satisfied its burden "through evidentiary proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). "Such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim . . . because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 33–34, 133 S.Ct. 1426 (citations and internal quotation marks omitted). And the Supreme Court has instructed that "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast*, 569 U.S. at 34, 133 S.Ct. 1426.

In considering predominance, the court begins "with the elements of the underlying cause of action." *Olean*, 31 F.4th at 665. Plaintiffs must show that a common question relating to an essential element predominates. *Id.* at 666. A class may fail to establish predominance where even one essential element requires individualized determination and this individualized issue outweighs "common, aggregation-enabling issues." *See Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1138 (9th Cir. 2022). The district court certified a Rule 23(b)(3) class for Plaintiffs' fraudulent misrepresentation and fraudulent concealment claims. Under California law, the elements of these claims are: "(1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 990, 22 Cal.Rptr.3d 352,

102 P.3d 268 (2004). A plaintiff may rely on a presumption of reliance, but "only [by making] a showing that the misrepresentations were material." *Engalla v. Permanente Med. Group, Inc.*, 15 Cal 4th 951, 977, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997), *as modified* (July 30, 1997).

The plaintiffs' ability to prove each element of their claim must be considered in light of the class-action mechanism, which often is ill-suited to fraud claims. As the 1966 Advisory Committee on Rule 23 notes, even where a "common core" exists in a fraud case, it nonetheless "may be unsuited for treatment as a class action if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed."[2] Fed. R. Civ. P. 23, Advisory Committee Notes to 1966 Amendments, Subdivision (b)(3). Here, Plaintiffs failed to establish predominance because there are three issues that involve individualized

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[2] The majority asserts that fraud claims are "particularly well suited to class treatment under Rule 23(b)(3)." Maj. Op. 1234. The majority references a passing statement from *Amchem*, which states that predominance may be "readily met in *certain* cases" of consumer fraud. *See* 521 U.S. at 625, 117 S.Ct. 2231 (emphasis added). The majority ignores, however, the rest of the paragraph from which it quotes, which specifically cautioned courts to heed the "[Rule 23 Advisory] Committee's warning, [which] continues to call for caution when individual stakes are high and disparities among class members great." *Id.* The majority's statement that fraud claims are "particularly well suited" for class treatment runs in the face of the Committee's cautionary understanding that our sister circuits have consistently recognized. *See, e.g., In re St. Jude Med., Inc.*, 522 F.3d 836, 838 (8th Cir. 2008) (noting the "difficulty with class treatment of cases alleging fraud or misrepresentation"); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1253 (2d Cir. 2002) (same).

questions: (1) whether each advertiser in the class was subject to a misrepresentation, (2) whether any misrepresentation was material, and (3) whether each advertiser relied on a material misrepresentation. I address each in turn.

**A. Misrepresentation**

To assess whether predominance is satisfied regarding the misrepresentation element, we must first be specific in identifying Plaintiffs' claimed misrepresentation. On appeal, Plaintiffs argue that Meta categorically misrepresented its Potential Reach metric presented to advertisers by characterizing it as a metric of "people" rather than "accounts." The majority accepts this characterization of Plaintiffs' claims. But Plaintiffs' complaint alleged that Meta failed to provide "accurate Potential Reach" because this calculation "is inflated." Core to Plaintiffs' claims is the degree of discrepancy between the number of people and the number of accounts (not just the characterization of Potential Reach as a calculation of people), which the Plaintiffs explicitly attempt to prove.[3]

Meta does not dispute that Potential Reach calculated accounts as a proxy for people. But

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[3] If Plaintiffs' claimed misrepresentation rested solely on the description of Potential Reach as a calculation of people, there would have been no need for Plaintiffs to submit statistical evidence regarding the degree of inflation of the Potential Reach calculation. The analysis could have been merely definitional—especially given that Meta does not dispute it used accounts as a proxy for people. And the district court recognized that Plaintiffs' theory was more than merely definitional, stating: "Potential Reach was always expressed as a number of 'people,' *and* the discrepancy between people and accounts made the number inaccurate.".

contrary to the majority's suggestion, this proxy is not *inherently* misleading like the accounting practices challenged in *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), discussed more below. Potential Reach as described is misleading only if there is a significant deviation between the number of accounts and the number of people that may see ads.[4] If these two populations neatly correlate, characterizing Potential Reach as a calculation of people is accurate. Moreover, whether a deviation between the number of accounts and the number of people is a misrepresentation must consider Meta's express disclosure that Potential Reach is *an estimate*. *Cf.* Estimate, Merriam-Webster (defining "estimate" as "a rough or approximate calculation"), https://www.merriam-webster.com/dictionary/estimate?utm_campaign=sd&utm_medium=serp&utm_source=jsonld; Estimate, Oxford English Dictionary (defining "estimate" as "an approximate notion of (the amount, number, magnitude, or position of anything) without actual enumeration or measurement"), https://www.oed.com/dictionary/estimate_v?tab=meaning_and_use#5272337. On this point, the district court erred by reasoning that *any* variation between accounts and people was a misrepresentation.

Properly framed, Plaintiffs' assertion that there is a cohesive class for which common questions

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[4] The relevant metric to whether a misrepresentation occurred is the Potential Reach after targeting. Only 1.2% of U.S. ads were purchased with numbers near the default Potential Reach of 200-250 million. Additionally, while the district court mentioned default Potential Reach in analyzing typicality, it did not rely on default Potential Reach in analyzing predominance for the misrepresentation element.

predominate begins to unravel. Consistent with the Rule 23 Advisory Committee's admonishment that fraud claims are not well suited for class treatment, we have upheld class certification of these kinds of claims in limited circumstances where the misrepresentations stemmed from a "common course of conduct" or "centrally-orchestrated scheme." *In re First All. Mortg. Co.*, 471 F.3d 977, 990–91 (9th Cir. 2006). The substance of the misrepresentation must be sufficiently uniform to prove fraud on a class-wide basis. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 560 (9th Cir. 2019) (approving a class certification where class members were uniformly exposed to a nationwide advertising campaign that gave "uniform fuel-economy misrepresentations"); *see also In re First All.*, 471 F.3d at 990 ("The required degree of uniformity among misrepresentations in a class action for fraud is a question of law . . . ."). If the challenged communication is not sufficiently uniform, then whether a material misrepresentation occurred depends on individual questions specific to each class member. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 582 U.S. 23, 137 S.Ct. 1702, 198 L.Ed.2d 132 (2017).

Plaintiffs assert that Meta made a common misrepresentation that fits "comfortably" within the "common course of conduct" principle, first established in *Blackie*, and applied again in *First Alliance*, because Meta uniformly represented that Potential Reach was a measurement of people. This argument is unavailing. At issue in *First Alliance* was a challenge to certification based on Rule 23(a)(2)'s commonality requirement, not Rule 23(b)(3)'s predominance requirement. For

commonality, we declined to adopt a "talismanic rule" that requires "representations [to be] all but identical." *In re First All.*, 471 F.3d at 991 (quoting *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 140 F.R.D. 425, 430 (D. Ariz. 1992)). Rather, we held that in a common-course-of-conduct analysis, courts must determine whether the "center of gravity" of the fraud overshadows any variations in individual misrepresentations across the class. *Id.* at 991. Where there are immaterial variations, a common course of conduct can compensate for reduced uniformity. *See id.* at 990. The center of gravity in *First Alliance* was a standardized protocol to induce fraud: sales agents were "carefully trained" in a "standardized training program" requiring memorization of a specific sales pitch and "strict adherence to a specific method of hiding information." *Id.*

In *Blackie*, we analyzed whether financial reports that "uniformly misrepresent a particular item" presented a common question, again for purposes of the commonality requirement. 524 F.2d at 903. Plaintiffs cite *Blackie*'s commonality analysis to support their predominance argument.[5] But the difference between the commonality and predominance analyses and the factual differences between *Blackie* and this case are key. The *Blackie* plaintiffs argued that 45 financial documents fraudulently inflated a stock price. *Id.* at 902. The court found a common misrepresentation based on the "unique situation of the accounting and legal

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[5] The *Blackie* court did not analyze predominance for the misrepresentation element, only for reliance, causation, and damages. 524 F.2d at 905–08.

principles" at play and that "financial reports throughout the period uniformly and fraudulently" failed to adhere to "accepted accounting principles" in a manner that "injur[ed] all purchasers."[6] *Id.* at 904. The court further noted that "plaintiffs are complaining of abuses of accounting principles, not estimates." *Id.* at 904 n.20.

But this case is about estimates. Meta represented to the advertiser class that Potential Reach is *an estimate* of people who could potentially view a given ad based on the advertiser's targeting criteria. That Meta provided a common description of Potential Reach does not automatically establish that this description was a *misrepresentation* as to all class members. *Cf. Blackie*, 524 F.2d at 903 n.19 (noting that even where a common course of conduct exists in a fraud class that satisfies Rule 23(a)(2) commonality, the predominance requirement may not be satisfied). Predominance requires more than a common but superficial thread connecting class members—this may be shown where class claims "prevail or fail in unison." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013). And given the context here, whether Meta's characterization of Potential Reach was misleading turns on how much deviation there was between the

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[6] The commonality and predominance analyses in *Blackie* were informed by the "flexibl[e]" context of securities fraud laws. 524 F.2d at 907; *see also id.* at 903 n.19; *cf. Sullivan v. Chase Inv. Servs. of Bos., Inc.*, 79 F.R.D. 246, 259 (N.D. Cal. 1978) (citing *Blackie* to support the proposition that "common questions generally predominate in securities fraud cases involving standardized written representations to a class of investors").

Potential Reach estimate and the number of people that fell within the advertiser's target criteria.

As discussed, targeted Potential Reach estimates are tailored to each advertiser's choices. Advertisers can narrow their estimates with standard demographics (age, education, gender, etc.) and by location and interests. Altogether, the available targeting criteria provide thousands of options. How this targeting criteria impacts the accuracy of each estimate is apparent considering, for example, duplicate counts. One Facebook user may have two or more accounts—take, for example, one professional and one personal. So, if an advertiser selects only geographic criteria, both accounts may be counted. But if the advertiser selects both geography and interests criteria, the work account may be excluded and only the personal account counted or vice versa. Given the variability at play in targeted Potential Reach calculations, their degree of accuracy relative to the number of people is not uniform—one Potential Reach calculation may be an accurate "estimate" of the people who may see an advertisement based on the selected criteria while another is not.

To make up for the lack of uniformity in the millions of Potential Reach calculations that Meta provided, Plaintiffs first assert that the district court found that Potential Reach estimates were always "significantly inflated." This misconstrues the record. The district court acknowledged that Plaintiffs' expert opined the Potential Reach calculation was always significantly inflated *and* that Meta's expert did not eliminate the possibility that some inflation

occurred.[7] What underpins the district court's decision is the latter point—that because Meta's expert failed to establish that *no inflation* occurred, characterizing Potential Reach as a calculation of people was inaccurate, regardless of the degree of inaccuracy. This means the class includes advertisers who received targeted Potential Reach estimates with a discrepancy between people and accounts that could range from 1% to 50%. *Cf. Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 218 Cal. App. 4th 1230, 1242 & n.7, 160 Cal.Rptr.3d 718 (2013) (holding fraud action may be based on an estimate after considering the disparity and finding "the *huge disparity* between the estimates and the ultimate costs supports an inference of misrepresentation" (emphasis added))

Plaintiffs' reliance on *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013), in arguing that a uniform misrepresentation was made regardless of any variation in Potential Reach

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[7] The majority seems to agree that the district court's acknowledgement that Meta failed to show that no inflation occurred is not the same as crediting Plaintiffs' expert that significant inflation always occurred, but it ignores the significance of this point in the class context. Resolving conflicts in the evidence is within the district court's purview. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011) ("[T]he district court was required to resolve any factual disputes necessary to determine whether there was a common pattern and practice that could affect the class as a whole."); *Olean*, 31 F.4th at 666 ("The determination whether expert evidence is capable of resolving a class-wide question in one stroke may include weighing conflicting expert testimony and resolving expert disputes, where necessary to ensure that Rule 23(b)(3)'s requirements are met . . . ." (cleaned up)). And without a finding regarding the rate of inflation, the common pattern begins to unravel because there is no set inflation range binding class members together.

inflation, is unavailing. In that case, the degree of difference between what the plaintiffs were charged and the "cost-plus" pricing they were entitled to pay was irrelevant to liability because *any* difference—one cent or a thousand dollars—was proof that plaintiffs were harmed. 729 F.3d at 118, 123. The same is not true here. Meta did not charge advertisers based on its Potential Reach estimates. And the degree of inflation in the Potential Reach calculation is the crux of whether Meta misrepresented the estimated number of people who could potentially see a given ad.

Determining whether the Potential Reach calculations were misrepresentations is further challenged by Meta's evolving disclosures over the class period. Early on, Meta's disclosures stated that Potential Reach was "not designed to match population or census estimates." Then in 2019, Meta changed its disclosure to state that Potential Reach depends on "[h]ow many accounts are used per person." Meta changed the disclosure again in 2021 to state that "the presence of fake accounts" could impact the Potential Reach calculation. I disagree that the impact of these changes goes only to class-wide merits issues. The court must determine whether individual or common questions will predominate in assessing whether Meta's Potential Reach calculations were fraudulent misrepresentations. The disclosures that Meta provided regarding the nature of its calculated estimate are important to this analysis. The reasoning in *Berger v. Home Depot USA, Inc.* is particularly persuasive. 741 F.3d at 1067–69. There, the district court denied certification of a fraud claim brought against Home Depot related to its tool-rental

contracts over a multi-year period. *Id.* at 1066. We affirmed on predominance grounds because the class period covered five different versions of the contract, each with different language requiring an "independent legal analysis." *Id.* at 1069. The varying disclosures that Meta provided about the limitations of Potential Reach estimates likewise present individualized issues in determining whether Meta made fraudulent misrepresentations. *Cf. Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (holding a class definition as fatally overbroad where many class members learned that the advertising was misleading before purchase).

In the cases where we have upheld certification of a fraud class based on misrepresentation of an estimate, the class members were given *the same estimate*. *See In re Hyundai*, 926 F.3d at 553, 559 (upholding certification based on "inflated fuel economy standards" that were uniformly disseminated). That is not what happened here, and the evidence does not establish that the millions of unique Potential Reach calculations that Meta provided to the class had the same degree of inflation. Is a Potential Reach calculation with a 2% deviation a misrepresentation where the targeted population includes millions of people? What about a Potential Reach calculation with an 8% deviation where the targeted population includes only 1,000 people? Where a class claim "prevail[s] or fail[s] in unison," it satisfies predominance. *Amgen*, 568 U.S. at 460, 133 S.Ct. 1184. That standard is not met here because the factfinder could conclude that some, but not all, Potential Reach calculations presented to the class members were fraudulently misleading. *See Lara*, 25 F.4th at 1139 (affirming denial of class certification

because "figuring out whether each individual putative class member was harmed would involve an inquiry specific to that person").[8]

**B. Materiality**

Because this case does not involve a uniform misrepresentation, many of the problems discussed in relation to the misrepresentation element of Plaintiffs' claim also apply to the *materiality*-of-the-misrepresentation element. Under California law, a misrepresentation is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Engalla*, 15 Cal. 4th at 977, 64 Cal.Rptr.2d 843, 938 P.2d 903 (quoting Restatement (Second) of Torts § 538 (1977)). Materiality is generally a fact question unless the "fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." *Id.* Our focus here is whether common or individual issues will predominate in determining whether a misrepresentation is material, not whether Plaintiffs

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[8] The reasoning in *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App'x 880 (9th Cir. 2020), though unpublished, is similarly persuasive. There, this court affirmed denial of certification on predominance grounds because whether a representation was false depended on comparing each individual product. *Id.* at 881. The products, dog food, had packaging that contained different information, and the court would need to conduct a bag-to-bag comparison for each representation. This led to individual questions predominating. *Id.* Here, each Potential Reach estimate is akin to an individual product that would require an individualized assessment to determine if each "product" was indeed false.

can *prove* materiality. *See Amgen*, 568 U.S. at 469, 133 S.Ct. 1184; *Olean*, 31 F.4th at 667.

In the majority's view, *Amgen* established that materiality always satisfies predominance because it is governed by an objective standard. I disagree. In *Amgen*, the Court concluded that the class had a "fatal similarity." 568 U.S. at 470, 133 S.Ct. 1184. If materiality failed for one, it failed for all. *Id.* at 468, 133 S.Ct. 1184 ("A failure of proof on the common question of materiality ends the litigation and thus will never cause individual questions of reliance or anything else to overwhelm questions common to the class."). The Court reached this conclusion because "[i]n no event will the individual circumstances of particular class members bear on the inquiry" of the materiality of the allegedly fraudulent statements Amgen made about its products that inflated its stock price. 568 U.S. at 460, 133 S.Ct. 1184. This makes sense in securities-fraud cases that address fraudulent statements that are released to and impact the market. *See id.* at 466, 133 S.Ct. 1184 ("[I]mmaterial information, by definition, does not affect market price . . . ."). But nothing in *Amgen* commands that materiality, no matter the context, necessarily is provable with class-wide evidence and, therefore, satisfies the predominance requirement.

Additionally, while *Amgen* addressed a claim arising under federal law, the Plaintiffs' claims here are governed by California law. California courts applying that state's law have recognized that materiality cannot be resolved on a class-wide basis where this issue inevitably depended on individualized questions. *See, e.g., In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129, 103 Cal.Rptr.3d 83 (2009) (stating that "if the issue of materiality . . . is a

matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action").[9] And federal courts applying California law likewise have found Rule 23 predominance lacking when plaintiffs fail to proffer class-wide evidence of how a reasonable consumer would interpret the allegedly misrepresented fact or when consumers are interested in a product for a variety of reasons. *See, e.g., Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1045, 1047–48 (C.D. Cal. 2018) (collecting cases).

Here, plaintiffs primarily rely on two pieces of evidence in arguing that materiality is susceptible to class-wide proof: Dr. Cowan's statistical analysis and Dr. Allenby's conjoint survey. Plaintiffs assert that Dr. Cowan can establish that all Potential Reach estimates were inflated by at least 10%. The Supreme

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[9] In an unpublished decision, the California Court of Appeal upheld denial of class certification in part because individualized questions predominated regarding the materiality of "online fuel calculator" estimates provided to encourage consumers to buy the Toyota Prius. *Reynante v. Toyota Motor Sales USA, Inc.*, No. B275937, 2018 WL 329569 (Cal. Ct. App. Jan. 9, 2018). The online calculations were accompanied by a message stating that "results are based on estimates." *Id.* at *4. The court reasoned that "[w]hether a consumer was actually misled by the fuel calculator prior to purchasing a [car] necessarily would vary by customer" because "[s]ome customers, for example, could have viewed the fuel calculator and have been adequately informed—whether by their experience with vehicle EPA estimates or by the disclaimer—that their actual fuel efficiency would vary based on driving conditions." *Id.* Similarly here, many advertisers are repeat players and Meta provides historical data from previous ad campaigns that can further alter their understanding of Potential Reach.

Court has held that "proving classwide liability" through statistical sampling is appropriate if "each class member could have relied on that sample to establish liability" in an individual action. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016). But here, it is unclear that materiality can be established based on just the percentage of deviation. As discussed above, the degree of inflation in the Potential Reach estimate informs whether a misrepresentation has occurred, let alone a material misrepresentation. The degree of inflation relative to the total number of people within the targeted audience may also be relevant. A 10% deviation may have different import as relates to a reach of millions than to a reach of thousands or hundreds. But even assuming plaintiffs could establish that a 10% inflation rate, or some other threshold, is always material, that does not resolve the claims of class members who received Potential Reach estimates with less than the threshold. Thus, again, while Plaintiffs' statistical evidence may prove or disprove *some* claims, they have not shown it can resolve all claims within the far-reaching class.[10]

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[10] This is true even if the misrepresentation at issue is merely Meta's statement that Potential Reach is an estimate of people instead of accounts. Plaintiffs point to no evidence that could establish on a class-wide basis that reasonable advertisers view the account-as-proxy-for-people *itself* as a material misrepresentation regardless of the degree of deviation between those two metrics. *Cf. In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1117 (C.D. Cal. 2015) (rejecting a survey as dispositive of materiality, in a predominance analysis, where it "did not ask respondents questions relevant in assessing the materiality of information omitted from the packaging").

Turning to Dr. Allenby's conjoint survey, the district court assessed this evidence in analyzing damages, not materiality. This survey included only small-to-medium businesses, not the full breadth of entities that compose the class. It also did not mirror Meta's varying disclosures during the class period. And lastly, this survey is representative of only 7% of the class.[11] While the survey shows that some respondents would increase their spending if an audience size was increased 10% in the abstract, Plaintiffs have not pointed to any evidence that the reasonable ad purchaser in this class would *understand* the estimated Potential Reach to not have any inflation or deviation. Nor is there any evidence addressing how reasonable advertisers would understand Potential Reach in light of Meta's evolving disclosures.

In sum, there are two primary reasons why predominance is not satisfied as to materiality. First, determining the objective perspective of a reasonable advertiser is made difficult by the breadth of Plaintiffs' proposed class, which includes millions of advertisers of all types conducting advertising campaigns ranging from millions of dollars to tens of dollars. *Cf. Webb v. Carter's Inc.*, 272 F.R.D. 489, 502 (C.D. Cal. 2011) (declining to apply the objective "reasonable consumer standard" where materiality would "vary from consumer to consumer").

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[11] The study only included respondents that spent $1,000 to $25,000 per year on advertising through their employment. The majority of Meta's advertisers spend less than $50 per year. And one of the Named Plaintiffs spent upwards of $1 million on Meta advertising.

Second, Meta told advertisers that Potential Reach is an estimate, and Meta provided evolving disclosures about the limitations of this estimate. A false estimate undoubtedly can be the basis for a fraud claim, *see Aloe Vera of Am., Inc. v. United States*, 699 F.3d 1153, 1164 (9th Cir. 2012), but what a reasonable purchaser believes about the precision of information necessarily is impacted by what they are told about precision. This case is a far cry from the objective class-wide materiality analysis that was appropriate in *Amgen*. Because securities fraud impacts the *market*, "fantastic scenarios in which an individual investor might rely on immaterial information (think of the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning)" do not establish that materiality is an individualized issue. *Amgen*, 568 U.S. at 469, 133 S.Ct. 1184. But here, the ability to establish materiality based on class-wide proof is not undermined by "fantastic scenarios." *Id.*

The Named Plaintiffs' own actions help demonstrate the point. Taking a "peek at the merits," *Dancel v. Groupon, Inc.*, 949 F.3d 999, 1005 (7th Cir. 2019) (citation omitted), the owner of DZ Reserve made statements online that inflation in the Potential Reach calculation "should . . . not deter anyone from doing [Facebook] ads for [e-commerce]." *Cf. Johnson v. Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 581 (E.D. Cal. 2012) (finding materiality lacking, in part, because the former named plaintiffs, even with full knowledge of a product's defect, "would still buy and recommend the [product]"). And Maxwell set an advertising budget of $20 regardless of whether the Potential Reach estimate was one million or 50

million. Contrary to the district court's assertion otherwise, this evidence suggests that ad buyers as a group may not have "attach[ed] importance" to Potential Reach in choosing to buy Facebook ads. *Engalla*, 15 Cal. 4th at 977, 64 Cal.Rptr.2d 843, 938 P.2d 903.

The district court's assertion that materiality is provable on a class-wide basis because "Potential Reach is an important number for advertisers," improperly conflates the importance of the subject matter with the importance *of the claimed misrepresentation* and also fails to meet the rigors of Rule 23(b)(3). *Cf. In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1019 (C.D. Cal. 2015), *aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017), *and aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) (analyzing the materiality of food labels not for their importance generally but for how consumers understand them). *ConAgra* concerned whether a "100% Natural" food label on cooking oil was a misrepresentation. *Id.* at 1018. Food labels are shown to all consumers, but the district court did not consider the importance of food labels in the abstract, it considered the content of the challenged label and how reasonable consumers would understand that content. *Id.* at 1019.

Here, the district court's and the majority's framing of Plaintiffs' case derails their analyses. *Cf. Gonzalez v. Corning*, 885 F.3d 186, 201 (3d Cir. 2018), *as amended* (Apr. 4, 2018) ("[T]he 'question of defect' they propose is only superficially a 'common question,' just as any question becomes universal when it includes the word 'all.' "); *In re Vioxx*, 180 Cal. App. 4th at 133–34, 103 Cal.Rptr.3d 83 (rejecting an argument, as an "oversimplification," where plaintiffs

argued there was nothing more material than "risk of death" because some patients and doctors would still use the medicine regardless of the risk). The proper focus is on how advertisers in the class would view the Potential Reach estimates they received in *specific* transactions, based on the total mix of information available at the time of purchase. *See Engalla*, 15 Cal. 4th at 977–78, 64 Cal.Rptr.2d 843, 938 P.2d 903 (assessing materiality based on the explicit and implicit representations made in the context of the transaction). Facebook provided advertisers with individualized information beyond Potential Reach. For example, the "Estimated Daily Reach" calculation—viewed alongside Potential Reach—estimated how many people might see an ad each day based on the buyer's advertising budget. The Estimated Daily Reach was part of the calculus informing the buyers' reasonable expectations in purchasing ads. *Cf. Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 457 (S.D. Cal. 2014) (looking at consumer expectations for a product in determining that materiality was not susceptible to common proof).

For all these reasons, the materiality analysis required in this case centers on individualized questions of what advertisers understood about the information they were given at the time they purchased Facebook ads, and, therefore, Plaintiffs have not satisfied the predominance requirement.

### C. Reliance

Finally, actual reliance is an essential element of fraud under California law. *Conroy v. Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1256, 91 Cal.Rptr.3d 532, 203 P.3d 1127 (2009). Actual reliance does not require proving the alleged misrepresentation was

the "sole" or "decisive" cause of the plaintiff entering into the transaction. *Id.* A plaintiff need only prove the misrepresentation was an "immediate cause" or "played a substantial part" in entering the transaction. *Id.* A plaintiff meets this burden by showing that, absent the misrepresentation, the plaintiff "would not, in all reasonable probability, have entered into the ... transaction." *Id.* (internal quotation marks and citation omitted). California law recognizes that "when the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class." *Kaldenbach v. Mutual of Omaha Life Insurance Co.*, 178 Cal. App. 4th 830, 851, 100 Cal.Rptr.3d 637 (2009), *as modified* (Oct. 26, 2009) (citation and emphasis omitted). But the presumption of reliance does not apply where uniformity of representation is lacking, or at least does not predominate. *Id.*

The seminal California case applying this presumption involved salesmen that "memorized a standard statement" that was "recited by rote to every member of the class." *Vasquez v. Superior Ct.*, 4 Cal. 3d 800, 812, 94 Cal.Rptr. 796, 484 P.2d 964 (1971); *see also Occidental Land, Inc. v. Superior Ct.*, 18 Cal. 3d 355, 358–59, 363, 134 Cal.Rptr. 388, 556 P.2d 750 (1976) (applying presumption where the class read the same document containing the misrepresentation and was required to state in writing that they had read it). On the other hand, the *Kaldenbach* court did not apply the presumption of reliance where the case involved individualized sales presentations because the plaintiff had not overcome the "significant individual issues" of whether misrepresentations

were made to each class member. 178 Cal. App. 4th at 851, 100 Cal.Rptr.3d 637.

Here, the district court erred by applying the presumption of reliance as a basis for granting class certification of Plaintiffs' Rule 23(b)(3) damages class because Plaintiffs did not establish that Meta made a uniform misrepresentation.[12]

For these reasons, I would reverse the district court's certification of Plaintiffs' Rule 23(b)(3) damages class. I do not reach Meta's additional challenges regarding the district court's typicality and adequacy analyses.

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[12] Plaintiffs rely on *In re Tobacco II Cases* to discount alternative information Meta provided to advertisers. *Tobacco II* stated that "an allegation of reliance is not defeated merely because there was alternative information available to the consumer-plaintiff, even regarding an issue as prominent as whether cigarette smoking causes cancer." 46 Cal. 4th 298, 328, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009). This language, however, concerns alternative information external to a defendant's representation, such as medical studies by third parties. *See id.* (citing to a case discussing "common knowledge"). It does not concern information provided by the defendant that is directly relevant in determining whether a misrepresentation occurred at all.

[2022 WL 912890]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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| DZ RESERVE, et al.,<br>Plaintiffs,<br>v.<br>META PLATFORMS, INC.,<br>Defendant. | Case No. 3:18-cv-04978-JD<br>**ORDER RE MOTION TO CERTIFY CLASS AND *DAUBERT* MOTIONS**<br>Re: Dkt. Nos. 282, 285, 286 |

In this action alleging fraud against Meta Platforms, Inc. (Meta), formerly known as Facebook, named plaintiffs DZ Reserve and Cain Maxwell have asked to certify a class of United States residents who paid Meta for placement of advertisements on social media platforms. Dkt. No. 282. The gravamen of the lawsuit is that Meta inflated its potential advertising reach to consumers, and charged artificially high premiums for ad placements. Meta opposes certification, and filed two *Daubert* motions challenging the opinions and conclusions proffered by plaintiffs' expert witnesses. Dkt. Nos. 285, 286.

Three claims alleged in the Third Amended Complaint (TAC) remain in play. Dkt. No. 332.[1] The Court dismissed with prejudice plaintiffs' claims for breach of the implied covenant of good faith and fair

[1] The TAC was originally filed under seal as Dkt. No. 166. The Court denied the administrative motion to seal the TAC without prejudice, *see* Dkt. No. 320, and the TAC was refiled as Dkt. No. 332.

dealing and a quasi-contract claim. Dkt. No. 255 at 2. The Court sustained plaintiffs' claims for fraudulent misrepresentation and fraudulent concealment, with the proviso that plaintiffs could not pursue those claims for conduct before August 15, 2015. *Id.* at 1-2. While the certification motion was pending, the Court granted a motion for judgment on the pleadings and dismissed plaintiffs' claim of restitution under the California Unfair Competition Law (UCL). Dkt. No. 366. The UCL claim was sustained for injunctive relief only. *Id.* at 2. Consequently, the claims subject to certification are fraudulent misrepresentation and fraudulent concealment for damages, and the UCL for injunctive relief.

## DISCUSSION

### I. BACKRGOUND

Before getting into the merits, a few words about Meta's brief are in order. Meta fired a blunderbuss of objections at certification. Virtually every page of its lengthy opposition brief presented a new argument, often in just a paragraph or two of discussion. As a result, many of its arguments were underdeveloped to the point where the Court had ample justification to disregard them. Even so, the Court undertook the burden of sorting through Meta's brief to identify and address what appear to be its main arguments. Meta aggravated this situation further by making factual arguments much more suited to summary judgment proceedings than a class certification motion. To be sure, as the ensuing certification standards make clear, the Court will review the evidence as pertinent to the question of whether a class should certified. Meta's arguments went far beyond that inquiry.

The parties' familiarity with the record is assumed. In pertinent part, the undisputed facts are that Meta sells advertising to businesses and business owners like plaintiffs DZ Reserve and Cain Maxwell. Dkt. No. 332 at ¶ 2 Meta's Ads Manager platform is used by advertisers to identify their advertising targets, including the demographic reach they desire. *Id.* at ¶ 3. After advertisers select their targeting and placement criteria, the Ads Manager displays a "Potential Reach" for the advertisement. *See* Dkt. No. 282-3. The Potential Reach is expressed as a number of people that the ad may reach. *Id.* The default Potential Reach number, before any targeting criteria are selected, is the Potential Reach for people in the United States aged 18 and up, which was shown during the putative class period to be over 200 million people. Dkt. No. 281-9 at ¶¶ 55-60. As targeting criteria are selected, the Potential Reach is revised accordingly. Dkt. No. 282-3; 281-13 at 54:21-59:25. Meta describes the Potential Reach as an estimate of people in the ad's target audience. *See* Dkt. No. 296-17 at 3.

**II. CLASS CERFITICATION STANDARDS**

Plaintiffs propose to certify this class under Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3):

> All United States residents (including natural persons and incorporated entities) who, from August 15, 2014, to the present ("Class Period"), paid for the placement of at least one advertisement on Facebook's platforms, including the Facebook and Instagram platforms, which was purchased through Facebook's Ads Manager or Power Editor.

> Excluded from the class are: (1) advertisements purchased pursuant to agreements other than Facebook's Terms of Service or Statement of Rights and Responsibilities; (2) advertisements purchased using only non-lookalike Custom Audiences as the targeting criteria; (3) advertisements purchased using Reach and Frequency buying; (4) advertisements purchased with the objectives of canvas app engagement, canvas app installs, offer claims, event responses, page likes, or external; and (5) advertisements for which Facebook provided Potential Reach lower than 1000.

Dkt. No. 282 at 15.

The Court has written extensively on the standards for class certification, which informs the discussion here. *See, e.g.*, *Sapan v. Yelp, Inc.*, No. 18-cv-3240-JD, 2021 WL 5302908 (N.D. Cal. Nov. 15, 2021); *Meek v. SkyWest, Inc.*, --- F. Supp. 3d ---, 2021 WL 4461180 (N.D. Cal. Sep. 29, 2021). A class action is "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 (2013) (quotations omitted). The overall goal is "to select the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013) (internal quotations omitted) (modification in original). Plaintiffs must show that their proposed class satisfies all four requirements of Rule 23(a), and at least one of the subsections of Rule 23(b). *Comcast*, 569 U.S. at 33 (2013); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001). As the parties seeking

certification, plaintiffs bear the burden of showing that the requirements of Rule 23 are met for their proposed class. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

The Court's class certification analysis "must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim," but merits 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*, 568 U.S. at 465-66 (internal quotations and citations omitted). The class certification procedure is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits. *Alcantar v. Hobart Service*, 800 F.3d 1047, 1053 (9th Cir. 2015). The decision of whether to certify a class is entrusted to the sound discretion of the district court. *Zinser*, 253 F.3d at 1186.

**III. RULE 23(B)(3) CLASS**

The Rule 23(a) factors are the same for certification of the proposed class under Rule 23(b)(2) or (b)(3), and the conclusions reached here for the Rule 23(a) elements apply to both types of classes. The main difference is the predominance element of Rule 23(b)(3), which Rule 23(b)(2) does not require. The Court takes up the proposed Rule 23(b)(3) class first.

The Court granted Meta's motion for judgment on the pleadings to dismiss plaintiffs' UCL claims for restitution, *see* Dkt. No. 366, so monetary relief is only available for plaintiffs' common law fraudulent concealment and fraudulent misrepresentation claims.

**A. Numerosity (23(a)(1))**

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs state, with evidentiary support, that "[d]uring each year of the class period, more than 2 million United States advertisers purchased Facebook ads." Dkt. No. 282 at 15. Meta does not contest numerosity, and the Court finds this element is satisfied.

**B. Typicality and Adequacy (23(a)(3)-(4))**

Rule 23(a) requires the named plaintiffs to demonstrate that their claims are typical of the putative class, and that they are capable of fairly and adequately protecting the interests of the class. Fed. R. Civ. P. 23(a)(3)-(4). The named plaintiffs say typicality is satisfied because they "bring the same legal claims as the rest of the putative [c]lass" and "rely on the same grounds for liability as the rest of the class." Dkt. No. 282 at 17. Plaintiffs also say that they are adequate representatives because "[t]hey have no conflicts with the class," have "participated actively in this case," and their counsel has no conflicts, has experience with class actions, and has demonstrated a "willingness to vigorously prosecute this action." *Id.*

Meta makes multiple objections to adequacy and typicality. The primary one is that the proposed class is said to include a diverse population of advertisers ranging from " 'large sophisticated corporations' to 'individuals and small businesses.'" Dkt. No. 294 at 16-17. In Meta's view, this means that the putative class members are necessarily in such disparate positions vis-à-vis its advertising services that the named plaintiffs, as advertisers on the smaller end of

the spectrum, cannot fairly or adequately represent them. *Id.*

The objection is not well taken. To start, typicality is demonstrated when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). "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." (internal quotation marks omitted). *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1019.

That is the situation here. Plaintiffs have adduced evidence indicating that, regardless of size or buying power, Meta's customers saw similar representations by Meta about its advertising reach and programs. Advertisers were shown the same default Potential Reach of over 200 million people before they applied any targeting criteria. Dkt. No. 281-9 at ¶¶ 55-60. Plaintiffs' expert, Dr. Charles Cowan, states that even with different targeting criteria for each advertiser, inflated Potential Reach representations were made across Meta's platform. Dkt. No. 281-11 at ¶ 33. All advertising customers were shown Potential Reach

estimates that were inflated by a similar percentage. *Id.* at ¶ 15.[2]

It may be that class members differ in advertising budgets and scope of purchases, as Meta suggests, but Meta has not shown that these differences defeat typicality or the named plaintiffs' ability to adequately represent all class members. This is not a case where the record demonstrates that the products, pricing, and programs accessed by class members were so dissimilar that typicality and adequacy could not be established. *See, e.g.*, *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 489-90 (N.D. Cal. 2008) (denying certification of antitrust class where evidence demonstrated putative class members purchased entirely different products at different prices). In effect, Meta simply posits that typicality and adequacy cannot be established because the class includes large and small ad purchasers. The problem with this approach is that it is *ipse dixit* and not an evidence-based objection.

Meta's case citations do not lead to a different conclusion. It overreads *In re Facebook, Inc., PPC Advertising Litig.*, 282 F.R.D. 446 (N.D. Cal. 2012), *aff'd sub nom. Fox Test Prep v. Facebook, Inc.*, 588 F. App'x 733 (9th Cir. 2014), to stand for the proposition that a "'diverse group' of advertisers" necessarily undercuts adequacy and typicality. Dkt. No. 293-4 at 16-17. But that case in fact determined that typicality had been demonstrated. *In re Facebook, Inc.*,, 282 F.R.D. at 453-54. Adequacy was not found because the record failed to show that the named plaintiffs had suffered a concrete injury from the

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[2] Dr. Cowan's work is discussed in more detail later in the order.

challenged conduct. *Id.* at 454. That is not a circumstance present here.

Meta also has not demonstrated an evidence-based reason to reject the adequacy of the named plaintiffs generally. Adequacy of representation asks whether: "(1) the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Meta did not make a serious effort at answering either inquiry in the negative, and plaintiffs have demonstrated that no such concerns are in play here. *See* Dkt. No. 282 at 16-17.

Meta's effort to recast its typicality and adequacy challenges as questions of reliance and UCL standing is equally unavailing. *See* Dkt. No. 294 at 15. To start, named plaintiffs demonstrated reliance by proffering evidence that DZ Reserve was deterred from using Meta ads after learning that the Potential Reach was an inaccurate metric. Dkt. No. 293-27 at 193:17-194:5. Similarly, named plaintiff Maxwell relied on Potential Reach to set his budgets and would not have spent money on Meta ads if he knew Potential Reach was inaccurate. *See* Dkt. No. 293-29 at 199:8-12; Dkt. No. 317-2 at 257:3-14. Meta says that the named plaintiffs would still have purchased ads if they knew the Potential Reach was inaccurate. Dkt. No. 294 at 16. But plaintiffs also indicated that they would have spent less on ads after learning the Potential Reach was inaccurate, demonstrating that they were deceived into spending more money. *See, e.g.*, Dkt. No. 317-3 at 105:21-106:5. This and similar evidence also establishes reliance for UCL standing purposes. *See Walker v. Life Insurance Co. of the Sw.*,

953 F.3d 624, 630 (9th Cir. 2020) ("To bring a UCL claim, a plaintiff must establish he suffered 'as a result of' the defendant's conduct.") (quoting Cal. Bus. & Prof. Code § 17204); *In re Tobacco II Cases*, 46 Cal. 4th 298, 325 (Cal. 2009) (named plaintiffs, not absent ones, must provide evidence of actual reliance at the certification stage).

Meta's mention of an arbitration provision in contracts for advertising after May 2018, Dkt. No. 294 at 17, also does not defeat the adequacy and typicality of the named plaintiffs. The complaint in this case was filed in August 2018. Dkt. No. 1. Despite that, and knowing of the arbitration clause and its possible application to plaintiffs, Meta never sought to compel arbitration, and instead vigorously litigated this lawsuit in federal court as if arbitration were not an option. A good argument can be made that Meta has waived arbitration on this record. *See Anderson v. Starbucks Corp.*, No. 20-cv-01178-JD, 2022 WL 797014 (N.D. Cal. March 16, 2022) (and cases cited therein). In addition, the record shows that the named plaintiffs purchased ads before and after May 2018, which indicates that they are adequate representatives for advertisers who purchased ads both before and after May 28, 2018. *See* Dkt. No 328-2 at ¶ 21. If for some presently unknown reason an adjustment to the class definition might be required on arbitration grounds, the Court can alter or amend it at any time before entry of a final judgment. Fed. R. Civ. P. 23(c)(1)(C); *see also Powers v. Hamilton Cty. Pub. Def. Com'n*, 501 F.3d 592, 619 (6th Cir. 2007).

Plaintiffs have satisfied the elements of adequacy and typicality.

### C. Commonality (23(a)(2)) and Predominance (23(b)(3)

The commonality requirement under Rule 23(a)(2) is satisfied when "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Because "any competently crafted class complaint literally raises common questions," the Court's task is to look for a common contention "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." *Alcantar*, 800 F.3d at 1052 (internal quotations and citations omitted). What matters is the "capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (internal quotations omitted) (emphasis in original). This does not require total uniformity across a class. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. "[E]ven a single common question will do." *Dukes*, 564 U.S. at 359. The commonality standard imposed by Rule 23(a)(2) is "rigorous." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013).

Rule 23(b)(3) sets out the related but nonetheless distinct requirement that the common questions of law or fact predominate over the individual ones. This inquiry focuses on whether the "common questions present a significant aspect of the case and [if] they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022 (internal quotations and citation omitted); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453

(2016). Each element of a claim need not be susceptible to classwide proof, *Amgen*, 568 U.S. at 468-69, and the "important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Rule 23(b)(3) permits certification when "one or more of the central issues in the action are common to the class and can be said to predominate, . . . 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*, 577 U.S. at 453 (internal quotations omitted).

"Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," *Comcast*, 569 U.S. at 34, and the main concern under subsection (b)(3) is "the balance between individual and common issues." *In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 560 (9th Cir. 2019) (en banc) (internal quotations omitted). The Court finds it appropriate to assess commonality and predominance in tandem, with a careful eye toward ensuring that the specific requirements of each are fully satisfied. *See, e.g.*, *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120-21 (9th Cir. 2017).

**1. Liability**

Plaintiffs have demonstrated that the main liability issues are common to the class members and are capable of resolution with common evidence. For the fraudulent concealment and fraudulent misrepresentation claims, plaintiffs must show: "(a) misrepresentation (false representation,

concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974 (1997). For plaintiffs' UCL claims (for which only commonality must be shown as part of the 23(a) factors, given the unavailability of monetary relief), plaintiffs must show that members of the public were likely to be deceived. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (claims under UCL and CLRA are "governed by the 'reasonable consumer' test"; plaintiffs "must show that members of the public are likely to be deceived") (internal quotations and citations omitted).

Consequently, the main liability question is the same for all class members: did Meta's Potential Reach metric mislead advertisers? Meta does not disagree, and instead hurls a grab bag of challenges to plaintiffs' ability of proving an answer in their favor. Much of Meta's argument against commonality and predominance is simply that the evidence does not support plaintiffs' case. That is not the pertinent inquiry at the certification stage. The question is whether it makes sense under Rule 23 and as a matter of due process and efficiency to present the liability dispute to a jury on behalf of a class. Whether plaintiffs can ultimately prove it up at trial is a different matter altogether.

To the extent a merits inquiry is warranted, plaintiffs have adduced evidence showing that all class members were exposed to a similar representation about the ability of Potential Reach to reach "people," namely unique individuals. *See, e.g.*, Dkt. No. 282-3; Dkt. No. 281-9 at ¶¶ 55-60. This is

seen in the Ads Manager interface, which represented Potential Reach as a number of people. *See, e.g.*, Dkt. No. 281-8. The evidence further shows that Meta's Potential Reach metric was not actually an estimate of people reached, but an estimate of "accounts" reached. *See* Dkt. No. 281-60 at ECF 10. Because the number of unique accounts and unique people were different, this led to an inaccurate representation of how many people the advertisements could reach. *See* Dkt. No. 281-11 at ¶ 15.

Meta does not dispute that the Potential Reach numbers were presented in terms of people. Instead, Meta says that the Potential Reach numbers were not uniformly inaccurate as a result of different targeting criteria producing different Potential Reach numbers. Dkt. No. 293-4 at 18-20. Even so, Potential Reach was always expressed as a number of "people," and the discrepancy between people and accounts made the number inaccurate, even if the numerical value of the inaccuracy varied across advertisers. Consequently, plaintiffs have shown that the question of whether Meta made misrepresentations to all class members can be shown through common evidence.

Meta's knowledge of the misleading statements, and intent to deceive, also lend themselves to resolution by common evidence. *See, e.g.*, *Brickman v. Fitbit, Inc.*, No. 15-cv-2077-JD, 2017 WL 5569827, at *6 (N.D. Cal. Nov. 20, 2017) (citing *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173-74 (2003)). Several documents show that Meta knew that its Potential Reach estimate did not accurately reflect the number of people its advertisements could reach. *See* Dkt. No. 281-25; Dkt. No. 281-27. Meta's intent for advertisers to rely on its Potential Reach numbers is also provable through common evidence. Meta knew that the

potential reach number was the most important number in its ads creation interface and that advertisers frequently relied on the estimated audience to build their budgets and advertising strategies. Dkt. No. 281-8.

So too for materiality and reliance. In common law and UCL fraud cases, questions of materiality and reliance do not necessarily undermine predominance and commonality. *Brickman*, 2017 WL 5569827, at *6-*7; *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD, 2021 WL 4427427, at *5 (N.D. Cal. Sep. 27, 2021). "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material." *Tobacco II Cases*, 46 Cal. 4th at 327. A misrepresentation is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Id.* (internal quotations omitted). The question of materiality "can be proved through evidence common to the class." *Amgen*, 568 U.S. at 467. Plaintiffs have established that materiality and reliance can be shown in this case through common evidence. Potential Reach metrics were shown to all advertisers in the Ads Manager. Dkt. No. 282-3; Dkt. No. 282-4. Meta has acknowledged that Potential Reach is an important number for advertisers. Dkt. No. 281-8. A majority of advertisers rely on Potential Reach as a metric for their advertisements. Dkt. No. 281-22.

Plaintiffs have also established that proof of injury is susceptible to common evidence. Among other evidence, a report from Pivotal Research showed that Potential Reach numbers exceeded census counts for various demographics, Dkt. No. 282-22 and several internal documents indicated various causes of

inflated Potential Reach levels, *see, e.g.*, Dkt. No. 282-28; 282-7; 282-31; 282-32. Plaintiffs' expert, Dr. Cowan, conducted a statistical analysis to determine the percentage of inflation for both nationwide and targeted advertisements. *See* Dkt. No. 282-8. He concluded that it was a statistical certainty that, for any advertisement with a Potential Reach of at least 1,000 people or more, the estimate would be significantly inflated above the actual number of people the advertisement could reach. *Id.*

Meta says that Dr. Cowan improperly assumed that the inflated estimates found in the default national population (United States, aged 18-65) Potential Reach were equally applicable across all targeted groups, and that each measure of inflation was distributed across targeted groups. Dkt. No. 281-11 ¶ 82. Meta's expert, Dr. Steven Tadelis, says that this is a flawed assumption because Meta's data sampling shows that sources of inflation are not distributed evenly across all smaller demographics that an advertiser might choose. Dkt. No. 293-44 ¶ 125. But Dr. Tadelis does not conclude that no inflation occurred at all, only that Dr. Cowan did not measure the exact inflation resulting from any given targeting criteria because inflation for any given sub population may be different from the inflation for the default national population. This criticism does not foreclose classwide proof of injury.

**2. Damages and *Daubert* Motions re Dr. Allenby and Mr. McFarlane**

While a damages methodology need not deliver mathematical precision, and may accommodate some individual variability among class members, *see In re Capacitors Antitrust Litigation*, No. 17-md-2801-JD,

2018 WL 5980139, at *9 (N.D. Cal. Nov. 14, 2018), it must be capable of determining damages across the class in a reasonably accurate fashion. *Comcast*, 569 U.S. at 35 (plaintiffs bear burden of showing that "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)"). The damages model "must measure only those damages attributable to" the plaintiffs' theory of liability. *Id.* Put plainly, the damages model must reasonably reflect the claims and evidence in the case.

Plaintiffs have proffered experts who analyzed the evidence to arrive at a price premium that advertisers paid for inflated Potential Reach values. Dkt. No. 281-3 at 21. Dr. Cowan measured the amount of inflation associated with Potential Reach as a result of the misleading "people" metric. *Id.* Dr. Allenby used a "conjoint survey" to test the impact of inflated Potential Reach on advertisers' budgets. *Id.* Dr. Roughgarden, an auction expert, calculated a price premium. *Id.* Dr. Levy, an economist, confirmed that Dr. Roughgarden's price premium properly considered supply and demand, and that damages could be calculated on a classwide basis. *Id.* Plaintiffs also offer expert witness Mr. McFarlane, who opined about the price premium class members paid compared to if no potential reach metric was provided at all. *Id.*

Meta offers little in its class certification brief to attack plaintiffs' damages models. It relies instead on two separately filed *Daubert* motions to exclude the opinions of Dr. Allenby and Mr. McFarlane, and by extension, the portions of Dr. Levy and Dr. Roughgarden's opinions that rely on the reports of Dr. Allenby and Mr. McFarlane. Dkt. Nos. 284-4, 284-6.

Overall, Meta has not demonstrated a good reason to exclude Dr. Allenby's work. Under the familiar standards of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), there is no "definitive checklist or test" used to evaluate the reliability of proposed expert testimony. *Daubert*, 509 U.S. at 593-94. The question for the Court at this stage is to decide whether Dr. Allenby will use a generally accepted method for determining price premiums, or whether his approach is "junk science" akin to predicting criminality by feeling the bumps on a person's head. *General Electric Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring in part).

The "inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage." *Sali v. Corona Reg'l Med. Ctr.*, 9-9 F.3d 996, 1006 (9th Cir. 2018). The Court determines whether the expert evidence helps to establish whether class certification is appropriate. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

Dr. Allenby conducted a conjoint survey and analyzed the data using both a linear regression model and a "logit model" (another type of statistical analysis) before determining that the logit model did not best fit the data. Meta does not suggest that a conjoint survey is an untested method, nor does it claim that it is improper to use a linear regression to analyze survey data. Rather, Meta says that the specific regression that Dr. Allenby used was a novel type of analysis that purposely excluded data from the analysis. Dkt. No. 284-4 at 10-12.

This Court has found conjoint analysis to be a reliable method of determining price premiums. *See,*

*e.g.*, *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD, 2021 WL 4467427, at * 7 (N.D. Cal. Sep. 27, 2021). Meta does not dispute the generally utility of conjoint analysis, and focuses its critique on Dr. Allenby's use of a linear regression model to analyze the data from the conjoint survey. Dkt. No. 284-4 at 10. Plaintiffs have shown that Dr. Allenby chose a linear regression model that is a standard method for analyzing this data. Dkt. No. 304-17 at 143:9-18; 304-20 at 57:23-58:7. Dr. Allenby's choice of one particular data analysis method over another goes to the weight of his opinion, not its admissibility. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010). To the extent that Meta suggests that Dr. Allenby improperly limited his data set, this too is a question of weight to be afforded to the opinion, not its admissibility. *In re Capacitors Antitrust Litig.*, No. 17-md-2801-JD, 2018 WL 5980139, at *6 (N.D. Cal. Nov. 14, 2018). Dr. Allenby states that he chose a subset of the data to analyze based on the fact that his conjoint survey included allocations of advertising for both Meta and Google ads, but only Meta ads are at issue in this case. Dkt. No. 304-17 at 288:10-289:8.

This is enough to be sound and useful for certification purposes. If evidence emerges at trial that substantially impeaches Dr. Allenby's methods and conclusions, the door may be opened to consideration of decertification.

Meta's objections to Mr. McFarlane's report lead to a different outcome. Meta says that Mr. McFarlane offered nothing more than his personal interpretation of documents and evidence. Dkt. No. 284-6 at 7. Meta also says that Mr. McFarlane used a price premium figure that he did not calculate, and merely applied it

in an obvious fashion to the amount of money plaintiffs are said to have spent on advertising. *Id.* at 3.

These objections are well taken. Overall, Mr. McFarlane's report does not offer any specialized or scientific expertise, or anything beyond the typical knowledge and experience of a jury. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592. The documents Mr. McFarlane interprets are reasonably intelligible to a jury without special assistance. Consequently, exclusion of Mr. McFarlane's opinions and report is required. Any portion of Dr. Roughgarden's opinions that is drawn on Mr. McFarlane's work is also excluded, unless an independent basis for it is demonstrated. The Court declines to undertake that analysis on the record as it currently stands. Meta may pursue it in a motion in limine, as circumstances warrant.

Because plaintiffs have adequately shown that they can calculate damages on a classwide basis using Dr. Allenby's report and evidence from their other experts (excluding Mr. McFarlane), they have shown an adequate damages model under Rule 23(b)(3).

**D. Superiority**

The final certification question is whether the ends of justice and efficiency are served by certification. Rule 23(b)(3) requires a finding that proceeding as a class is superior to other ways of adjudicating the controversy, which in this case would mean individual actions by each putative class member. There can be no doubt here that a class is the superior method of handling the claims of individual advertisers. The price premium at issue here for each advertiser is no more than $32, Dkt. No.

281-3, and it is not likely for class members to recover large amounts individually if they prevailed. No reasonable person is likely to pursue these claims on his or her own, especially given the cost and other resources required to litigate against a company like Meta, which has already retained multiple experts and shown that it is committed to strongly defending this case. This all "vividly points to the need for class treatment." *Just Film*, 847 F.3d at 1123.

**IV. RULE 23(B)(2) CLASS**

Plaintiffs seek certification of a class under Rule 23(b)(2) for the UCL injunctive relief claim. Such a class may be certified when "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." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195. The primary use of Rule 23(b)(2) classes has been the certification of civil rights class actions, but courts have certified many different kinds of classes under Rule 23(b)(2). *See Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). The Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy must also be shown for a Rule 23(b)(2) class. *Zinser*, 253 F.3d at 186. As discussed, plaintiffs have met their burden for proving the Rule 23(a) requirements.

For Rule 23(b)(2), the Court is not required "to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*

*v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). "It is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Id.* (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)) (internal quotations omitted).

The California Supreme Court has held that "[i]njunctions are the 'primary form of relief available under the UCL to protect consumers from unfair business practices." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 337 (2011); *see also Tobacco Cases II*, 46 Cal. 4th at 319. For the proposed Rule 23(b)(2) class, plaintiffs seek injunctive relief in the form of an order directing Meta to "either (a) correct the [Potential Reach] metric by removing known sources of inflation, or (b) remove the [Potential Reach] metric altogether." Dkt. No. 281-3 at 18.

Plaintiffs have standing to seek an injunction. As our circuit has determined, "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase," because "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018). Plaintiffs have proffered deposition testimony to the effect that they would consider purchasing ads from Meta again if Meta corrected or removed the misleading Potential Reach metric. Dkt. No. 282-65 at 242:18-23; Dkt. No. 282-64 at 105:24-106:5. This establishes plaintiffs' standing to pursue injunctive relief in this case.

Meta's arguments to the contrary are unavailing. To start, Meta repeats the same arguments that it already made in its motion for judgment on the pleadings, Dkt. No. 270, that plaintiffs have failed to show they lack an adequate remedy at law. The Court has already determined that plaintiffs have shown an inadequate remedy at law for their injunctive relief claim under the UCL. Dkt. No. 366 at 2.

Meta also says that plaintiffs did not show they face a threat of actual future harm because at least one inflation source has already been remediated and Meta updated disclosures about multiple accounts. Dkt. No. 293-4 at 25. This is a merits question that is not properly decided at the class certification stage.

Meta's passing comment that the injunction plaintiffs seek is "overbroad and unworkable," Dkt. No. 293-4 at 25, is no basis for denying certification. The remark was not developed in a meaningful way, and concerns about the scope of an inunction are premature at this stage. *See B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019). There is considerably more to be done in this case, namely trial, before the specific terms of an injunction might warrant debate.

Consequently, a Rule 23(b)(2) class is appropriate for plaintiffs' UCL claims.

## CONCLUSION

The Court certifies the proposed class under Rule 23(b)(3) for the common law fraud claims, and under Rule 23(b)(2) for the UCL injunction claim. Plaintiffs DZ Reserve, Inc. and Cain Maxwell are appointed class representatives, and their counsel at Cohen Milstein Sellers & Toll PLLC and the Law Offices of Charles Reichmann are appointed class counsel.

Meta's motion to exclude the report and testimony of Dr. Allenby is denied. Meta's motion to exclude the report and testimony of Mr. McFarlane is granted.

Plaintiffs are directed to file by April 29, 2022, a proposed plan for dissemination of notice to the classes. Plaintiffs will meet and confer with Meta at least 10 days in advance of filing the plan so that the proposal can be submitted on a joint basis, to the fullest extent possible.

A status conference is set for May 26, 2022, at 10:00 a.m. in Courtroom 11, 19th Floor, San Francisco. The parties are directed to file a joint statement by May 19, 2022, with proposed dates for the final pretrial conference and trial.

The parties are referred to Magistrate Judge Hixson for a settlement conference to be held as his schedule permits.

**IT IS SO ORDERED.**

Dated: March 29, 2022

/s/ James Donato
JAMES DONATO
United States District Judge

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| DZ RESERVE; CAIN MAXWELL, DBA Max Martialis,<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>META PLATFORMS, INC., FKA Facebook, Inc.,<br><br>Defendant-Appellant. | No. 22-15916<br><br>D.C. NO. 3:18-cv-04978-JD<br>Northern District of California,<br>San Francisco<br><br>ORDER |

Before: WALLACE, S.R. THOMAS, and FORREST, Circuit Judges.

Meta Platforms, Inc.'s ("Meta") motion for leave to file a reply in support of its petition for panel rehearing and rehearing en banc is DENIED.

Judges Wallace and S.R. Thomas have voted to deny Meta's petition for panel rehearing. Judge Forrest has voted to grant the petition for panel rehearing.

The full court has been advised of Meta's petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

## 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:

* * *

(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.

* * *