NO. 24-____

In the

Supreme Court of the United States

PREMIER NUTRITION CORPORATION,
Petitioner,

v.

MARY BETH MONTERA, *individually and on behalf of all others similarly situated*,
Respondents.

On Petition for 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 *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), this Court encouraged federal courts to certify uncertain questions of state law to state high courts. Certification, the Court advised, "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Id.* at 391. Fifty years have now passed since *Lehman* without further guidance on when to use certification. In that time, lower courts have developed widely divergent approaches; several circuits have lost sight of *Lehman*'s goal of cooperative federalism, even as the need for cooperative federalism has increased. An increasing number of important state-law claims, particularly in the class-action context, are being litigated in foreign federal courts because of *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), and *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 582 U.S. 255 (2017). Yet many lower courts, especially the Ninth Circuit, have summarily refused to certify those questions to state high courts. States have thus been left to watch as far-away federal courts control their laws. The questions presented are:

1. Whether a federal court must consider federalism interests when asked to certify important and unresolved questions of state law?
2. Whether the Ninth Circuit erred in summarily denying Petitioner's request for certification in an unreasoned footnote?

PARTIES TO THE PROCEEDING

Petitioner is Premier Nutrition Corporation, now known as Premier Nutrition Company, LLC. Petitioner was the defendant-appellant-cross-appellee below.

Respondent is Mary Beth Montera, individually and on behalf of all others similarly situated. Respondent was the plaintiff-appellee-cross-appellant below.

CORPORATE DISCLOSURE STATEMENT

Premier Nutrition is wholly owned by Dymatize Enterprises, LLC, which is wholly owned by TA/DEI-A Acquisition Corp., which is wholly owned by BellRing Brands, LLC, which is wholly owned by BellRing Intermediate Holdings, Inc., which is wholly owned by BellRing Brands, Inc., which is publicly held. No publicly held corporation owns 10% or more of BellRing Brands, Inc.'s stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Montera v. Premier Nutrition Corporation*, No. 16-cv-06980-RS, U.S. District Court for the Northern District of California. Judgment entered August 12, 2022.
- *Montera v. Premier Nutrition Corporation*, No. 22-16375, 22-16622, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 6, 2024.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Premier Nutrition Corporation (Premier) respectfully petitions 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 Ninth Circuit's decision (Pet.App.1a-41a) is reported at 111 F.4th 1018. The Ninth Circuit's order denying Premier's petition for rehearing en banc (Pet.App.141a-142a) is not reported.

The district court's decision (Pet.App.54a-77a) denying Premier's motions for judgment as a matter of law and to decertify the class, and granting in part Plaintiff's motion for entry of judgment, is reported at 621 F. Supp. 3d 1012. The district court's decision (Pet.App.42a-53a) denying Premier's renewed motion for judgment as a matter of law and motion for a new trial is not reported.

JURISDICTION

The Ninth Circuit entered judgment on August 6, 2024. Pet.App.1a. The court denied Premier's petition for rehearing en banc on October 18, 2024. Pet.App.141a. On January 14, 2025, this Court extended Premier's deadline to petition for a writ of certiorari to and including March 17, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

Over 50 years ago in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), this Court endorsed certifying important and novel questions of state law to a state's highest court. As appropriate for the first decision in a new area, the Court said little about what should guide the certification analysis, leaving room for development. In the decades since, the Court has provided no further guidance. Left to themselves, the circuit courts have developed widely varying formulations of the certification inquiry and have applied them haphazardly and inconsistently. When litigants assess the prospect of certification, they have no idea whether it will be granted. Too often certification is not granted and states are given benchwarmer status—relegated to watching from the sidelines as federal courts play the lead role in developing their laws.

All of that is out of line with the cooperative federalism this Court directed in *Lehman*. States share sovereign dignity, and control over one's law is central to sovereignty. Federal courts play a key cooperative role in enforcing state laws, but it is not for them to say what state law is on questions that are novel and important. Unfortunately, that is increasingly a power some federal courts are claiming.

More than ever, federal courts today are asked to apply the law of far-away states. Questions of state law commonly arise in class actions in federal courts under diversity jurisdiction. Moreover, because of this Court's decisions in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (addressing class actions), and *Bristol-Myers Squibb*

Co. v. Superior Court of California, San Francisco County, 582 U.S. 255 (2017) (addressing personal jurisdiction), sometimes the questions of state law that arise in federal court will never arise in state court, and often they arise in federal courts located outside the state whose law is at issue.

Thus, the need to develop the analysis governing certification of important and novel questions is growing. "Federal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 48 (1997). That is especially true when the federal court and state are on opposite ends of the country. "When federal judges in [California] attempt to predict uncertain [New York] law, they act … as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman*, 416 U.S. at 391.

In this case, "[t]he Ninth Circuit" once again "lost sight of these limitations." *Arizonans*, 520 U.S. at 48. Presented with important and unsettled questions of New York law—questions that will likely never arise directly in New York state courts because of *Shady Grove*—the Ninth Circuit chose to answer those questions itself rather than certify them to the New York Court of Appeals.

State courts have shown they want to answer these questions when given the opportunity. The New York Court of Appeals, for instance, has accepted 96% of questions certified to it by federal courts. Other state courts also have high acceptance rates. To ensure those state interests are not overlooked, federal courts should consider (1) the degree to which

the state court in question has welcomed certification; (2) whether the state whose law is at issue lies outside the district or circuit being asked to certify the question; (3) whether the question involves a matter of policy over which the state has exercised control; and (4) whether the question is likely to arise in state court without certification.

The Ninth Circuit's decision declining to certify considered none of those factors, nor any federalism interests at all. Its summary refusal to let the New York Court of Appeals address important and unsettled questions of New York law underscores the need for this Court's direction. Certification is too important to leave underdeveloped. Fifty years' experience has shown that unclear standards yield underuse. Without guidance from this Court to reinforce the importance of cooperative federalism and to prescribe how it should be considered, state courts will continue to be left on the outside looking in as federal courts "rule definitively on the meaning of state legislation." *Arizonans*, 520 U.S. at 48.

STATEMENT

A. Legal Background

This case arises at the intersection of state-law certification, judicial federalism, and this Court's recent decisions in *Shady Grove* and *Bristol-Myers*.

1. The advent of certification and its embrace by state courts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), requires federal courts to apply substantive state law in diversity cases. When state law is unclear, *Erie* requires federal judges to "forecast" how a state's

supreme court would rule. *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941).

Federal forecasting is sufficient for run-of-the-mill issues, but when the state-law issues are novel and important, it raises federalism concerns. To avoid "the problem of" federal courts opining on "unresolved state law," states began adopting certification procedures circa 1945. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960). These procedures allow federal courts to certify uncertain questions of state law to a state high court for "authoritative[]" resolution. *Id.*

Certification ensures that the "judicial policy of a state [is] decided when possible by state, not federal, courts." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.). It protects a state against "los[ing] the ability to develop or restate the principles that it believes should govern" and "ensures that the law [federal courts] apply is genuinely *state* law." *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (*en banc*) (Easterbrook, J.). Conversely, when a federal court fails to certify a question, it "in effect, prevent[s] state courts from deciding unsettled issues of state law." *McCarty v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (Calabresi, J., dissenting). And that violates "fundamental principles of federalism and comity." *Id.*

Today, "every state except North Carolina allows certifications." Hon. Kenneth F. Ripple & Kari Anne Gallagher, *Certification Comes of Age: Reflections on the Past, Present, and Future of Cooperative Judicial Federalism*, 95 Notre Dame L. Rev. 1927, 1930 (2020). And state courts overwhelming embrace the process. Empirical evidence shows that state high courts

accept most of the questions certified to them.[1] Anecdotal evidence is also favorable.[2]

2. *Lehman Brothers* and the lack of certification standards in federal court.

Soon after states began authorizing certification, this Court encouraged federal courts to use the practice. In *Lehman Bros. v. Schein*, the Court reversed a lower court for failing to consider whether a "controlling issue of Florida law should be certified to the Florida Supreme Court." 416 U.S. 386, 392 (1974). The Court favorably discussed certification, noting that "in the long run," it can "save time, energy, and resources and help[] build a cooperative judicial federalism." *Id.* at 391. But because the procedure was so novel, the Court provided little in the way of guidance, noting

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[1] *See, e.g.*, Rachel Koehn Breland, *Avoiding Rejection: Studying When and How State Courts Declined Certification Questions*, 92 Fordham L. Rev. 1429, 1457-62 (2024) (between 2000 and 2023, the Nevada Supreme Court accepted 74% of certified questions, the Alabama Supreme Court accepted 71%, and the Ohio Supreme Court accepted 69%); Jason A. Cantone & Carly Giffin, *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. Tol. L. Rev. 1, 36 (2021) (between 2010 and 2018, state supreme courts accepted 87% of questions certified by the Third Circuit, 80% by the Ninth Circuit, and 60% by the Sixth Circuit); Practice Handbook on Certification of State Law Questions by the United States Court of Appeals for the Second Circuit to the New York Court of Appeals (3d ed. 2016), at 2 (between 1986 and 2015, the New York Court of Appeals accepted 96% of certified questions).

[2] *See, e.g.*, John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 457 (1988) (finding "overwhelming judicial support for the certification process," with "state judges agree[ing] that certification affords the state courts their appropriate decisionmaking role").

simply that certification was not "obligatory" and that "[i]ts use in a given case rests in the sound discretion of the federal court." *Id.* at 390-91.

Since *Lehman*, the Court has "repeatedly commented favorably on the procedure and sometimes instructed lower courts to consider certification on remand." *Lindenberg v. Jackson Life Ins. Co.*, 919 F.3d 992, 997 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc); *see, e.g.*, *McKesson v. Doe*, 592 U.S. 1, 5 (2020); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997); *see also Minn. Voters All. v. Mansky*, 585 U.S. 1, 26-32 (2018) (Sotomayor, J., dissenting).

Still, though, the Court has not developed the law governing certification. The Ninth Circuit recognized the lack of guidance over 30 years ago. *See In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) ("*Lehman Bros*. . . . provides no clear standards as to when certification should be used."). It is now widely acknowledged. *See, e.g.*, Deborah J. Challener, *Distinguishing Certification From Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847, 866 (2007) ("[The Supreme] Court has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate."); Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 Geo. Wash. L. Rev. 251, 268 (2017) (the Court "has not provided a uniform guidance to lower federal courts in deciding whether to use certification").

Lower federal courts have accordingly "had to make their own guidelines," with "the burden fall[ing] on each circuit to define standards for certifying questions." *Lindenberg*, 919 F.3d at 997, 1002 (Bush, J., dissenting from denial of rehearing en banc).

The result has been inconsistent standards, inconsistently applied, with courts frequently failing to pursue the cooperative federalism *Lehman* identified as the chief goal of the certification device. *See infra* Reasons for Granting the Writ § II.

3. *Shady Grove*.

Meanwhile, the importance of federal courts certifying state-law questions to state high courts has only grown.

Because of this Court's decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), some state-law claims are now being litigated primarily or exclusively in federal court because federal procedure allows them while state procedure does not. This case is an example.

New York law prohibits class actions in suits seeking penalties or statutory minimum damages absent express statutory authorization. *See* N.Y. Civ. Prac. Law Ann. § 901(b). *Shady Grove* considered whether this prohibition conflicted with Federal Rule of Civil Procedure 23, such that the law could not be applied by a federal district court sitting in diversity. In a sharply divided 5-4 decision, the Court held that New York's law *did* conflict with Civil Rule 23 and so could *not* be applied in federal court. 559 U.S. at 399-401 (plurality opinion of Scalia, J.); *accord id.* at 417-36 (Stevens, J., concurring in part and concurring in the judgment).

The plurality opinion acknowledged that its ruling undermined New York's goal of reducing "overkill" class damages awards, *id.* at 402-03, and "will produce forum shopping," *id.* at 415-16. But, the plurality submitted, that was "the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure." *Id.* at 415; *but see id.* at 436-37 (Ginsburg, J., dissenting) (arguing that the majority failed to exhibit "awareness of, and sensitivity to, important state regulatory policies" and "approve[d]" a plaintiff's "attempt to transform a $500 case into a $5,000,000 award," even though "the State creating the right to recover has proscribed this alchemy").

Because of *Shady Grove*, more state-law class actions have been filed in federal court. For example, federal courts have become the preferred forum for plaintiffs to file putative class claims under New York's General Business Law ("GBL") §§ 349 and 350, which prohibit deceptive practices and false advertising and which provide for statutory damages in lieu of actual damages. *See, e.g.*, *Sedhom v. Pro Custom Solar LLC*, 2018 WL 3429907, at *3 (E.D.N.Y. July 16, 2018) (collecting numerous examples of such class actions filed after 2010).[3] Like New York, many other states have similarly limited the use of class actions to recover statutory damages, or, in some cases, barred private class actions under state consumer-protection laws altogether.[4] Plaintiffs are increasingly filing

[3] Indeed, a Westlaw search for cases citing GBL § 349 suggests that at least 1,771 federal class actions have been filed under the statute since April 1, 2010.

[4] *See, e.g.*, Fla. Stat. § 768.734 (barring class actions that seek statutory damages); Utah Code § 13-11-19(2) (barring private

class actions in federal court under *these* states' laws, too. Because of *Shady Grove*, federal courts have allowed those claims to proceed, state-law prohibitions notwithstanding.[5]

As a result of *Shady Grove* and statutes expanding the scope of federal jurisdiction, *see, e.g.*, 28 U.S.C. § 1332(d), important state-law questions are increasingly raised in federal forums. Federal courts now consider "the bulk of class actions alleging state-law violations from misleading advertising, bait-and-switch schemes, hidden fees and interest-rate hikes, underpayment of employees, and consumer warranty and

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class actions under certain state consumer-protection laws); Ala. Code § 8-19-10(f) (same); Ga. Stat. § 10-1-399(a) (same); Mont. Code Ann. § 30-14-133(1) (same); S.C. Code § 39-5-140(a) (same); Tenn. Stat. § 47-18-109(a)(1) (same); La. Revised Stat. § 51:1409(A) (same); 740 Ill. Comp. Stat § 10/7(2) (same, under state antitrust law).

[5] *See, e.g.*, *Lisk v. Lumber Wood Preserving, LLC*, 792 F.3d 1331, 1334-37 (11th Cir. 2015) (allowing Alabama consumer-protection case to proceed in federal court as a class action, contrary to state law); *Speerly v. General Motors, LLC*, 115 F.4th 680, 710-11 (6th Cir. 2024), *vacated for r'hrg en banc*, 2024 WL 5162574 (6th Cir. Dec. 19, 2024) (same, for claims brought under Louisiana, Arkansas, and Tennessee law); *Morris v. Lincare, Inc.*, 2024 WL 2702101, at *4-5 (M.D. Fla. May 24, 2024) (same, for claims brought under Florida law); *In re Pork Antitrust Litig.*, 495 F. Supp. 3d 753, 776-78, 790 (D. Minn. 2020) (same, for claims brought under Illinois, South Carolina, Utah, and Arkansas law); *Wilson v. Volkswagen Grp. of Am., Inc.*, 2018 WL 4623539, at *14 (S.D. Fla. Sept. 26, 2018) (same, for claims brought under Utah law); *Ace Tree Surgery, Inc. v. Terex Corp.*, 2018 WL 11350262, at *13-16 (N.D. Ga. Dec. 10, 2018) (same, for claims brought under Georgia law); *Wittman v. CB1, Inc.*, 2016 WL 1411348, at *8 (D. Mont. Apr. 8, 2016) (same, for claims brought under Montana law).

privacy breaches." Jordan Elias, *Cooperative Federalism in Class Actions*, 86 Tenn. L. Rev. 1, 5 (2018); *see also* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101, 2131-40 (2019) (further discussing the "expanding federal control of state class actions").

When federal courts decide for themselves the novel state-law questions these cases often raise, the federalism costs are obvious. Whole swathes of state law are being developed "without any participation by the state courts." Ripple & Gallagher, *Certification Comes of Age*, 95 Notre Dame L. Rev. at 1941. And when state courts are not given the opportunity to interpret their own law, federal courts can have no confidence "that the law [they are] apply[ing] is genuinely *state* law." *Todd*, 9 F.3d at 1222.

4. *Bristol-Myers Squibb*.

This Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 582 U.S. 255 (2017), increases certification's importance still more because of that decision's tendency to funnel state-law claims from across the country into federal courts in a defendant's home forum.

In *Bristol-Myers*, the Court held that a state could not exercise *specific* personal jurisdiction over nonresident plaintiffs' claims, even as part of a "mass action," unless each nonresident plaintiff could show "a connection between the forum and the[ir] specific claims at issue." *Id.* at 265. But, the Court added, "[o]ur decision does not prevent" nonresident plaintiffs "from joining together in a consolidated action in the States that have *general* jurisdiction over" the defendant, *i.e.*, where the defendant is incorporated or has its

principal place of business. *Id.* at 268 (emphasis added); *see Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

Under *Bristol-Myers*, an increasing number of multi-state class actions have been filed in "the defendant's home state where it is subject to general jurisdiction." Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. Rev. 1251, 1282 (2018). Indeed, "it would seem that . . . a multistate or nationwide class action may *only* be maintained in a state that can exercise general jurisdiction over the defendant—or in a state where the defendant consents." *Id.* at 1285 (emphasis added); *see also, e.g.*, *Lyngaas v. Curaden Ag*, 992 F.3d 412, 442-45 (6th Cir. 2021) (Thapar, J., concurring in part and dissenting in part) (agreeing with this interpretation of *Bristol-Myers*); *Molock v. Whole Foods Market Grp., Inc.*, 952 F.3d 293, 304-10 (D.C. Cir. 2020) (Silberman, J., dissenting) (same).

The combined effect of *Shady Grove* and *Bristol-Myers* has been to lead plaintiffs overwhelmingly to file state-law class actions not only in a federal court, but in a *foreign* federal court. For example, a plaintiff trying to represent a nationwide class under multiple states' laws will likely bring a complaint against a New York defendant in New York federal court. *See, e.g.*, *Hanks v. Lincoln Life & Annuity Co. of New York*, 330 F.R.D. 374 (S.D.N.Y. 2019) (bringing such a case).

The New York federal court will then be tasked with interpreting other states' laws.[6]

This trend further increases the need for federal courts to certify novel questions of state law to state high courts. It is one thing for a federal court to interpret the law of its home state—that is often the unavoidable consequence of removal jurisdiction. *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 n.6 (1981) (noting "the interest in having the trial of a diversity case in a forum that is at home with the law"). More concerning is a federal court interpreting *another state's* law, without any reasonable likelihood of the home state court weighing in. As this Court cautioned, "[w]hen federal judges in New York attempt to predict uncertain Florida law, they act . . . as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman*, 416 U.S. at 391; *see also In re Amazon.com, Inc.*, 942 F.3d 297, 300 (6th Cir. 2019), *certified question answered*, 667 Pa. 16 (2021) ("Certification by a federal court of appeals may be particularly appropriate where the law at issue is from a distant State outside of the circuit presented with the question."). In such circumstances, the "cooperative federalism" rationale undergirding certification is at its zenith. *Lehman*, 416 U.S. at 391.

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[6] The Westlaw search for cases citing GBL § 349, *see supra* n.3, confirmed this trend. Of the nearly 1,800 federal class actions citing GBL § 349 since April 1, 2010, over 650 arose in federal courts outside New York.

B. Factual Background and District Court Proceedings.

This action illustrates the trend under *Shady Grove* and *Bristol-Myers* and showcases the severe federalism concerns that arise under the undisciplined analyses currently governing certification.

This case concerns Joint Juice, a drinkable glucosamine supplement made and sold by Premier. In 2013, a different plaintiff represented by Plaintiff's counsel tried to bring a nationwide class action under California law challenging Joint Juice's marketing. *See Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271-RS (N.D. Cal.). Plaintiff's counsel attempted to include New York customers in that class. Pet.App.129a-130a. Nationwide certification was denied, however, because choice-of-law rules required applying each state's laws to its own consumers. Pet.App.130a-140a.

After nationwide certification was denied, Plaintiff's counsel filed nine separate actions, each addressing a different state. All nine actions were filed in the Northern District of California, where Premier is headquartered and thus subject to general personal jurisdiction. *See Daimler*, 571 U.S. at 137.

The action at issue here, *Montera*, was brought by a New York resident on behalf of a class of New York Joint Juice purchasers. Plaintiff asserted claims challenging Joint Juice's labeling under GBL §§ 349 and 350, which prohibit deceptive practices and false advertising. Pet.App.78a, 80-81a. As noted, claims under these statutes are increasingly common, especially in the "false labeling" class-action context. *See*, *e.g.*, *Cosgrove v. Oregon Chai, Inc.*, 520 F. Supp. 3d 562, 569

(S.D.N.Y. 2021) (collecting cases). Under *Shady Grove*, plaintiffs bring these class claims for statutory damages in federal court because they cannot be brought in New York state court.

Under GBL §§ 349 and 350, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675 (N.Y. 2012). As damages, plaintiffs can recover either actual damages or, more enticingly, statutory damages of $50 for GBL § 349 or $500 for GBL § 350.

Plaintiff here claimed that Premier violated GBL §§ 349 and 350 because Joint Juice's packaging included allegedly misleading statements about the drink's effect on joint health, *e.g.*, "Use Daily for Healthy, Flexible Joints." Pet.App.4a. Although these statements were supported by valid, peer-reviewed studies (Pet.App.99a, 102a), Plaintiff claimed that the statements were misleading because other studies concluded differently. Pet.App.4a-5a.

As for injury, Plaintiff alleged neither a physical injury nor a price premium. Pet.App.14a. Rather, Plaintiff asserted that Joint Juice was "valueless for its advertised purpose," and that, allegedly, no class member would have purchased Joint Juice but-for the challenged statements. Pet.App.18a. As a result, Plaintiff contended, the class was entitled to, at minimum, full refund damages. Pet.App.6a. Here, such damages totaled $1,488,078.49. *Id.*

More notably, Plaintiff also argued that the class was entitled to $550 in *statutory* damages *per*

purchase of Joint Juice sold during the class period. Pet.App.32a-33a. On that theory, Plaintiff sought to recover $91.4 million in damages. *Id.*

Several aspects of Plaintiff's case raised unsettled questions of New York law. The answers to these questions were important not only to this case but also to the flood of other federal labeling class actions asserting GBL claims. In particular, the parties disputed the following questions, none of which had been clearly answered by the New York Court of Appeals:

1. Whether GBL §§ 349 and 350 authorize claims based on *substantiated* statements regarding a product's efficacy?[7]
2. Whether plaintiffs who allege that their injury was buying a product they otherwise would not have purchased must *prove* that they made the purchases *because of* the alleged misleading statement?[8]
3. If a violation is proven, whether GBL §§ 349(h) and 350-e(3) authorize a plaintiff to recover either actual damages or up to $50 or $500 in statutory damages *per person*, or,

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[7] *See, e.g.*, *Parker v. United Indus. Corp.*, 2020 WL 5817012, at *4 (S.D.N.Y. Sept. 29, 2020) (granting summary judgment in defendant's favor on this point).

[8] *See* GBL §§ 349(h) and 350-e(3) (requiring plaintiff to show that they were "injured by reason of [the] violation"); *cf. Fishon v. Peloton Interactive, Inc.*, 620 F. Supp. 3d 80, 101-02 (S.D.N.Y. 2022) (supporting a causal proof requirement in cases like this one).

instead, actual damages or up to $50 or $500 *per transaction*?[9]

The parties litigated these questions at class certification, in jury instructions, and, ultimately, in post-trial briefing. Although the district court acknowledged that some of these questions did "not have a clear answer" and had divided "highly regarded district courts across the country," Pet.App.97a, the court ultimately ruled against Premier on each point. The district court held that New York law *does* authorize claims against substantiated statements of efficacy, that it *does not* require proof of causation for each purchaser when plaintiffs argue they would not have bought the product but for the challenged statements, and that it *does* assess statutory damages per purchase (rather than per person). *See* Pet.App.45a (substantiation), Pet.App.92a-98a (damages), Pet.App.112a-113a, 115a-117a (causation).

The district court relied on these interpretations of New York law in instructing the jury and in denying Premier's post-trial motions. *Id*. The result was a $1,488,078.49 actual damages jury verdict against Premier, which the district court vacated in favor of a larger $8.3 million statutory damages award. Pet.App.70a. The court declined to award Plaintiff the entirety of her requested $91.4 million in statutory damages because of due-process concerns. Pet.App.60a-71a.

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[9] *See, e.g.*, Pet.App.93a-96a (collecting cases going both ways); *Porsch v. LLR, Inc.*, 2019 WL 3532114, at *2 n.2 (S.D.N.Y. Aug. 2, 2019) (considering but declining to resolve this question).

Plaintiff appealed the reduction in statutory damages and Premier appealed the other aspects of the judgment, including the district court's handling of the unsettled questions of New York law.

C. Court of Appeals Proceedings.

Before the Ninth Circuit, Premier had its first opportunity to seek certification to the New York Court of Appeals and promptly sought it. Pet.App.143a.[10]

In its fully developed motion, Premier explained that the proposed certified questions were "unresolved" and "raise[d] substantial issues of broad application," and that "the spirit of comity and federalism weigh[ed] in favor of certification." Pet.App.147a-153a. In particular, Premier noted that, because of *Shady Grove*, these questions "will likely *never* surface to the New York Court of Appeals." Pet.App.150a. This put "federal courts in the position of repeatedly determining how to wield the GBL without the benefit of insight from any of the New York appellate courts." *Id.* "Respect for New York as a distinct sovereign and for the New York Court of Appeals as the final authority on the construction of that state's positive laws" thus "weigh[ed] heavily in favor of certification." Pet.App.152a.

In the Ninth Circuit's merits opinion, it repeatedly acknowledged that the questions Premier raised were indeed unresolved under New York law. *See, e.g.*, Pet.App.33a ("We know of no New York caselaw that resolves this question. . . ."); Pet.App.31a ("there is limited precedent from New York courts on some

[10] Premier also moved to certify a question regarding prejudgment interest that is not relevant to this petition.

questions presented by this appeal related to the calculation of damages"); Pet.App.32a (observing that the district court "[l]ack[ed] guidance from New York courts"); Pet.App.12a (faulting Premier for its "failure to support its interpretation of New York law" with more than a single New York federal-court decision).

Despite the lack of New York authority, the unlikeliness that New York courts would have the opportunity to resolve those questions, and New York's demonstrated interest in resolving certified questions of state law, the Ninth Circuit summarily denied Premier's motion for certification in a footnote:

> Premier asks that we certify several questions of New York law to the New York Court of Appeals. We deny Premier's motion for certification (Dkt. No. 32). *See Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974) (explaining that the decision to certify "rests in the sound discretion of the federal court").

Pet.App.41a.

Having denied certification to the New York Court of Appeals, the Ninth Circuit then decided the important questions of unsettled New York law itself and affirmed the district court's decision except as to prejudgment interest. *See* Pet.App.9a-12a (substantiation), Pet.App.19a-22a (causation), Pet.App.31a-37a (damages). The court also ordered the district court to review again its reduction of Plaintiff's statutory damages. Pet.App.37a-38a.

Premier is now faced with a damages award of $83.1 million,[11] ostensibly based in New York law, but subject only to due-process review by a California federal court. Absent this Court's intervention, the New York state courts will have no say in the matter.

REASONS FOR GRANTING THE WRIT

For at least four reasons, the Court should grant certiorari. *First*, the question of when federal courts should certify uncertain questions of state law to a state court, and what role federalism should play in that analysis, is an important and recurring question that has gone unaddressed for over 50 years. Its importance has only grown following this Court's decisions in *Shady Grove* and *Bristol-Myers*.

Second, the circuits are hopelessly muddled in their approach to certification. Some circuits expressly consider federalism, others are inconsistent, and still others, most especially the Ninth Circuit, largely ignore it.

Third, this case is an ideal vehicle to address this issue because it involves a foreign federal court deciding admittedly unresolved questions of New York state law. In addition, the court from which Premier sought certification—the New York Court of Appeals—is particularly receptive to certification.

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[11] On remand, Plaintiff reduced her statutory damages request from $91,436,950 to $83,124,500, because her original request improperly sought a double recovery under GBL §§ 349 and 350. And although the district court has since re-affirmed its initial view that Plaintiff can recover only $8.3 million in statutory damages, *see* No. 3:16-cv-6980-RS, Dkt. 391 (Mar. 10, 2025), that decision remains subject to appeal to the Ninth Circuit.

Finally, the Ninth Circuit's decision to reject certification below was wrong and wholly unreasoned. The Ninth Circuit rejected Premier's certification request in a two-sentence footnote at the end of its opinion. The decision should be reversed or, alternatively, vacated and remanded so that the Ninth Circuit can address this question again, while giving New York's sovereign interests the respect they deserve.

I. This Court's Guidance is Needed to Address a Growing Federalism Problem.

Certiorari is necessary, first, because the question presented implicates "an important question of federal law" that has gone unaddressed for over 50 years. Sup. Ct. R. 10(c). Namely, under what circumstances should a federal court certify a question of uncertain state law, and what role should federalism interests play in that analysis?

The Court last addressed this issue in 1974, in *Lehman*. And there, the Court said little in the way of guidance because of how new the issue was. The Court simply advised lower courts that certification was not "obligatory" and that "[i]ts use in a given case rests in the sound discretion of the federal court." 416 U.S. at 390-91.

As courts and commentators have recognized, *Lehman* does not provide "concrete rules to govern lower federal courts in deciding whether to certify questions," and thus lower courts currently "lack" "direction" and "predictability" in this area. *Lindenberg*, 919 F.3d at 997 (Bush, J., dissenting from denial of rehearing en banc); *see also McLinn*, 744 F.2d at 681 ("*Lehman Bros*. . . . provides no clear standards as to when certification should be used."); *see also* Challener,

Distinguishing Certification, 38 Rutgers L.J. at 866 ("[The Supreme] Court has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate."); Chang, *You Have Not Because You Ask Not*, 85 Geo. Wash. L. Rev. at 268 (The Court "has not provided a uniform guidance to lower federal courts in deciding whether to use certification.").

This lack of clarity is concerning because certification is critical to a "cooperative judicial federalism." *Lehman*, 416 U.S. at 391; *Pino*, 507 F.3d at 1236 (Gorsuch, J.). And this Court has increasingly recognized judicial federalism as a foundational element of our constitutional system. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (providing for highly deferential review of state court decisions interpreting state law to protect "state sovereignty"). Further guidance addressing the federalism concerns underlying certification is both warranted and long overdue.

Certiorari is particularly necessary because this Court's recent decisions have generated a flood of state-law questions being brought to federal courts—often, to foreign federal courts. The net result of *Shady Grove* and *Bristol-Myers* has been more forum shopping and more state-law class actions being filed *exclusively* in foreign federal courts. *See supra* Statement §§ A.2-3. The federalism costs are obvious. State law is developed "without any participation by the state courts." Ripple & Gallagher, *Certification Comes of Age*, 95 Notre Dame L. Rev. at 1941. And courts and litigants have no choice but to treat federal decisions as "determinati[ve]" of state law. *Pullman*, 312 U.S. at 499. Absent certification, state courts are kept from

checking federal "forecasts" of state law, *id.*, losing their sovereign prerogative.

In short, 50 years ago, this Court recognized the importance of state certification. Fifteen years ago, this Court made certification more necessary than ever. The Court should now act to ensure that lower courts have adequate guidance in addressing certification requests, including by directing them to consider (1) the degree to which the state court has welcomed certification; (2) whether the state whose law is at issue lies outside the district or circuit being asked to certify the question; (3) whether the question involves a matter of policy over which the state has exercised control; and (4) whether the question is likely to arise in state court without certification.

Without this Court's contribution, it is all but certain that some courts will continue to do what the Ninth Circuit did below: block states from answering important questions about their own laws with summary denials of requests for certification and without proper regard for the role of cooperative federalism.

II. Lower Courts Are Divided Over the Role Federalism Interests Should Play in the Certification Analysis.

Division in the lower courts over the standards governing certification further supports granting the petition. *See* Sup. Ct. R. 10(a) ("conflict" among the "court[s] of appeals" on an "important matter" supports certiorari).

Guided by nothing beyond *Lehman*'s cursory statements, lower federal courts have had to chart their own paths in this area, and it shows. "Because" this Court "has not announced concrete rules to govern

lower federal courts in deciding whether to certify questions, those lower federal courts have had to make their own guidelines." *Lindenberg*, 919 F.3d at 997 (Bush, J., dissenting from denial of rehearing en banc). Left to their own, the courts of appeals are all over the map. They do not agree on *when* certification is appropriate or even *what* should guide their analyses.

In *Lehman*, this Court made passing mention of "cooperative federalism" as a byproduct of state certification. 416 U.S. at 391. But it did not direct federal courts to consider federalism interests when deciding whether to certify a question to a state's highest court. The result has been that many federal courts do not consider those important interests at all, while only a few consistently do.

A. Five circuits have yet to develop a framework for deciding whether to certify state law issues.

Five circuits have yet to develop clear guidelines governing when to certify an issue of state law. These circuits generally recognize that a court has discretion to certify when state law is uncertain but do not provide a framework that guides courts in exercising that discretion. As a result, litigants and state courts have no idea whether federalism will play a role in the decision.

The Sixth Circuit is not shy about this approach. Its judges have explained that the court "trust[s] panels to exercise their experience, discretion, and best judgment to determine when certification is appropriate" and has therefore refused to establish specific "criteria for certification to state courts."

Lindenberg, 919 F.3d at 993 (Clay, J., concurring in the denial of rehearing en banc). As a result, sometimes federalism interests factor into a panel's consideration. *See Geib v. Amoco Oil Co.*, 30 F.3d 133 (6th Cir. 1994) (granting certification to guard against the "very real danger that [the state's] courts will be denied any meaningful participation in the interpretation" of its own statutes, and thus to protect "state sovereignty"). Others times, panels decline to certify even "uncertain and important questions of state law" without considering the federalism ramifications of doing so. *Lindenberg v. Jackson Nat. Life Ins. Co.*, 912 F.3d 348, 370 (6th Cir. 2018) (Larsen, J., concurring in part). And frequently, panels leave federalism out of their analysis, considering only how clear the state law issue is. *See, e.g.*, *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (declining to certify because the state's caselaw provided "sufficient guidance to allow us to make a clear and principled decision").

Four other circuits likewise take a case-by-case approach. The Fourth Circuit makes certification decisions based upon the clarity of the state law issue, without considering other factors or federalism interests. The court, for example, certified a question to the Virginia Supreme Court without further analysis because it "remain[ed] uncertain as to whether Virginia would permit" a particular type of claim after reviewing state law. *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 306 F.3d 126, 141 (4th Cir. 2002). It took the same approach in another recent case, certifying an issue to the West Virginia Supreme Court of Appeals solely on the basis of the "sparsity of

governing state law." *Shears v. Ethicon, Inc.*, 64 F.4th 556, 563 (4th Cir. 2023).

Eighth Circuit panels also usually treat the uncertainty of state law as dispositive. *See, e.g.*, *Anderson v. Hess Corp.*, 649 F.3d 891, 895 (8th Cir. 2011). The Eighth Circuit does not provide other criteria that a panel must consider as part of its certification inquiry. *See Kulinski v. MedtronicBio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997). Sometimes, it has considered whether a state law issue has been "lured" into federal court through diversity jurisdiction with "cooperative judicial federalism" in mind, but that has been infrequent. *See, e.g., Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266, 1268 (8th Cir. 1983) (en banc).

The Tenth Circuit asks whether existing state law provides "a reasonably clear and principled course" for resolving the state law question. *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, 85 F.4th 1034, 1038 (10th Cir. 2023). It emphasizes that state law certification "is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law" but provides no guidance regarding what factors must be considered in deciding whether to invoke the procedure. *Id.* Thus, some panels consider federalism interests. *See Pino*, 507 F.3d at 1236 (Gorsuch, J.) (seeking "to give meaning and respect to the federal character of our judicial system" and recognizing "that the judicial policy of a state should be decided when possible by state, not federal, courts"). Others do not. *See Monarch*, 85 F.4th at 1038.

The Federal Circuit, too, offers little guidance beyond the certainty of state law. It has noted the

"desirability" of certifying questions when there is "real doubt about the state's law" but has denied certification where state law is settled, without considering other factors. *Toews v. United States*, 376 F.3d 1371, 1380-81 (Fed. Cir. 2004).

B. Seven circuits have developed frameworks for determining whether to certify a state-law issue, but they vary substantially.

Seven circuits have adopted frameworks to guide state-law certification. But these frameworks vary widely, particularly over the need to ensure that state courts retain the power to shape state law. And no circuit requires panels to consider the propriety of a foreign federal court deciding issues of state law.

1. One circuit holds that certification is appropriate whenever a panel has substantial doubt about the answer to a state law question.

The Eleventh Circuit puts federalism at the forefront in its distinctively pro-certification approach. It holds that "[w]hen we have substantial doubt about the answer to a dispositive question of state law, we 'should certify that question to the state supreme court." *Cordero v. Transamerica Annuity Serv. Corp.*, 34 F.4th 994, 999 (11th Cir. 2022) (collecting cases); *see also Miller v. Scottsdale Ins. Co.*, 410 F.3d 678, 678 (11th Cir. 2005) ("Because there is no controlling Florida authority on this question, we certify this issue to the Florida Supreme Court."). That approach, the Eleventh Circuit has explained, offers "the state court the opportunity to explicate state law." *Cordero*, 34 F.4th at 999. Because it roots certification in

"federalism concerns," it will certify uncertain questions even if a party does not raise the issue. *Id.*

2. Three circuits formally consider federalism interests when deciding whether to certify.

The First Circuit will certify when an issue is "important," "complex," and "outcome-determinative." *Plourde v. Sorin Grp. USA, Inc.*, 23 F.4th 29, 31 (1st Cir. 2022). In determining whether an issue is important, the First Circuit is "particularly mindful" of "the interests of federalism" in its certification analysis. *The Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 119 (1st Cir. 2010). To protect these interests, it will certify state law questions that are likely to arise only in federal court. *See Ins. Co. of Pennsylvania v. Great N. Ins. Co.*, 787 F.3d 632, 638 (1st Cir. 2015). Failing to do so, it has explained, would promote forum shopping and "reduc[e] the odds that the [state supreme court] will get to decide [the] issue." *Id.*

The Second Circuit has identified "at least six factors that must be considered in deciding whether certification is justified." *Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000). Those factors include not only "the absence of authoritative state court interpretations of the state statute," and "the importance of the issue to the state and the likelihood that the question will recur," but also "the federalism implications of a decision by the federal courts and in particular whether a decision by the federal judiciary potentially interferes with core matters of state sovereignty." *Id.* Applying this test, the Second Circuit has repeatedly recognized that "[i]f a question of state law is arising

primarily" in federal court, "it may be particularly important to certify in order to ensure that state courts are not 'substantially deprived of the opportunity to define state law.'" *10012 Holdings, Inc. v. Sentinel Ins. Co.*, Ltd., 21 F.4th 216, 224 (2d Cir. 2021); *Gutierrez v. Smith*, 702 F.3d 103, 116 (2d Cir. 2012) (collecting cases).

The Seventh Circuit looks to "whether the case concerns a matter of vital public concern, [whether it] involves an issue likely to recur in other cases, and whether the state supreme court has yet to have an opportunity to illuminate a clear path on the issue." *Zahn v. N.A. Power & Gas, LLC*, 815 F.3d 1082, 1085 (7th Cir. 2016). In its analysis, the Seventh Circuit expressly considers "whether the issue is of interest to the state supreme court in its development of state law." *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001). It holds that certification is warranted when necessary to prevent the State from "los[ing] the ability to develop or restate the principles that it believes should govern the category of cases." *Todd*, 9 F.3d at 1222. The Seventh Circuit will therefore certify state-law questions that "arise often in federal cases but rarely in state cases." *Carver v. Sheriff of LaSalle Cnty., Illinois*, 243 F.3d 379, 386 (7th Cir. 2001) (Easterbrook, J.).

The regard these circuits show for the decision-making role of state supreme courts is correct and should be extended nationally by this Court.

3. Three circuits consider public policy interests but do not formally consider whether certification is necessary to ensure that state courts retain the ability to shape state law.

The D.C. Circuit asks (1) whether the law is "genuinely uncertain" and (2) "whether the case is one of extreme public importance." *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001). Accordingly, the D.C. Circuit will certify a question when its resolution would "have significant effects" within the District of Columbia, *DeBerry v. First Gov't Mortg. & Inv'rs Corp.*, 170 F.3d 1105, 1110 (D.C. Cir. 1999), but will decline to so when the question is not "of substantial interest to the District," *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014).

The Third Circuit only recently "identified what considerations our court should take into account when deciding if certification is appropriate." *United States v. Defreitas*, 29 F.4th 135, 141 (3d Cir. 2022). It now considers whether the answer to a question of state law is "unclear," and whether it will "control an issue in the case." *Id.* at 860. It also considers the "importance" of an issue, as well as the effect certifying a question will have on "judicial economy." *Id.* at 861-62. Although it sometimes discusses "cooperative judicial federalism" when assessing an issue's importance, *id.*, what more often drives its certification decisions is the importance of the issue to the "public." *Delta Funding Corp. v. Harris*, 426 F.3d 671, 675 (3d Cir. 2005); *see Samsung Fire & Marine Ins. Co. (U.S. Branch) v. RI Settlement Tr.*, 2024 WL

4921644, at *4 (3d Cir. Aug. 12, 2024). Thus, unlike the courts that formally consider federalism interests, the Third Circuit considers the sparsity of state court cases on a topic to weigh *against* certification, taking it as a sign that the issue is not particularly important to the people of the state. *See Zanetich v. Wal-Mart Stores E., Inc.*, 123 F.4th 128, 150 (3d Cir. 2024).

The Fifth Circuit applies a three-factor certification test derived from *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), which examines (1) "the closeness of the question and the existence of sufficient sources of state law," (2) "the degree to which considerations of comity are relevant," and (3) practical considerations, including delay. *Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516, 522 (5th Cir. 2015). The "comity" interests the Fifth Circuit considers typically refer to the importance of the case as a matter of public policy and the workload of the receiving court, rather than interests of judicial federalism. *See, e.g.*, *Blanchard v. Via*, 2023 WL 3316326, at *2 n.2 (5th Cir. May 9, 2023) (declining to certify because "the stakes at issue here do not warrant the additional expenditure of that court's resources to resolve"). Like the Third Circuit, and unlike the courts that formally consider federalism interests, it considers the number of state court cases raising an issue as a signal of the issue's importance. *See Sanders v. Boeing Co.*, 68 F.4th 977, 983 (5th Cir. 2023).

C. The Ninth Circuit takes a uniquely standardless approach to certification.

Then there is the Ninth Circuit. "More than any other circuit . . . the Ninth Circuit's approach to

[certification] has been inconsistent and poorly reasoned." Molly Thomas-Jensen, *Certification After Arizonans for Official English v. Arizona: A Survey of Federal Appellate Courts' Practices*, 87 Denv. U. L. Rev. 139, 163 (2009). Sometimes it decides certification requests on public policy grounds. *See, e.g.*, *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003) ("The certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts."). Other times, it certifies questions after considering only the lack of clarity on the state-law issue. *See Ruelas v. Cnty. of Alameda*, 51 F.4th 1187, 1190 (9th Cir. 2022). And rarely, some panels consider federalism interests. *See Yamashita v. LG Chem, Ltd.*, 48 F.4th 993, 1002 (9th Cir. 2022).

What is most distinctive about the Ninth Circuit, however, is its penchant for issuing "unpublished" or "inadequately explained" certification rulings. Jensen, *Certification After Arizonans*, 87 Denv. U. L. Rev. at 163; *see, e.g.*, *Knight v. LM Gen. Ins. Co.*, 770 F. App'x 350, 351 (9th Cir. 2019) (declining to certify without providing any reasons).

III. This Case Is an Ideal Vehicle for Clarifying the Certification Analysis and Federalism's Role in it.

The disarray among and within the circuits calls for this Court's guidance. The need is growing more urgent as state law issues increasingly get raised exclusively in federal courts. After more than 50 years of percolation in the lower courts, the standards for deciding whether to certify state-law questions to

state courts are ripe for this Court to revisit. Four features of this case make it an ideal vehicle for this Court to use to develop the law.

First, all recognize that New York law is unclear on the issues in this case. The Ninth Circuit repeatedly relied on the absence of controlling New York precedent when ruling against Premier on the merits. *See supra* Statement § C. For some circuits, that lack of clarity alone would result in certification. For others, the importance of the issues, added to the lack of clarity, would compel certification. In the Ninth Circuit, it depends on the panel.

Second, because of *Shady Grove*, this case presents state-law issues that arise "often in federal cases but rarely in state cases." *Carver*, 243 F.3d at 386. That makes this case the perfect opportunity to resolve a split among the circuits over whether this fact raises important federalism concerns warranting certification, *see id.*; *Geib*, 30 F.3d at 133; *Gutierrez*, 702 F.3d at 116; *Ins. Co. of Pennsylvania*, 787 F.3d at 638, or demonstrates just the opposite, *Zanetich*, 123 F.4th at 150; *Sanders*, 68 F.4th at 983.

Third, as has been increasingly true after *Bristol-Myers*, this case involves *foreign* federal judges deciding issues of state law—here two Ninth Circuit judges and a visiting judge from the Seventh Circuit resolving important questions for New York. The dangers of "outsiders" deciding state law featured strongly in *Lehman*, 416 U.S. at 391, but it has not featured much in the circuits since. This case presents an opportunity for the Court to instruct the lower courts on its significance as they face increasing

demands to resolve unsettled issues of law emerging from foreign forums.

Fourth, the New York Court of Appeals is particularly receptive to certification. It has "underscore[d] the great value in New York's certification procedure," noting that it provides "the requesting court with timely, authoritative answers," facilitates "the orderly development and fair application of the law" and benefits "Federal and State courts as well as litigants." *Tunick v. Safir*, 731 N.E.2d 597, 599 (N.Y. App. 2000). It has accepted "all but a very few of the questions that have been certified to" it. *Id.* Indeed, it accepts about 96% of certified questions. *See supra* n.1. And New York's Court of Appeals is not alone in welcoming certification. State courts "overwhelming[ly]" support "the certification process." Corr & Robbins, *Interjurisdictional Certification*, 41 Vand. L. Rev. at 457. No circuit presently considers whether a state would want to decide the question at issue. That should change.

IV. The Ninth Circuit Erred in Summarily Denying Premier's Request for Certification Here.

The Ninth Circuit summarily denied Premier's motion for certification in this footnote:

> Premier asks that we certify several questions of New York law to the New York Court of Appeals. We deny Premier's motion for certification (Dkt. No. 32). *See Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974) (explaining that the decision to certify "rests in the sound discretion of the federal court").

Pet.App.41a.

The Ninth Circuit's decision was erroneous. A court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014). And here, the Ninth Circuit erred as a matter of law because the panel did not take federalism into account in issuing its decision; indeed, the panel did not appear to apply any discernable legal standard at all. As explained above, failing to certify an unsettled issue of state law that is unlikely ever to arise in state court conflicts with the decisions from many other circuits. It also conflicts with the fundamental constitutional principle that "[f]ederal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans*, 520 U.S. at 48. This Court should grant the petition and establish standards for certification that incorporate that principle.

No less importantly, the process by which the Ninth Circuit reached its decision cannot be justified. In the 50 years since *Lehman*, the other circuits have tried to develop and faithfully apply their own bodies of law. Only the Ninth Circuit remains content replacing the "will of the law" with the "will of the Judge." *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824). Before a federal court opts to resolve legal questions arising from a state 3,000 miles away that are unlikely to arise in that state's own courts, it should at least explain that choice.

At the very least, the Ninth Circuit's decision should be vacated and the case remanded so the "court may reconsider whether the controlling issue of [New York] law should be certified to the" New York Court of Appeals. *Lehman*, 416 U.S. at 391–92.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 17, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 22-16375, 22-16622

D.C. No. 3:16-cv-06980-RS

MARY BETH MONTERA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant/Cross-Appellee,

v.

PREMIER NUTRITION CORPORATION, FKA JOINT JUICE, INC.,

Defendant-Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, Chief District Judge, Presiding

Argued and Submitted February 14, 2024
San Francisco, California

Filed August 6, 2024

Appendix A

Before: Sidney R. Thomas, David F. Hamilton,* and Morgan Christen, Circuit Judges.

Opinion by Judge Christen

OPINION

CHRISTEN, Circuit Judge:

This consumer class action involves New York purchasers of Joint Juice, a dietary supplement drink made by defendant Premier Nutrition. Mary Beth Montera sued Premier on behalf of a class of New York consumers for deceptive conduct and false advertising in violation of New York General Business Law (GBL) §§ 349 and 350 based on representations on Joint Juice's packaging that touted its ability to relieve joint pain. The district court certified a class and the case proceeded to trial. Montera introduced peer-reviewed, non-industry-funded studies finding that Joint Juice's key ingredients, glucosamine and chondroitin, have no effect on joint function or pain; Premier maintained the product's efficacy based on industry-funded studies. The jury found the statements on Joint Juice's packaging deceptive under New York law, and the district court awarded statutory damages to the class.

Both parties appeal the district court's rulings. Premier contends that the district court applied erroneous

* The Honorable David F. Hamilton, United States Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

interpretations of New York law when it certified the class and denied Premier's post-trial motion for judgment as a matter of law. In Premier's view, Montera did not prove liability, either individually or on a classwide basis. Premier further contends that the district court made numerous errors during the trial and when it calculated statutory damages on a per-violation basis and awarded prejudgment interest. Montera appeals the district court's decision to cut statutory damages by over 90%.

We find no errors in the district court's class certification rulings, analysis of New York law, trial rulings, or initial calculation of statutory damages. But we conclude that the award of prejudgment interest was error, and that the statutory damages award must be reconsidered in light of our intervening decision in *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109 (9th Cir. 2022). We therefore affirm in part, reverse in part, and vacate and remand in part.

I. BACKGROUND

This case began as a putative nationwide consumer class action for the allegedly deceptive advertising of Joint Juice. After the district court declined to certify a nationwide class, plaintiffs filed nine separate cases, each bringing claims under the laws of a different state. The court first certified a class in the California case, *Mullins v. Premier Nutrition Corp.*, No. 13-cv-01271 (N.D. Cal.), then certified the other classes, including the *Montera* class, in a single order that was entered in each case. The district court ordered the parties to provide "two cases

to prioritize for trial, one chosen by the Plaintiffs and one chosen by the Defendant." Plaintiffs proposed the New York case and Premier proposed the Massachusetts case. The district court chose *Montera*, the New York case, to go first. After the close of discovery and prior to trial, Premier moved to decertify the New York class. The district court denied the motion.

The evidence at trial showed that Premier targeted its Joint Juice advertising to people who suffer joint pain as a result of osteoarthritis. The shrink-wrap packaging for Joint Juice sported the Arthritis Foundation logo and name, and made claims such as "Use Daily for Healthy, Flexible Joints" and "A full day's supply of glucosamine combined with chondroitin helps keep cartilage lubricated and flexible." The jury heard that Premier spent just under $40 million between 2009 and 2015 to market and advertise Joint Juice, and netted annual sales of approximately $20 million in both 2020 and 2021.

Both parties offered expert witnesses to testify about scientific studies on the effect of glucosamine and chondroitin on joint health. Montera offered evidence of numerous studies conducted over the past three decades, including three by the National Institutes of Health, that found glucosamine and chondroitin had no effect on joint health. In contrast, industry-funded studies almost uniformly found glucosamine to be effective for joint pain, though some of the sponsoring companies refused to release data for external review. Evidence showed that Premier was aware of the studies concluding that glucosamine and chondroitin have no effect on joint

health but continued to sell—and increased its marketing of—Joint Juice to arthritis and joint-pain sufferers. For example, Montera introduced an internal email dated January 2011, in which the brand director for Joint Juice wrote, "there is no scientific evidence for chondroitin at 200 mg." When Premier considered running its own study, its president wrote a note that was introduced at trial: "if poor—don't publish." For its defense, Premier introduced evidence that some studies found that glucosamine and chondroitin have therapeutic benefits, and that Joint Juice is beneficial because it is hydrating and contains Vitamins C and D.

Both parties' experts introduced surveys they conducted that sought to determine what messages Joint Juice's packaging conveyed to consumers and whether that messaging was material to consumers' decisions to buy Joint Juice. Montera's expert testified that 92.5 percent of respondents to his study "believed that the product packaging was communicating one or more of [the packaging's claimed] joint health benefits," and 56% of respondents said that Joint Juice's claimed joint health benefits "were material to their purchase decisions." Montera also introduced Premier's internal customer survey in which 96% of those surveyed said they were managing chronic pain, 75% said they bought Joint Juice because they have joint pain and thought the drink would help them, and 56% said they had been diagnosed with arthritis. In Premier's expert's survey, 21.5% of respondents said that information on Joint Juice's packaging influenced their purchase decisions, and 32.3% said they had generally heard about the benefits of glucosamine.

After a nine-day trial, the jury returned a verdict for Montera, finding that Premier "engaged in an act or practice that [was] deceptive or misleading in a material way" and that "Montera and the class suffered injury as a result." The jury further found that 166,249 units of Joint Juice had been sold in New York during the class period and that the class's actual damages (based on average purchase price) were $1,488,078.49. GBL §§ 349 and 350 require courts to award the greater of actual damages or statutory damages of $50 or $500, respectively. N.Y. Gen. Bus. Law §§ 349(h), 350-e. Because the jury found Premier liable under both §§ 349 and 350, Montera sought $550 per unit sold in statutory damages, totaling $91,436,950. Premier argued that a damages award of $91,436,950 would violate its right to substantive due process. The district court agreed and awarded statutory damages of $50 per unit sold—the amount available under § 349—totaling $8,312,450. The district court also awarded $4,583,004.90 in prejudgment interest and entered final judgment on August 12, 2022. Premier filed post-trial motions to decertify the class and for judgment as a matter of law or a new trial, all of which the district court denied. Both Montera and Premier timely appealed.

II. STANDARD OF REVIEW

We review de novo a district court's denial of a motion for judgment as a matter of law, and "[a] jury verdict will be upheld if supported by substantial evidence." *Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 476 (9th Cir. 2021). "We review a district court's formulation of civil jury instructions for an abuse of discretion, but

we consider *de novo* whether the challenged instruction correctly states the law." *Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014). We review for abuse of discretion a district court's class certification orders, evidentiary rulings, and denials of motions for a new trial. *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1090-91 (9th Cir. 2010); *United States v. Daly*, 974 F.2d 1215, 1216-17 (9th Cir. 1992); *Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010) (per curiam).

When interpreting New York law, we are bound by the decisions of New York's highest court, the Court of Appeals. *See In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). "In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* at 1239.

III. DISCUSSION

On appeal, Premier argues that Montera failed to prove deceptive conduct, injury, and causation under New York law. Premier also argues that the district court abused its discretion in its class certification and trial rulings, and erred in its calculation of statutory damages and prejudgment interest. Montera appeals the district court's reduction of the statutory damages award. We affirm the district court on all issues except its award of prejudgment interest. Because we issued an intervening decision concerning Premier's substantive due process challenge to the damages award, we also vacate and

remand the district court's reduction of the award for reconsideration in light of this new authority.

A. Liability under GBL §§ 349 and 350

Montera brought claims under two overlapping New York consumer protection laws. GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce." N.Y. Gen. Bus. Law § 349. GBL § 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service." N.Y. Gen. Bus. Law § 350. Section 350 specifically addresses false advertising but otherwise has the same broad scope and standard for recovery as § 349. *See Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 712 N.E.2d 662, 665, 690 N.Y.S.2d 495 (N.Y. 1999); *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 774 N.E.2d 1190, 1195 n.1, 746 N.Y.S.2d 858 (N.Y. 2002).

To succeed on a claim under § 349 or § 350, the plaintiff must show that the defendant "engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 967 N.E.2d 675, 675, 944 N.Y.S.2d 452 (N.Y. 2012) (citation omitted). The first element is not at issue in this case. Premier contends that Montera cannot satisfy the second or third elements.

For the second element, Premier argues that its conduct was not materially misleading as a matter of law because its claims about Joint Juice's efficacy were substantiated. Premier advances no persuasive authority

to support this argument. For the third element, Premier argues that Montera's injury is not cognizable under New York law and that, even if it is cognizable, Montera cannot show that her injury was caused by the statements on the Joint Juice packaging. We conclude that New York law recognizes Montera's injury, and that Montera proved at trial that the class members' injuries were caused by Premier's misrepresentations.

1. Materially misleading conduct

Premier argues that it was entitled to judgment as a matter of law because, in its view, it substantiated its claims about the efficacy of glucosamine and chondroitin and therefore those claims were not deceptive under New York law. Premier fails to support its position that the deceptiveness of its statements was a question of law under the circumstances of this case. It also overlooks that the jury, after considering the studies introduced by both sides, found as a matter of fact that Joint Juice was "valueless for its advertised purpose."

Claims under GBL §§ 349 and 350 require "a showing that [the] defendant is engaging in an act or practice that is deceptive or misleading in a material way." *Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529 (N.Y. 1995). New York courts have adopted "an objective definition of deceptive acts and practices" that is "limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* at 745.

Whether Premier's statements were misleading was a question of fact decided by the jury at trial. *See Sims v. First Consumers Nat'l Bank*, 303 A.D.2d 288, 758 N.Y.S.2d 284, 286 (App. Div. 2003) ("Whether defendants' conduct was deceptive or misleading is a question of fact."); *Duran v. Henkel of Am., Inc.*, 450 F. Supp. 3d 337, 346 (S.D.N.Y. 2020) ("[The deceptiveness] inquiry is generally a question of fact . . . ."). New York law permits a court to decide that a statement is not deceptive as a matter of law in narrow circumstances, not present here, such as when "a plaintiff's claims as to the impressions that a reasonable consumer might draw are patently implausible or unrealistic." *Anderson v. Unilever U.S., Inc.*, 607 F. Supp. 3d 441, 452 (S.D.N.Y. 2022) (internal quotation marks and citation omitted).

The district court instructed the jury that Montera "must prove that the advertisement was likely to mislead a reasonable consumer acting reasonably under the circumstances" and that Montera suffered an injury only if Joint Juice is "valueless for its advertised purpose."[1] The jury considered each party's evidence, including

1. The district court did not adopt Montera's proposed injury instruction. Montera requested an instruction stating that the class was injured if "a reasonable consumer did not receive the full value or benefit of the product as advertised." Premier requested an instruction that allowed the jury to find injury only if Joint Juice was "valueless." Montera objected to the district court's partial adoption of Premier's language, and Premier defended the district court's "valueless for its advertised purpose" instruction, arguing that Montera's "full value" language was contrary to New York law. Montera has not argued in these appeals that the district court's injury instruction was erroneous, and we express no view on the question.

their competing scientific studies, and found that Montera established both elements. Thus, contrary to Premier's first argument on appeal, judgment as a matter of law in its favor was not required merely because it introduced studies that supported its view of Joint Juice's efficacy. The jury considered the evidence offered by both parties and found that Premier's statements about Joint Juice's efficacy for treating joint pain were materially misleading, which is all the second element of a §§ 349 or 350 claim requires.

Premier cites no authority that supports its contention that "New York law provides that a claim is not misleading as a matter of law when it is substantiated." Premier argues that the most on-point decision is *Parker v. United Industries Corp.*, 2020 U.S. Dist. LEXIS 179381, 2020 WL 5817012 (S.D.N.Y. Sept. 29, 2020). But *Parker* is of little help to Premier. In that case, the plaintiff alleged that the defendant's bug repellant deceptively claimed it "repels mosquitoes for hours." 2020 U.S. Dist. LEXIS 179381, [WL] at *4. The district court granted summary judgment for the defendant because there was no genuine dispute of fact as to the deceptiveness of the statement. *Id.* Specifically, the court reasoned that the plaintiff's evidence did not establish that the spray was "ineffective for all individuals, even if this Court were to credit [the plaintiff's] cited studies and expert's analysis and discount those proffered by the Defendant." *Id.* The *Parker* court's ruling was specific to the evidence presented; it did not purport to apply a rule of New York law that claims under §§ 349 and 350 necessarily fail if both sides introduce reputable scientific studies supporting their respective positions.

Given the jury's factual finding that Joint Juice's packaging was materially misleading and Premier's failure to support its interpretation of New York law, we conclude that the district court correctly rejected Premier's argument that Joint Juice's packaging was not misleading as a matter of law.

As an alternative to its argument that it was entitled to judgment as a matter of law, Premier argues that it is entitled to a new trial because the district court declined to instruct the jury on a regulatory safe harbor that provides a defense to § 349 liability. We are not persuaded.

Section 349 provides that "it shall be a complete defense" to liability if a challenged practice is "subject to and complies with the rules and regulations of" a federal regulatory agency. N.Y. Gen. Bus. Law § 349(d). Premier contends that it complied with the Food and Drug Administration's (FDA) dietary supplement regulation, 21 C.F.R. § 101.93, and was therefore entitled to § 349(d)'s safe harbor. That federal regulation permits dietary supplement labels to include "structure/function" claims. Such claims may "describe the role of a nutrient or dietary ingredient" on the "structure or function" of the human body, "provided that such statements are not disease claims." 21 C.F.R. § 101.93(f). "Disease claims" are statements "that the product itself can cure or treat a disease." *Greenberg v. Target Corp.*, 985 F.3d 650, 654 (9th Cir. 2021) (citing § 101.93(g)). To comply with § 101.93(f), a manufacturer must notify the FDA within 30 days of first marketing a supplement that the product's label includes a qualifying claim, and certify that the claim

is substantiated, among other requirements. 21 C.F.R. § 101.93(a)(1), (a)(3).

After the close of evidence, the district court declined to instruct the jury on Premier's safe harbor defense because Premier did not dispute that it failed to comply with the regulation's 30-day notice requirement. Premier began including the challenged statements on Joint Juice's packaging in 2009 but did not send the required notification to the FDA until 2012. Premier offered no evidence that the FDA excused its failure to comply with the regulatory deadline and offers no support for its assertion that the 2012 notice cured its earlier lack of compliance. Because Premier concedes that it did not comply with the plain text of the regulation, the district court did not err by declining to instruct the jury on the safe harbor provision.[2]

2. Injury

GBL §§ 349 and 350 require plaintiffs to show that the defendant's "deceptive act or practice . . . caused actual, although not necessarily pecuniary, harm." *Oswego*, 647 N.E.2d at 745. The district court instructed the jury that the class was "injured by purchasing Joint Juice if it was valueless for its advertised purpose." In his closing argument, Montera's counsel asked the jury for a full refund, but he acknowledged that the jury could also

2. We grant Montera's unopposed request for judicial notice of certain FDA and Federal Trade Commission guidance documents (Dkt. No. 45) because these are government sources "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

conclude that a reasonable consumer could find some value in Joint Juice separate from its advertised purpose of treating joint pain, such as hydration or Vitamin C. Montera's counsel explained to the jury that they might reduce the class's damages accordingly. The jury's special verdict form shows that the jury found the class was injured by purchasing Joint Juice, and it awarded damages equal to the total amount spent on Joint Juice during the class period based on average purchase price. Despite the suggestion by Montera's counsel, the jury declined to reduce the damages amount on account of Joint Juice having any residual value apart from its advertised purpose.

Premier contends that only two types of injuries are cognizable under §§ 349 and 350: a claim that a product affirmatively harmed the consumer, or a claim that the consumer paid a "price premium" for a particular product attribute that was deceptively advertised. Premier argues that New York law does not recognize the injury Montera pursued at trial because Montera sought a full refund based on Joint Juice not providing the benefits promised by the packaging. Montera did not contend that ingesting Joint Juice injured class members or that the class paid a higher price than they should have paid for the product. Thus, Premier contends that it is entitled to judgment as a matter of law because Montera did not state a cognizable injury under §§ 349 and 350. In the alternative, Premier argues that it is entitled to a new trial because the district court erred when it instructed the jury on injury.

We reject Premier's strained reading of New York law, and find no error in the district court's denial of Premier's

motion for judgment as a matter of law on the ground that Montera did not state a cognizable injury. We also find no error in the district court's injury instructions.

Premier relies on *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 (N.Y. 1999), which involved five proposed class action suits against tobacco companies. In that case, the plaintiffs alleged that the companies "deceived them about the addictive properties of cigarettes and fraudulently induced them to purchase and continue to smoke cigarettes." *Id.* at 894. Critically, the plaintiffs did not argue that they were injured by becoming addicted to nicotine. *Id.* at 898. Instead, the only injury the plaintiffs claimed was "that defendants' deception prevented them from making free and informed choices as consumers." *Id.* The New York Court of Appeals held that the plaintiffs had not stated a cognizable injury under § 349. *Id.*

Premier latches onto the Court of Appeals' comment that the plaintiffs' "theory contains no manifestation of either pecuniary or 'actual' harm; plaintiffs do not allege that the cost of cigarettes was affected by the alleged misrepresentation, nor do they seek recovery for injury to their health as a result of their ensuing addiction." *Id.* From this, Premier argues that the *Small* court limited cognizable injuries under § 349 to price premium and physical injury claims. Not so. Premier overlooks that the *Small* court's reasoning addressed the specific deficiencies in the plaintiffs' complaint. The court explained that "*[w]ithout addiction as part of the injury claim*, there is no connection between the misrepresentation and any harm from, or failure of, the product," and the plaintiffs'

claim "thus sets forth deception as both act and injury." *Id.* (emphasis added). In other words, *Small* held that the plaintiffs in that case got the cigarettes they paid for and made no claim that they were either harmed by the product or deceived into paying too much for it. The alleged deception about the addictive quality of cigarettes had no effect on the product the plaintiffs received. Critically, the plaintiffs in *Small* did not limit their class to only those who became addicted to cigarettes, nor did they allege that the cigarettes promised anything extra that they did not receive.[3]

In contrast, Montera alleges that the Joint Juice class members did *not* get what they paid for because they purchased a product that was advertised to improve joint health but in reality did not. *See DeRiso v. Synergy USA*, 6 A.D.3d 152, 773 N.Y.S.2d 563, 563 (App. Div. 2004) (explaining that the plaintiff failed to allege a § 349 injury under *Small* because she "d[id] not claim that defendant failed to deliver the [promised] services"). Montera properly alleged deceptive conduct that was distinct from her claimed injury. Premier's deceptive conduct was its statements touting joint health on Joint Juice's

3. We are similarly unpersuaded by Premier's reliance on *Donahue v. Ferolito, Vultaggio & Sons*, 13 A.D.3d 77, 786 N.Y.S.2d 153 (App. Div. 2004). Applying *Small*, *Donahue* affirmed the dismissal of a consumer suit alleging deceptive statements about health benefits on herbal tea and fruit punch labels because the plaintiff had not alleged a cognizable injury. *Id.* at 154. As in *Small*, the *Donahue* plaintiffs received products with some value—the tea and fruit punch were presumably tasty beverages despite their lack of health benefits—and the plaintiffs did not allege they were physically injured or paid an inflated price for the drinks.

packaging, and the class's claimed injury was the purchase of a product that did not deliver its advertised benefits. The jury found that Joint Juice had no value to the class members without its advertised joint health benefits.

Premier's argument that New York law recognizes only two types of injuries is further undermined by the Second Circuit's decision in *Orlander v. Staples, Inc.*, 802 F.3d 289 (2d Cir. 2015). The plaintiff in *Orlander* had purchased a Staples computer protection plan that promised two years of repair services. *Id.* at 293. In reality, the repair services were not available until the manufacturer's one-year warranty had lapsed. *Id.* at 294. The Second Circuit held that the plaintiff sufficiently alleged an injury under §§ 349 and 350 because he paid "for a two-year . . . Protection Plan which he would not have purchased had he known that Defendant intended to decline to provide him any services in the first year of the Contract." *Id.* at 301. Staples argued, just as Premier does here, that the plaintiff's injury was not cognizable because it did not allege a price premium. *See id.* at 302. Rejecting Staples' argument, the *Orlander* court explained that "there is no such rigid 'price premium' doctrine under New York law," and that New York law permits a plaintiff to allege only that "on account of a materially misleading practice, she purchased a product and did not receive the full value of her purchase." *Id.* (citing *Small*, 720 N.E.2d at 898). Here, the jury concluded that the class members purchased Joint Juice and did not receive the full value of their purchase—in fact, did not receive any value—because Joint Juice did not provide its advertised benefits. Contrary to Premier's characterization, this case

arguably takes the price premium theory to its logical endpoint: the jury found that Joint Juice was entirely "valueless for its advertised purpose," so the entirety of the purchase price could be viewed as a price premium.

Finally, we consider that Premier's narrow view of injury under New York law would frustrate what the New York Court of Appeals has explained is the broad applicability of these statutes. Sections 349 and 350 "apply to virtually all economic activity, and their application has been correspondingly broad." *Plavin v. Grp. Health Inc.*, 35 N.Y.3d 1, 124 N.Y.S.3d 5, 146 N.E.3d 1164, 1168 (N.Y. 2020) (quoting *Karlin*, 712 N.E.2d at 665); *see also Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co.*, 37 N.Y.3d 169, 150 N.Y.S.3d 79, 171 N.E.3d 1192, 1197 (N.Y. 2021) ("GBL § 349 prohibits deceptive acts and practices that misrepresent the nature or quality of products and services."); *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 750 N.E.2d 1078, 1083, 727 N.Y.S.2d 30 (N.Y. 2001) ("[Section 349] encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law."). Premier's reading of New York law would immunize from liability the age-old deceptive tactics of the "grifting snake oil salesman," which spurred the adoption of some of the earliest consumer protection laws in this country.[4] Montera's claim that she purchased a sham product falls easily within the heartland of consumer injuries and is

4. Victor E. Schwartz et al., *Marketing Pharmaceutical Products in the Twenty-First Century: An Analysis of the Continued Viability of Traditional Principles of Law in the Age of Direct-to-Consumer Advertising*, 32 Harv. J.L. & Pub. Pol'y 333, 337 (2009).

consistent with the expansive reach of §§ 349 and 350. *See Karlin*, 712 N.E.2d at 666 ("[Sections] 349 and 350 have long been powerful tools aiding the Attorney General's efforts to combat fraud in the health care and medical services areas.").

We conclude that Montera advanced a cognizable injury under §§ 349 and 350. Because Montera's injury is cognizable, we find no error in the district court's injury instructions.

3. Causation

Premier next argues that, even if Montera's injury is cognizable, it was entitled to judgment as a matter of law because Montera did not show that the class members' injuries were caused by the statements on Joint Juice's packaging. In Premier's view, Montera's theory of injury—that the class members would not have purchased Joint Juice absent Premier's misrepresentations—required her to prove at trial that Premier's "deceptive statement[s] caused each purchase." Premier further argues that because causation in this case is "an individual issue," common issues did not predominate and the district court should have granted Premier's pre-and post-trial motions to decertify the class. *See* Fed. R. Civ. P. 23(b)(3) (requiring that "questions of law or fact common to class members predominate over any questions affecting only individual members"). In the alternative, Premier argues that judgment must be granted in its favor "because no reasonable jury could find causation proven based on the evidence at trial."

We reject Premier's causation argument because it is inconsistent with New York law. Premier acknowledges that its argument would require Montera to prove that each class member relied on the challenged statements to make their purchase decisions. The Court of Appeals has unequivocally held that reliance is not required to show causation under GBL §§ 349 and 350. *Koch*, 967 N.E.2d at 676 ("Justifiable reliance by the plaintiff is not an element of [a § 349 or § 350] claim."). Instead, New York uses "an objective definition of deceptive acts and practices." *Oswego*, 647 N.E.2d at 745. Liability under §§ 349 and 350 "turns on what a *reasonable* consumer, not a particular consumer, would do." *Fishon v. Peloton Interactive, Inc.*, 620 F. Supp. 3d 80, 100 (S.D.N.Y. 2022) (citation omitted). "Because the test is objective and turns upon the reasonable consumer, reliance is not at issue, and the individual reason for purchasing a product becomes irrelevant and subsumed under the reasonable consumer standard, i.e., whether the deception could likely have misled someone, and not, whether it in fact did." *Id.* (internal quotation marks and citation omitted and alteration adopted); *see also Stutman v. Chem. Bank*, 95 N.Y.2d 24, 731 N.E.2d 608, 613, 709 N.Y.S.2d 892 (N.Y. 2000) (explaining "there is a difference between reliance and causation" and holding plaintiffs need not "allege that they would not otherwise have entered into the transaction"). As the Eleventh Circuit recently explained in affirming certification of a class action under New York law, "Rule 23(b)(3)'s predominance requirement poses no barrier to class treatment of [§ 349] claims because it's unnecessary to make any individualized inquiry into what each plaintiff knew and relied on in purchasing his or her

[product]." *Tershakovec v. Ford Motor Co.*, 79 F.4th 1299, 1310-11 (11th Cir. 2023).

The jury's findings satisfied New York's causation requirement. The district court correctly instructed the jury to consider whether Premier's conduct was "misleading in a material way." The instructions further explained that a representation is misleading if it "is likely to mislead a reasonable consumer acting reasonably under the circumstances" and that "[a] representation is material if a reasonable consumer would consider it important in determining whether to purchase the product." These instructions correctly encapsulate New York's objective consumer test for deceptive practices. The jury found that Premier's claims about the benefits of Joint Juice were materially misleading to a reasonable consumer and that all class members were injured as a result of purchasing a product "valueless for its advertised purpose." *See CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841, 129 S. Ct. 2139, 173 L. Ed. 2d 1184 (2009) ("[J]uries are presumed to follow the court's instructions."). Given New York's objective consumer test and the jury's injury and causation findings, Montera was not required to establish that each class member subjectively relied on Premier's misrepresentations when they purchased Joint Juice.[5]

5. Premier also argues that New York law requires that each purchaser "saw the misrepresentation or was exposed to it in some other way." *Fishon*, 620 F. Supp. at 99. Assuming that New York law has such a requirement, it is satisfied in this case because the class members were exposed to the misrepresentations on the Joint Juice packaging when they purchased the product. *See Hasemann v.*

Our rejection of Premier's causation argument is consistent with our caselaw analyzing consumer claims under other states' consumer protection laws. For example, in *Yokoyama*, the district court declined to certify a class because it determined that Hawai'i's "consumer protection laws require individualized reliance showings." 594 F.3d at 1093. Reversing the district court, we explained that Hawai'i "uses an objective test to effectuate its remedial consumer protection statute" and therefore whether a consumer relied on the defendant's misrepresentation required the jury "to determine only whether [the defendant's] omissions were likely to deceive a reasonable person." *Id.* Both Hawai'i and New York use an objective consumer test, but New York does not require reliance, making this case more straightforward than *Yokoyama*.

Having rejected Premier's view of New York's causation requirement, we easily dispose of Premier's remaining arguments that class certification was improper and that there was insufficient evidence for the jury to find causation. At trial, Montera presented evidence that Premier advertised Joint Juice to treat joint pain despite numerous studies concluding that glucosamine and chondroitin have no effect on joint health, and the majority of customers surveyed—56% in Montera's

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Gerber Prods. Co., 331 F.R.D. 239, 267 (E.D.N.Y. 2019) ("Requiring one hundred percent certainty that each and every customer has been exposed to the representations at issue would impermissibly depart from the objective standards of sections 349 and 350 of the GBL, and would impermissibly read a seeing and a reliance requirement into the statute.").

survey and 75% in Premier's internal survey—purchased Joint Juice because they thought it would help their joint pain. The district court did not abuse its discretion by concluding that this evidence satisfied Rule 23(b)(3)'s predominance requirement. *See Tershakovec*, 79 F.4th at 1311 ("[T]here can be no reliance-based predominance objection to class treatment of . . . § 349 claims . . . ."). The jury also had ample evidence before it to conclude that the misrepresentations on the Joint Juice packaging were materially misleading to a reasonable consumer and caused the class members' injuries.[6]

B. Trial issues

Premier contends that the district court's evidentiary rulings and Montera's counsel's inflammatory arguments entitle it to a new trial. We disagree.

1. Evidentiary rulings

Premier argues that the district court violated Federal Rules of Evidence 401, 402, and 403 by admitting evidence that was irrelevant, confusing, and unfairly prejudicial. Specifically, Premier challenges the admission of: (1) Premier's advertisements other than Joint Juice's

6. Premier separately argues that the district court erroneously relied on California's law of causation when it denied Premier's motions to decertify. The record refutes this contention. The district court correctly applied the New York Court of Appeals' opinion in *Small*, and its citations to its prior order certifying a class under California law merely incorporated by reference the common evidence of causation, not the court's analysis of California law.

packaging; (2) evidence about the size of Premier's parent companies; and (3) a letter sent by Premier's tax advisor to a California recycling agency.

a. Advertising evidence

The advertising evidence Montera offered included a list of Google AdWords that Premier purchased to market Joint Juice, many of which related to arthritis, and a television commercial featuring a celebrity recommending Joint Juice to help joint stiffness.

Premier first argues that this evidence was irrelevant under Rules 401 and 402 because it could not support Montera's claims about Joint Juice packaging and because not every New York purchaser saw the AdWords and television commercial. Evidence is relevant if it has any tendency to make a fact of consequence in the case more or less probable than it would be without the evidence. Fed. R. Evid. 401. Irrelevant evidence is inadmissible. Fed. R. Evid. 402. Montera contends that this evidence was relevant to establish the message conveyed by the Joint Juice labeling. We agree.

At a minimum, the extra-label evidence was relevant to Premier's safe harbor defense because it tended to show that the packaging statements were meant to convey a disease claim, not a structure/function claim. We may consider evidence aside from a product's label to determine whether the label makes a structure/function claim or implicitly makes a disease claim. *See Kroessler v. CVS Health Corp.*, 977 F.3d 803, 815 (9th Cir. 2020)

(quoting 65 Fed. Reg. 1000, 1006 (Jan. 6, 2000) (codified at 21 C.F.R. pt. 101)). In *Kroessler*, we noted that when evaluating implied disease claims, many courts have admitted "the product's advertisements, the consumer's experience with the product, and market research showing consumer's typical uses of the product." *Id.* at 815 & n.9. The AdWords and television commercial fall within the types of evidence relevant to differentiating between structure/function claims and disease claims. Because Premier continued to press its safe harbor defense until the close of evidence, the district court did not abuse its discretion by ruling that the extra-label evidence was relevant to show the type of message Premier intended the Joint Juice packaging to convey.

Next, Premier argues that admission of the AdWords and television commercial violated Rule 403 because this evidence likely confused the jury about which marketing claims were at issue. Again, we disagree. Evidence may be excluded when its probative value is substantially outweighed by a danger of confusing the issues or misleading the jury. Fed. R. Evid. 403. Here, the extra-label advertising evidence was probative of Premier's intended packaging messages, and we see no danger of confusion. The district court instructed the jury that "[t]he acts, practices, and advertisements at issue for your analysis are the labels and packaging for the Joint Juice product," and that "you are not to assess whether any other acts, practices, or advertisements by Premier Nutrition are misleading or deceptive." "[J]uries are presumed to follow the court's instructions." *CSX Transp.*, 556 U.S. at 841. Because the risk of jury confusion did

not outweigh the evidence's probative value, the district court did not abuse its discretion by admitting evidence of non-packaging advertising.

b. Size of parent companies

Premier argues that evidence Montera elicited about Post Holdings and BellRing Brands, Premier's parent companies, was irrelevant and unfairly prejudicial. The district court ruled before trial that mention of Post was relevant when discussing documents that referred to the company, but precluded mention of any parent company's financial condition because Montera was not seeking punitive damages, making the parent companies' finances irrelevant.

Premier challenges the district court's decisions overruling its objections to three instances during trial in which Montera's counsel elicited testimony about the parent corporations. None of these instances referred to the parent companies' financial condition. On one occasion, Montera asked a question about Joint Juice's corporate structure that elicited an answer about Post, as allowed by the district court's pre-trial ruling, and counsel then moved to another topic.[7] Next, Montera asked Premier's president about her roles at Premier and the parent companies, whether BellRing was traded on the New York Stock Exchange, and whether it was "a big company."

7. Montera's counsel had the following exchange with Joint Juice's brand director: "Q. You left Premier at some point after it had been acquired by another company; is that true? A. Yes. . . . Q. The name of that company was Post Holdings; is that correct? A. Yes."

When Premier objected, the district court told Montera to move on and denied Premier's request to remind the jury that BellRing and Post were not defendants. Finally, Montera asked a few questions about a children's cereal that Post manufactures after a testifying expert mentioned it in his report. These brief references were not unfairly prejudicial or likely to cause the jury to decide the case based on their views or impressions of large companies. The district court did not abuse its discretion in these evidentiary decisions.

c. California tax letter

Premier also argues that the district court erred by overruling its objection to a letter its tax advisor sent to the California Department of Resources Recovery and Recycling in 2010. The letter argued that Joint Juice should not be subject to a five-cent bottle deposit tax because it did not qualify as a "beverage" under California law, but rather was a "medical supplement" and "over-the-counter medication." Premier argues that the letter was irrelevant, unfairly prejudicial, and confusing to the jury.

In Premier's view, the letter was irrelevant because no New York consumer saw it, so it could not have affected any purchases. This argument fails because extra-label evidence of the message intended by Joint Juice's packaging was relevant to Montera's defense against Premier's regulatory safe harbor argument that the Joint Juice label made structure/function claims rather than disease claims. *See Kroessler*, 977 F.3d at 815.

With respect to Rule 403, Premier argues that admission of the 2010 letter was unfairly prejudicial and confusing because the letter was written in the context of California's bottle deposit laws, not FDA regulations. Contrary to Premier's contentions on appeal that the packaging was "entirely different" from the statements in the letter, the letter referred to Joint Juice's packaging as proof that the product was a medication. The letter included the statement, "Joint Juice® supplement . . . is an over-the-counter medication — not a soft drink — as indicated by its label, its ingredients, and its recommended daily consumption." Images of Joint Juice's packaging were attached to the letter as support. The letter's passing references to California law would not have distracted the jury from the relevant portions of the letter, such as its representation that "the only reason to purchase Joint Juice® supplement is for the medicinal value of the glucosamine and chondroitin it contains." The district court did not abuse its discretion by admitting Premier's 2010 letter to the California Department of Resources Recovery and Recycling.

2. Counsel's arguments

Premier argues that the district court erred by denying Premier a new trial based on Montera's opening statement and closing argument, which Premier considered inflammatory. "To receive a new trial because of attorney misconduct," Premier must show that Montera's misconduct "substantially interfered" with Premier's interests. *SEC v. Jasper*, 678 F.3d 1116, 1129 (9th Cir. 2012) (quoting *Cal. Sansome Co. v. U.S. Gypsum*,

55 F.3d 1402, 1405 (9th Cir. 1995)). Because "the district court is 'in a superior position to gauge the prejudicial impact of counsel's conduct during the trial,' we will not overrule a district court's [assessment of] the impact of counsel's alleged misconduct unless we have 'a definite and firm conviction that the court committed a clear error of judgment.'" *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192 (9th Cir. 2002) (quoting *Anheuser—Busch Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995)). Premier fails to show that Montera's arguments were improper, let alone that misconduct "permeate[d] [the] entire proceeding" such that reversal is warranted. *Jasper*, 678 F.3d at 1129 (quoting *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984)).

Premier first argues that Montera inappropriately suggested to the jury that Premier was "prey[ing] on the vulnerable." This argument fails because counsel "is allowed to argue reasonable inferences based on the evidence," *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997), and counsel's argument that "Joint Juice set out to target people who suffer from arthritis" was consistent with the evidence of Premier's marketing strategy. Similarly, counsel's argument that Premier used "paid hacks and certified [q]uacks in the articles that they publish" was not untethered from the record; it was consistent with evidence about Premier relying on industry-backed studies, evidence that some of the sponsoring companies refused to release the underlying data for external review, and the note written by Premier's president not to publish the study Premier contemplated if it yielded unfavorable results.

Premier next argues that Montera "primed the jury's sense of community protectiveness by referring . . . to the defendant's size." Premier takes issue with Montera's counsel's comment during his opening statement that Premier is a "large company" and with evidence Montera introduced during her case-in-chief showing that Post Holdings acquired Premier in 2014. Premier overlooks that defense counsel commented during voir dire that Premier is "not really a corporation" and is instead "a much smaller company," and the district court's caution that those statements opened the door to contrary evidence and arguments. Premier also objects to the statement in Montera's closing argument that "[i]n our country, even the little people have the right to band together and say no. They have the power to say to the most powerful corporations, no, you cannot lie to us." We have held that appealing to the jury "to act as a conscience of the community" is not misconduct when it is not "specifically designed to inflame the jury." *United States v. Audette*, 923 F.3d 1227, 1239 (9th Cir. 2019) (quoting *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984)). Premier has not shown that Montera's statements crossed this line, or otherwise exceeded the bounds of a permissible response to defense counsel's suggestion that Premier was a small company.

Finally, Premier argues that counsel "repeatedly emphasized the supposed moral blameworthiness of Premier's conduct" and portrayed "everyone on Premier's side" as "liars and thieves." Montera responds that whether Premier's statements were false was relevant to its claim that Joint Juice's packaging was deceptive.

We agree. "Using some degree of emotionally charged language during closing argument in a civil case is a well-accepted tactic in American courtrooms." *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 518 (9th Cir. 2004). We have recognized that lawyers are "entitled to argue that the jury should disbelieve the opposing party's witnesses for any number of reasons." *Id.* at 520. The district court did not abuse its discretion when it ruled that "Plaintiff's counsel stayed within the reasonable bounds of argument and did not improperly inflame the jury."

C. Damages

Finally, we turn to the parties' competing challenges to the district court's calculation of damages and prejudgment interest. New York law provides that statutory damages are not an available remedy in class actions unless the New York Legislature expressly authorizes them. *See* N.Y. C.P.L.R. § 901(b) ("[A]n action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").[8] The parties agree that § 901(b) would prevent this case from being litigated as a class action in New York state court because the class seeks statutory damages. Because of § 901(b), there is limited precedent from New York courts on some questions presented by this appeal related to the calculation of damages. The district

8. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Supreme Court held that because § 901(b) is procedural, not substantive, it has no application in federal diversity suits such as this. 559 U.S. 393, 398, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

court calculated statutory damages by multiplying the number of Joint Juice units sold during the class period by the damages authorized by GBL §§ 349 and 350, resulting in a total award of $91,436,950. The court reduced the award after concluding that imposition of the total would violate Premier's substantive due process rights. Montera appeals the district court's remittitur; Premier challenges the court's initial calculation of statutory damages and award of prejudgment interest.

1. Calculating statutory damages

GBL §§ 349 and 350 allow for the greater of actual damages or statutory damages. Section 349(h) provides that "any person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater." N.Y. Gen. Bus. Law § 349(h). Section 350-e similarly states that "[a]ny person who has been injured by reason of any violation of [this section] may bring . . . an action to recover his or her actual damages or five hundred dollars, whichever is greater." *Id.* § 350-e. The statutes are not explicit about whether statutory damages are calculated on a per-person or per-violation basis.

Lacking guidance from New York courts, the district court canvassed federal caselaw and concluded that "§§ 349(h) and 350-e allow statutory damages on a per unit basis," where each unit of Joint Juice sold represented a statutory violation.[9] The jury found that 166,249 units of

9. The evidence showed that the vast majority of Joint Juice was sold in six-or thirty-pack units.

Joint Juice were sold in New York during the class period. After the verdict, Montera sought statutory damages of $91,436,950, which represented the combined statutory damage amount of $550 per unit. Premier argues that the district court erred because §§ 349 and 350 authorize statutory damages only on a per-plaintiff basis.

We know of no New York caselaw that resolves this question and federal courts have applied these statutes inconsistently. In some cases, the courts awarded damages without specifying how damages were calculated. In others, the distinction between awarding damages on a per-person or per-violation basis was not at issue because the cases involved single violations.[10]

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10. *See Chery v. Conduent Educ. Servs., LLC*, 581 F. Supp. 3d 436, 452 (N.D.N.Y. 2022) ("Section 349 only permits a plaintiff to recover once 'per violation.'"); *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 526 (E.D.N.Y. 2017) (editing the quoted text of § 349 to read "actual damages or *fifty dollars [per transaction*]" and paraphrasing § 350 as "*five hundred dollars* per transaction" (alteration in original)); *Koch v. Greenberg*, 14 F. Supp. 3d 247, 262 (S.D.N.Y. 2014), *aff'd*, 626 F. App'x 335 (2d Cir. 2015) (upholding treble damages for each of 24 fraudulent wine bottles sold as part of a set but not discussing how to calculate damages); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 87 (2d Cir. 2015) (stating only that "statutory damages under GBL § 349 can be assessed on the basis of common proof, as they are capped at $50" but offering no indication that any plaintiff experienced the fraudulent scheme more than once); *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373, 395 (E.D.N.Y. 2022) (concluding, without analysis, that § 349 "provides for damages of $50 *to each class member*" who bought eyeglasses (emphasis added)); *Haag v. Hyundai Motor Am.*, 330 F.R.D. 127, 133 n.5 (W.D.N.Y. 2019) (assuming that each class member who purchased a single vehicle with allegedly defective brakes "may be entitled to $50 each in statutory damages"); *Madden v. Midland Funding, LLC*,

The New York Court of Appeals has instructed that "[w]hen interpreting a statute, our primary consideration is to discern and give effect to the Legislature's intention. The text of a statute is the clearest indicator of such legislative intent and courts should construe unambiguous language to give effect to its plain meaning." *Avella v. City of New York*, 29 N.Y.3d 425, 58 N.Y.S.3d 236, 80 N.E.3d 982, 987 (N.Y. 2017) (internal quotation marks and citations omitted).

GBL §§ 349 and 350 create private causes of action for persons "injured by reason of any violation" of either statute. In our view, the plainest reading of that phrase is that a cause of action arises for each violation. Here, a class member suffered a violation each time they purchased a unit of Joint Juice bearing a deceptive label, whether packaged in a six-or thirty-pack, and New York law entitled them to receive either actual or statutory damages for each violation.

The history and purpose of §§ 349 and 350 support this reading. "[I]nitially only the Attorney General's

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237 F. Supp. 3d 130, 161 (S.D.N.Y. 2017) (quoting *Sykes*, 780 F.3d at 87, in stating that statutory damages under § 349 "are capped at $50" and implying that this cap was per person for putative class alleging that debt collector charged unlawful interest rate for each class members' account); *Geismar v. Abraham & Straus*, 109 Misc. 2d 495, 439 N.Y.S.2d 1005, 1008 (Dist. Ct. 1981) (awarding $50 in statutory damages to sole plaintiff who tried to purchase one dish set at advertised sale price); *Sharpe v. Puritan's Pride, Inc.*, 2017 U.S. Dist. LEXIS 16531, 2017 WL 475662, at *2 (N.D. Cal. Feb. 6, 2017) (stating, without analysis, that § 349 "provides for the greater of actual damages or $50 in statutory damages *per person*" (emphasis added)).

Office could sue to enforce the statutes . . . ." *Plavin*, 146 N.E.3d at 1168. In 1980, recognizing "the inability of the New York State Attorney-General to adequately police false advertising and deceptive trade practices," *Beslity v. Manhattan Honda, a Div. of Dah Chong Hong Trading Corp.*, 120 Misc. 2d 848, 467 N.Y.S.2d 471, 474 (App. Term 1983), the New York Legislature "amended both section 349 and 350 to add a private right of action . . . , allowing injunctive relief and damages, as well as reasonable attorney's fees," *Plavin*, 146 N.E.3d at 1168. The Legislature authorized statutory damages to "encourage private enforcement" and to "add a strong deterrent against deceptive business practices." *Beslity*, 467 N.Y.S.2d at 474 (quoting Mem. of Gov. Carey, On Approving L.1980, chs. 345 and 346, 1980 N.Y. Sess. Laws 1867 (June 19, 1980)). In 2007, the Legislature increased the statutory damages amount in § 350-e from $50 to $500 because "[c]urrent limits are too low to be effective." N.Y. State Senate Introducer's Mem. in Support for Bill No. S4589.[11]

The Legislature's use of the phrase "by reason of any violation" in the text of §§ 349 and 350 and its expansion of the statutes to create private causes of action in order to deter deceptive conduct supports calculating damages on a per-violation basis, as does the legal backdrop against which the Legislature enacted and amended §§ 349 and 350. Because New York law does not allow class actions for

11. We grant Montera's unopposed request for judicial notice of these materials (Dkt. No. 22) because "[l]egislative history is properly a subject of judicial notice." *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012).

claims involving statutory damages, the Legislature was surely aware that the statutes' deterrent function would not be accomplished by aggregating statutory damages across a large number of plaintiffs. *See* N.Y. C.P.L.R. § 901(b). When the legislature increased the statutory damages award authorized by § 350 in 2007, the individual filing fees in New York state and county courts totaled $400 or more.[12] If statutory damages were calculated on a per-person basis, a consumer deceived into making several purchases of the same low-cost item might have to pay $400 in up-front filing fees to potentially recover $550 in combined statutory damages under §§ 349 and 350. We are not persuaded that the Legislature would have considered that such a meager incentive would accomplish the Legislature's express goal of deterring statutory violations.

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12. Last increased in 2003, the filing fees in New York state and county courts include $210 for the clerk of court to assign "an index number" to a new case, N.Y. C.P.L.R. § 8018(a)(1), (3); $125 to "request judicial intervention" and place a case on a judge's trial calendar, *id.* § 8020(a); and $65 to request a jury trial, *id.* § 8020(c). On top of these $400 in initial fees, parties must pay a $45 fee for every motion filed. *Id.* § 8020(a).

The filing fees in small claims court in New York are lower, ranging from $10 to $20. *See* N.Y. Uniform Just. Ct. Act § 1803 (UJCA); N.Y. Uniform City Ct. Act § 1803 (UCCA); N.Y. Uniform Dist. Ct. Act § 1803 (UDCA). However, it would not be possible to bring a consumer claim against the vast majority of defendants in New York small claims court because defendants in small claims court must reside in or have an office in the same municipality as the town or village court or in the same county as the city or district court. *See* UJCA § 1801; UCCA § 1801; UDCA § 1801.

We conclude that awarding statutory damages for each violation, particularly when the violation relates to a low-cost product, advances the Legislature's deterrent purpose and is consistent with the plainest reading of the statutory text. We therefore affirm the district court's ruling that statutory damages under §§ 349 and 350 should be calculated on a per-violation basis.

2. Substantive due process challenge to aggregate damages

Premier argued to the district court that a $91 million statutory damages award was substantively unreasonable and violated its due process rights. The district court agreed that the total award was excessive, and it awarded the class $50 per violation, rather than $550 per violation. The district court noted there was little guidance addressing when or how a court should reduce statutory damages on due process grounds, other than the Supreme Court's century-old opinion in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919). The district court instead looked to the Supreme Court's *State Farm* factors for assessing the substantive reasonableness of punitive damages awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

Two months after the district court entered final judgment, we published *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109 (9th Cir. 2022). *Wakefield* concerned a company that placed over 1.8 million robocalls in violation of the Telephone Consumer Protection Act (TCPA). *Id.* at 1116.

Based on the TCPA's fixed statutory penalty of $500 "for each [] violation," 47 U.S.C. § 227(b)(3)(B), the district court ordered the defendant to pay $925.2 million. *Wakefield*, 51 F.4th at 1116. We declined to endorse the application of the *State Farm* factors outside of the punitive damages context and instead instructed the district court to use the seven factors we identified in *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990), to decide "when an award is *extremely* disproportionate to the offense and 'obviously' unreasonable." *Id.* at 1122-23 (quoting *Williams*, 251 U.S. at 67). In light of this intervening authority, we remand for the district court to consider in the first instance whether the statutory damages award violates due process under *Wakefield*. *See Six Mexican Workers*, 904 F.2d at 1310.[13] In doing so, we express no opinion on whether the award in this case was substantively unreasonable.

13. *Wakefield* instructed trial courts to consider whether "aggregation [of statutory damages] has resulted in extraordinarily large awards wholly disproportionate to the goals of the statute" and whether the award "greatly outmatch[es] any statutory compensation and deterrence goals." *Wakefield*, 51 F.4th at 1122. Here, the district court considered the New York Legislature's goals in barring aggregate damages in class actions pursuant to § 901(b) and concluded that the Legislature's intent to limit aggregation of statutory penalties supported reducing the total damages award. With the benefit of *Wakefield*, the relevant statutory goals for the district court to consider on remand include the Legislature's "compensation and deterrence goals" in enacting GBL §§ 349 and 350—the statutes that authorized the statutory damages at issue. *Id.*

3. Prejudgment interest

Premier challenges the district court's award of prejudgment interest on the statutory damages award. Section 5001(a) of the New York Civil Practice Law and Rules provides that "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property." N.Y. C.P.L.R. § 5001(a). Montera argues that she is owed prejudgment interest because the statutory damages here are compensatory in nature.

New York courts have cautioned that "the sole function of [§ 5001] interest is to make whole the party aggrieved. It is not to provide a windfall for either party." *Kaiser v. Fishman*, 187 A.D.2d 623, 590 N.Y.S.2d 230, 234 (App. Div. 1992); *see also Delulio v. 320-57 Corp.*, 99 A.D.2d 253, 472 N.Y.S.2d 379, 381 (App. Div. 1984) (declining to award prejudgment interest on punitive damages because "[i]nterest on such damages prior to verdict or decision is unnecessary to assure full compensation to the injured party"); *Stassou v. Casini & Huang Constr., Inc.*, 14 A.D.3d 695, 789 N.Y.S.2d 225, 226 (App. Div. 2005) (applying *Delulio* and denying prejudgment interest). Montera's strongest case is *Navigators Insurance Co. v. Sterling Infosystems, Inc.*, a Fair Credit Reporting Act case where the New York court reasoned that "[s]ince the consumer must elect the option of either actual or statutory damages, and may also recover punitive damages, it is reasonable to infer . . . that the actual and the statutory damages serve the same purpose." 145

A.D.3d 630, 42 N.Y.S.3d 813, 814 (App. Div. 2016). Montera contends, under the reasoning in *Navigators*, that the statutory damages here are compensatory because GBL §§ 349 and 350 similarly allow for the award of either actual or statutory damages and separately provide for treble damages.

Montera overlooks the New York Court of Appeals' description of § 349(h)'s statutory and treble damages as "a nonmandatory *penalty*." *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 998 N.Y.S.2d 729, 23 N.E.3d 997, 1002 (N.Y. 2014) (emphasis added). As we have explained, "[s]tatutory damages differ meaningfully from actual damages: while actual damages only compensate the victim, statutory damages may compensate the victim, penalize the wrongdoer, deter future wrongdoing, or serve all those purposes." *Y.Y.G.M. SA v. Redbubble, Inc.*, 75 F.4th 995, 1008 (9th Cir. 2023). In this way, statutory damages resemble, and serve some of the same purposes as, punitive damages.

We conclude that the award of prejudgment interest was error. The statutory damages award in this case was not compensatory because it exceeded the jury's actual damages award of $1,488,078.49, which the jury based on the number of units sold during the class period and the average price class members paid per unit of Joint Juice. As such, any award of prejudgment interest in addition to an award of statutory damages would constitute a windfall.[14]

14. Nor is the class entitled to prejudgment interest on the portion of the statutory damages award that did not exceed the jury's

IV. CONCLUSION

We affirm the district court's orders denying Premier's motion for class decertification, judgment as a matter of law, and for a new trial. We also affirm the district court's evidentiary and trial rulings and initial calculation of statutory damages. We vacate the damages award and remand with direction to reassess Premier's substantive due process challenge to the award of statutory damages in light of the factors identified in *Wakefield*. On remand, the district court shall not award prejudgment interest on statutory damages.[15]

AFFIRMED IN PART, REVERSED IN PART, AND VACATED AND REMANDED IN PART.

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actual damage calculation. *Cf. Adiel v. Chase Fed. Sav. & Loan Ass'n*, 810 F.2d 1051, 1055 (11th Cir. 1987) (rejecting plaintiffs' "attempt to recover prejudgment interest" by arguing that a portion of a statutory damages award under the Truth in Lending Act should be characterized as actual damages). The class was entitled to statutory damages *or* actual damages, whichever was greater. N.Y. Gen. Bus. Law §§ 349(h), 350-e. By recovering statutory damages, the class suffered no "deprivation of use of" its actual damages. *Kaiser*, 590 N.Y.S.2d at 234. Our conclusion is limited to the damages awarded in this case under §§ 349 and 350, and we do not address statutes that permit plaintiffs to recover both actual and statutory damages.

15. Premier asks that we certify several questions of New York law to the New York Court of Appeals. We deny Premier's motion for certification (Dkt. No. 32). *See Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974) (explaining that the decision to certify "rests in the sound discretion of the federal court").

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, FILED OCTOBER 18, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-06980-RS

MARY BETH MONTERA,

Plaintiff,

v.

PREMIER NUTRITION CORPORATION,

Defendant.

Filed October 18, 2022

ORDER DENYING RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, DENYING MOTION FOR NEW TRIAL, AND GRANTING IN PART AND DENYING IN PART MOTION FOR ATTORNEY FEES, EXPENSES, AND SERVICE AWARD

I. INTRODUCTION

Plaintiff Mary Beth Montera brought this lawsuit on behalf of New York consumers who had purchased Joint Juice, a beverage containing glucosamine and chondroitin that is sold by Defendant Premier Nutrition Corporation ("Premier"). The case proceeded to trial in May and June

2022, and the jury found Defendant liable for violations of New York General Business Law ("GBL") §§ 349 and 350. Judgment was entered against Defendant in July 2022, after which the parties each filed post-trial motions. Defendant brings a renewed motion for judgment as a matter of law and moves for a new trial, while Plaintiff brings a motion seeking an award of attorney fees, reimbursement of expenses, and a service award for Ms. Montera.

These motions are suitable for disposition without oral argument. Civ. L.R. 7-1(b). For the reasons discussed below, Defendant's motions are denied. Plaintiff's motion is granted in part and denied in part, with leave to amend. As to Plaintiff's request for attorney fees and expenses, the documentation submitted is insufficient to support a lodestar analysis, which is the proper method to calculate attorney fees here. However, Plaintiff's request for a service award is granted.

II. BACKGROUND

This case was brought as one of numerous certified class actions alleging false advertising and other claims arising from Premier's promotion of Joint Juice, a line of joint health dietary supplements. Each class action concerns a set of plaintiffs in a different state. Initially filed in December 2016, this action concerned consumers in New York and was the first of the related cases to proceed to trial. Following a nine-day trial in May and June 2022, the jury returned a verdict finding that Premier engaged in deceptive acts and practices, in violation of GBL § 349,

and deceptive or misleading advertising, in violation of GBL § 350. Judgment in the amount of $12,895,454.90 was thereafter entered against Defendant and in favor of Plaintiff and the Class.[1]

III. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Under Rule 50 of the Federal Rules of Civil Procedure, a court may grant a motion for judgment as a matter of law ("JMOL") against a party on a claim or issue if the party "has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a). If a party's motion for JMOL under Rule 50(a) is denied or deferred, the party may renew its motion after trial. Fed. R. Civ. P. 50(b). The standard for granting the renewed motion is the same as the standard for granting the initial motion for JMOL. *See Madrigal v. Allstate Ins. Co.*, 215 F. Supp. 3d 870, 892 (C.D. Cal. 2016). A renewed motion for JMOL "is limited to the grounds asserted in the . . . Rule 50(a) motion." *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). "A jury's verdict must be upheld if it is supported by substantial evidence," *Johnson v. Paradise Valley Unified*

1. Actual damages were determined by the jury to be $1,488,078.49, a sum derived from the total sales of Joint Juice in New York during the Class Period. *See* Dkt. 268. Following the trial, statutory damages were assessed at $8,312,450 (reduced from Plaintiff's request of $91,436,950), along with $4,583,004.90 in prejudgment interest. *See* Dkt. 294. Judgment was entered as to statutory (rather than actual) damages because the relevant GBL sections allow a prevailing plaintiff to recover the higher of the two awards. *Id.*; *see* N.Y. Gen. Bus. Law §§ 349(h), 350-e(3).

Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001), and the evidence must be viewed in the light most favorable to the nonmoving party, *see Go Daddy*, 581 F.3d at 961.

Premier's motion raises several familiar arguments, including that Plaintiff failed to prove the elements of injury, causation, materiality, and deceptiveness. Some of these arguments have been augmented, but nothing in the record has changed: the jury's verdict was supported by ample evidence as to each element of both claims, and thus a reasonable jury would have had a legally sufficient evidentiary basis to find for Plaintiff. *Accord* Dkt. 293. Defendant's additional arguments — that it was entitled to the GBL's safe harbor provision (or, alternatively, that federal law preempts Plaintiff's claim) and that its labels should be shielded by the First Amendment and/or the New York Constitution — were not raised in Defendant's initial motion for JMOL. The only further inquiry is thus limited to reviewing the jury's verdict for plain error and reversing "only if such plain error would result in a manifest miscarriage of justice." *Go Daddy*, 581 F.3d at 961 (quoting *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002)). Again, the jury's verdict was not plainly erroneous; as noted above, it was well supported. The motion is denied.

IV. MOTION FOR NEW TRIAL

Under Federal Rule of Civil Procedure 59(a)(1), a court may grant a new trial "if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (citing

Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 510 n.15 (9th Cir. 2000)). Unlike on a motion for JMOL, the court reviewing a motion for new trial "can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). However, a new trial should not be ordered "simply because the court would have arrived at a different verdict." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). Rather, the motion should only be granted if the court is "left with the definite and firm conviction that a mistake has been committed." *Landes*, 833 F.3d at 1372 (citation and internal quotation marks omitted). "If a motion for new trial is based on an alleged evidentiary error, a new trial is warranted only if the party was 'substantially prejudiced' by an erroneous evidentiary ruling." *Feiman v. City of Santa Monica*, 2014 WL 12703729, at *1 (C.D. Cal. July 18, 2014) (quoting *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995)).

Premier presents numerous arguments for why it is entitled to a new trial. Like with its renewed motion for JMOL, nearly all of them have been raised before and can be dismissed outright: (1) Defendant was not entitled to invoke the GBL's safe harbor provision due to its failure timely to notify the FDA as required by the statute, *see* 21 U.S.C. § 343(r)(6), and thus it was not entitled to a jury instruction on this subject; (2) Premier's Seventh Amendment rights were not violated, *see* Dkt. 215, at 5; (3) the jury was not erroneously instructed as to the injury element of Plaintiff's claims, *see* Dkt. 265; and (4) evidence of Premier's marketing strategy was not erroneously or prejudicially admitted, *see* Dkt. 180. Further, as noted

above, the jury's verdict was not against the weight of the evidence; Defendant's argument regarding the Thompson/Cal Recycle tax letter is unpersuasive; and Plaintiff's counsel stayed within the reasonable bounds of argument and did not improperly inflame the jury. None of these arguments individually warrant a new trial, nor is Premier's argument, as a whole, greater than the sum of its parts. The motion is therefore denied.

V. ATTORNEY FEES, EXPENSES, AND SERVICE AWARD

A. Attorney Fees

Plaintiff seeks an attorney fee award of $6,806,031.96. This figure is based on two separate calculations that lead to roughly the same total. Plaintiff claims that, under the "percentage-of-the-fund" approach, it is entitled to a fee award that is equivalent to a certain percentage of the gross benefit inuring to the Class. This gross benefit, as Plaintiff calculates, is $20,438,534.42 — that is, the sum of the $12,895,454.90 judgment, the proposed fee award, and reimbursed expenses. Plaintiff's fee award request represents 33% of this total.

Alternatively, Plaintiff calculates a "lodestar" amount, stemming from the familiar rule of "begin[ning] with the multiplication of the number of hours reasonably expended by a reasonable hourly rate." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019). Supported by declarations from members of Plaintiff's litigation team, Plaintiff states this case has required 9,635.05 hours of work, yielding a total lodestar of $6,409,284.75 — comprised of $5,418,781.25 for Blood Hurst &

O'Reardon LLP, $393,293.50 for Lynch Carpenter LLP, and $598,210.00 for Iredale & Yoo, APC. *See* Dkt. 296-1 ("Blood Decl.") ¶ 69. Plaintiff then notes that the slight difference between the lodestar and the percentage-of-the-fund calculations reflects a lodestar multiplier of only 1.06; thus, Plaintiff argues, the full $6,806,031.96 award is appropriate.

Premier, on the other hand, contests Plaintiff's calculations on two main fronts. First, it claims the percentage-of-the-fund method is inappropriate where a fee-shifting statute is involved, and that the lodestar method should be used instead. Second, it argues Plaintiff's declarations are insufficient to assess the lodestar, as Plaintiff failed to include detailed, contemporaneous time records along with its motion. For these reasons, Premier suggests the percentage-of-the-fund method should be used, and that Plaintiff's counsel should receive only 25% of the judgment amount, rather than 33%; this lower figure represents the Ninth Circuit's "benchmark." *See, e.g.*, *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945 (9th Cir. 2011). This calculation results in a total fee award of $3,223,863.72, drawn from the judgment itself.

The parties' positions yield two drastically different values and two very different outcomes for the Class's recovery. Under Plaintiff's model, the Class would retain most or all of the $12.89 million judgment, and Premier would be obligated to pay an additional $6.8 million award of fees and expenses to Plaintiff's counsel directly. By contrast, Defendant's model would result in Plaintiff's counsel receiving roughly $3.5 million less and, since the award would be drawn from the judgment, the Class itself would bear this cost and receive roughly $9.69 million.

Appendix B

1. *Application of Fee-Shifting Provision*

The first question that must be resolved is whether the fee-shifting provision of GBL §§ 349 and 350 should apply. These sections provide that the Court "may award reasonable attorney's fees to a prevailing plaintiff." N.Y. Gen. Bus. Law §§ 349(h), 350-e(3) (emphasis added). The statutory language offers no guidance on when fees should be awarded; rather, courts have held that granting a fee award under these sections "is left to the discretion of the trial court in all circumstances." *Koch v. Greenberg*, 14 F. Supp. 3d 247, 280 (S.D.N.Y. 2014) (quoting *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 54 (2d Cir. 1992)). Among other factual situations, courts have approved of fee shifting in circumstances involving acts of fraud perpetrated against "consumers who are 'vulnerable' or 'disadvantaged," especially fraud conducted at a large scale. *Id.* For instance, in *Independent Living Aids, Inc. v. Maxi-Aids, Inc.*, 25 F. Supp. 2d 127 (E.D.N.Y. 1998), the Eastern District of New York concluded that fee shifting under §§ 349 and 350 was appropriate, considering the purpose of these statutes and the fact that "the customers at issue [were] among the most vulnerable in our society: the blind, the elderly, the physically disabled, and the infirm." 25 F. Supp. 2d at 132; *see also* Richard A. Givens, Practice Commentary, N.Y. Gen. Bus. Law § 349 (McKinney 1988).

Joint Juice, similarly, was marketed toward people suffering from joint pain. As the jury concluded, these claims were fraudulent. The Class itself is also quite large, and thus the impact of the fraud was broad. The

public policy underpinning §§ 349 and 350 therefore weigh strongly in support of allowing fee shifting here. Thus, Plaintiff's fees will be shifted under the GBL statutes.

2. *Calculating Attorney Fees*

As discussed above, Plaintiff and Defendant disagree about how attorney fees should be calculated. Like many questions in the long life of this case, the question of how properly to calculate attorney fees in this scenario appears to be without a clear answer. Both parties cite to many cases involving class action *settlements*, rather than litigated cases, while other cited cases only partially fit the facts presented here. However, the caselaw does suggest a path forward.

At the outset, Defendant's ultimate conclusion must be rejected. Notwithstanding the shortcomings of Plaintiff's lodestar submissions (discussed in greater detail below), it would be patently unreasonable to award Plaintiff's counsel less than half of their proffered lodestar amount. Even more saliently, Defendant's approach would result in attorney fees being drawn down from the Class's judgment; thus, no fee shifting would occur. *Cf. Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015) ("[T]his case was litigated under a fee-shifting statute, and we do not see a good reason why, in the absence of a contract, counsel should be entitled to money from the class on top of or in lieu of payment by the losing litigant."). This result is unwarranted given the conclusion above: Premier will be required to pay the fee award directly.

Plaintiff argues that either the percentage-of-the-fund or the lodestar method can be used here to calculate the fee. While the percentage method is preferred for its ease of application, "[u]nder a fee-shifting statute, the court 'must calculate awards for attorneys' fees using the lodestar method.'" *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003) (quoting *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2011)); *see Bluetooth*, 654 F.3d at 942 ("The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes . . . ."); *Sobel v. Hertz Corp.*, 53 F. Supp. 3d 1319 (D. Nev. 2014); *Pike v. Cnty. Of San Bernardino*, 2020 WL 1049912, at *4 (C.D. Cal. Jan. 27, 2020) ("[T]he percentage-of-the-fund method is disfavored in cases with fee-shifting statutes." (citing *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010)); 5 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 15:38 (6th ed. 2022) ("So strong is the Court's devotion to the lodestar method that it has held that the lodestar calculation 'yields a fee that is presumptively sufficient to achieve [fee-shifting's] objective.' What that means is that a court's failure to utilize the lodestar method in a fee-shifting case may constitute reversible error." (footnote omitted)). Thus, the lodestar will serve as the relevant guide.

Here, however, the declarations submitted by Plaintiff's counsel are "insufficient" to conduct a fulsome lodestar analysis, as they lack contemporaneous time records. *In re Optical Disk Drive Prods. Litig.*, 2021 WL 4124159, at *1 (N.D. Cal. Sept. 9, 2021). This does not suggest, as Defendant claims, that Plaintiff acted in bad faith or should not be entitled to provide such documentation;

indeed, Plaintiff fully complied with Civil Local Rule 54-5(b) and did not submit more detailed records. *See* Civ. L.R. 54-5(b)(2) (requiring only a "summary" of time spent by counsel). Indeed, these records would have been sufficient for use as a cross-check under a percentage calculation. *See Optical Disk Drive*, 2021 WL 4124159, at *2.

Yet "[w]ithout in any way questioning the good faith basis for [Plaintiff's counsel's] statement[s], there simply is no way to verify [them]." *Indep. Living Aids, Inc.*, 25 F. Supp. 2d at 133. To ensure the lodestar that Plaintiff proffers is accurate, especially in light of the concerns raised by Defendant as to potentially overlapping work with the related Joint Juice cases, Plaintiff will be directed to refile its motion with contemporaneous time records. The motion is therefore denied as to Plaintiff's request for attorney fees, without prejudice.

B. Expenses

In addition to attorney fees, Plaintiff seeks $1,133,794.77 in reimbursed expenses. This total is supported by a series of declarations, noting a variety of routine litigation expenses (for instance, printing and photocopying, expert fees, and travel). *See, e.g.*, Blood Decl. ¶¶ 66–68. Defendant, in turn, argues that Plaintiff did not provide sufficient documentation to support this request, and it raises the concern that Plaintiff has sought to recover expenses for the related Joint Juice actions. Thus, Defendant requests the Court award, at most, $197,852.36 in expenses.

Plaintiff's declarations, though a useful starting point, ultimately "lack[] sufficient detail to establish the reasonableness of the costs." *Banas v. Volcano Corp.*,

47 F. Supp. 3d 957, 977–80 (N.D. Cal. 2014). Given that Plaintiff will be afforded the opportunity to submit a more detailed request for attorney fees, she will likewise be given the opportunity to refile the motion with more detailed expense documentation. The motion is therefore denied with respect to expenses, without prejudice.

C. Service Award

Finally, Plaintiff requests a $25,000 service award for Ms. Montera. Defendant does not contest the award, and the award is both comparable to similar awards in this District and reasonable considering Ms. Montera's experience participating in this case. The motion is therefore granted with respect to the service award, with the award to be paid from the judgment.

VI. CONCLUSION

Defendant's renewed motion for JMOL and its motion for new trial are denied. Plaintiff's motion is granted only with respect to the request for a service award for Ms. Montera. It is denied in all other respects, without prejudice.

IT IS SO ORDERED.

Dated: October 18, 2022

/s/ Richard Seeborg
RICHARD SEEBORG
Chief United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 12, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-06980-RS

MARY BETH MONTERA,

Plaintiff,

v.

PREMIER NUTRITION CORPORATION,

Defendant.

Filed August 12, 2022

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW, DENYING DEFENDANT'S MOTION TO DECERTIFY, AND GRANTING PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT

I. INTRODUCTION

Plaintiff Mary Beth Montera brought this lawsuit on behalf of New York consumers who had purchased Joint Juice, a beverage containing glucosamine and chondroitin that is sold by Defendant Premier Nutrition Corporation

("Premier Nutrition"). The case proceeded to trial, where upon the jury found Defendant liable for violations of New York General Business Law ("GBL") sections 349 and 350. Following the close of Plaintiff's case, Defendant moved for judgment as a matter of law, which the Court took under submission pending the jury's verdict. After the close of all evidence, the jury determined that Plaintiff and the Class suffered actual damages in the amount of $1,488,078.49, representing full refunds of the money they paid for Joint Juice. Plaintiff now brings a motion for entry of judgment, asking the Court to impose statutory damages in the amount of $50 per unit sold for violations of GBL § 349 and $500 per unit sold for violations of GBL § 350, as well as prejudgment interest. Premier Nutrition argues that if statutory damages are available, the Court should only award statutory damages in the amount of $50 per person. Premier Nutrition also argues that under New York law, prejudgment interest does not apply to statutory damages.

A reduction of statutory damages is permitted under Supreme Court and Ninth Circuit law, and is warranted in this case because the calculated amount of statutory damages, $91,436,950, is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S. Ct. 71, 64 L. Ed. 139 (1919). The New York legislature has specifically raised concerns about the aggregation of statutory damages in a class context, and disallows such recovery in New York state courts. The statutory damages in this case veer away from serving a compensatory purpose and towards a

punitive purpose. A reduction of statutory damages to $8,312,450 is therefore appropriate. Contrary to Defendant's arguments, however, prejudgment interest applies to statutory damages, and is applied as class members' claims accrued, for a total of $4,583,004.90 in prejudgment interest.

Next, Defendant's motion to decertify the class action is denied. Other than Defendant's argument concerning superiority, the arguments raised in the motion are repetitive of arguments Defendant made—and the Court rejected—less than four months ago in Defendant's prior motion to decertify. As for the superiority argument, despite the possibility of recoveries in the thousands of dollars for class members, the class action remains a superior device for resolving claims in this case. Further, Defendant's concerns are mitigated by the reduction of statutory damages described above. Finally, Defendant's motion for judgment as a matter of law is denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case is one of numerous certified class actions pending before this Court alleging false advertising and other claims arising from Premier Nutrition's promotion of Joint Juice, a line of joint health dietary supplements. Each class action concerns a set of plaintiffs in a different state; this action focuses on consumers in New York. In November 2021, the Court set this case for trial on May 23, 2022, the first of these related cases to proceed to trial.

A reccurring issue in pretrial litigation was the availability of statutory damages for a violation of GBL

§§ 349 and 350, and how statutory damages would be imposed if the jury found for Plaintiff and the class. The first arose in the context of a *Daubert* motion concerning the expert testimony of Colin Weir, Plaintiff's damages expert. Defendant moved to exclude Weir's testimony, arguing that his calculations of statutory damages were irrelevant. Defendant argued that the calculations were irrelevant because Weir's calculations were done on a per unit basis, and Defendant argued that New York law only permitted statutory damages on a per person basis. While recognizing the diverging views of courts across the country on this question, the Court concluded that statutory damages were available on a per unit basis, reasoning as follows:

> A violation of sections 349 and 350 occurs when a consumer views the label and purchases the product. This means a plaintiff may experience multiple violations of the statutes. Indeed, Premier marketed its product to encourage consumers to drink the product regularly and to make multiple purchases. Consumers were repeatedly exposed to the label, and repeatedly made the choice to buy the product. A reading of sections 349 and 350 that recognizes a plaintiff experiences a violation each time the product is purchased is consistent with the text and intent of the statute. Thus, GBL §§ 349(h) and 350-e allow statutory damages on a per unit basis.

Order on Motions to Exclude Expert Testimony and Motion to Decertify Class, Dkt. No. 180, p.14.

Much of Defendant's argument at the *Daubert* stage for why statutory damages should only be allowed on a per person basis concerned the constitutionality of a high award of statutory damages. This argument, however, was predicated on the expected divergence between the amount of actual damages and the statutory damages prescribed under New York law. The arguments, thus, concerned the constitutionality of an award of per unit statutory damages in this case, rather than arguing that an award of statutory damages on a per unit basis would be unconstitutional in every instance.[1] As the Ninth Circuit has noted, it is "not appropriate to evaluate the excessiveness of the award" during pretrial litigation before the award of damages is actually imposed, as doing so "is unduly speculative." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 723 (9th Cir. 2010). The parties were instructed that Premier Nutrition's arguments concerning constitutionality of statutory damages in this case would be considered if and when a verdict was delivered for Plaintiff. *See* Order on Motions in Limine, Dkt. No. 215, p.5 n.1.

Next, the parties disputed whether Plaintiff had to present evidence of actual damages, since Plaintiff argued

1. Indeed, it is easy to imagine products for which the statutory damages to be awarded on a per unit violation would be much closer to the actual unit price, such as some smartphones or car tires. Defendant's arguments would not have applied in such a case, and thus determining that statutory damages are not available on a per unit basis for violations of GBL §§ 349 and 350 would have ignored that constitutional concerns are not necessarily present each time statutory damages are awarded under GBL §§ 349 and 350.

statutory damages would be imposed automatically if liability were found. The relevant statutes allow a plaintiff to recover the greater of actual damages or statutory damages. *See* N.Y. Gen. Bus. Law § 349(h) ("[A]ny person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater[.]"; *id.* at § 350-e(3) (explaining that a person may bring "an action to recover his or her actual damages or five hundred dollars, whichever is greater"). The statutes require a determination of whether actual damages or statutory damages is higher, and thus Plaintiff was instructed "to prove actual damages at trial." Order on Motions in Limine, Dkt. No. 215, p.4. A determination of actual damages was also necessary to evaluate fully Defendant's constitutional arguments about an award of statutory damages.

The parties further disagreed as to whether the imposition of statutory damages was a question that needed to be put to the jury. As GBL §§ 349 and 350 impose a specific amount of statutory damages, rather than allowing the jury to choose an amount of statutory damages within a range, the imposition of statutory damages is a question of law for the court, rather than a factual question that needed to be put to the jury. The jury was therefore instructed to determine the actual damages if they found Defendant liable. The jury was also asked to determine the number of units sold in New York during the Class Period such that statutory damages could be calculated.

After a nine-day trial, the jury reached a verdict two and half hours after the case was submitted to them for deliberation. The jury determined both that Premier Nutrition engaged in deceptive acts and practices in violation of GBL § 349 and engaged in deceptive or misleading advertising in violation of GBL § 350. The jury further determined that Premier Nutrition had sold 166,249 units of Joint Juice in New York during the Class Period and that Plaintiff and the Class should be awarded $1,488,078.49 in actual damages.

III. MOTION FOR JUDGMENT AS A MATTER OF LAW

"If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue," the Court may "grant a motion for judgment as a matter of law against the party on a claim or defense[.]" Fed. R. Civ. Pro. 50(a). Defendants moves for judgment as a matter of law as to both the section 349 and section 350 claims. The jury's verdict, however, is supported by ample evidence as to each element of both of the claims. A reasonable jury would therefore have a legally sufficient evidentiary basis to find for the Plaintiff, and the motion is therefore denied.

IV. MOTION FOR ENTRY OF JUDGMENT

A. Statutory Damages

As courts across the country have noted, the imposition of statutory damages aggregated across the

members of a class action may, in some circumstances, have Due Process Clause implications. *See, e.g., Parker v. Time Warner Ent. Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting that in a class action in which statutory damages are awarded as a matter of strict liability, "the due process clause might be invoked, not to prevent certification, but to nullify [a distortedly high award of statutory damages] and reduce the aggregate damage award" in a "sufficiently serious case"); *Moeller v. Taco Bell Corp.*, No. C 02-5849 MJJ, 2004 U.S. Dist. LEXIS 32183, 2004 WL 5669683, at *3 (N.D. Cal. Dec. 7, 2004) (recognizing that "statutory damages may, in [a] severe case, raise due process concerns"). Plaintiff requests the imposition of $8,312,450.00 in statutory damages under GBL § 349(h) and $83,124,500 in statutory damages under GBL § 350-e, for a total of $91,436,950. Defendant argues that if the Court imposes statutory damages, a much lower award is appropriate.

The question of whether statutory damages may raise constitutional concerns is not a new one. Over one hundred years ago, the Supreme Court considered the question of whether statutory damages prescribed by an Arkansas law violated the Due Process Clause of the Fourteenth Amendment. *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919). The statute, which "regulat[ed] rates for the transportation of passengers between points within the state" on railroads, stated that the penalty for each offense was "a penalty of not less than fifty dollars nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee[.]" *Id.* at 63-64 (internal quotation marks omitted). The

Supreme Court noted that the Arkansas Supreme Court had concluded that "the penalties prescribed [were] no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached." *Id.* at 67 (quoting *Chicago, Rock Island & Pacific Ry. Co. v. Davis*, 114 Ark. 519, 525, 170 S.W. 245 (1914)). The Supreme Court held that when "considered[ing] [] due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *Id.*

The Ninth Circuit has cited to *Williams* when commenting on this issue in more modern times. In *United States v. Citrin*, the Ninth Circuit explained that "[a] statutorily prescribed penalty violates due process rights 'only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'"[2] *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (quoting *Williams*, 251 U.S. at 66-67). As explained below, how to apply *Williams* is a question for which there is little guidance. There is no question, however, the Supreme Court has instructed that a district court may evaluate whether the statutory damages in a case are "wholly disproportioned to the offense and obviously unreasonable[,]" and thus that

2. *Citrin*, however, is not an apt point of comparison to the present case, as it involved "statutorily prescribed damages resulting from [the defendant]'s breach of a scholarship agreement with the United States." 972 F.2d at 1046.

inquiry is the crux for whether a reduction of statutory damages is appropriate.

A discussion of the imposition of statutory damages in this case must start with a discussion about the availability of statutory damages in a class action under New York law. New York's Civil Practice Law and Rules states that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." N.Y. C.P.L.R. § 901(b). In other words, a plaintiff may not bring a class action seeking statutory damages in New York state court. This provision is within the rule describing the prerequisites for maintaining a class action in New York.

In *Shady Grove Orthopedic Associates v. Allstate Insurance*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010), the Supreme Court addressed the question of whether a plaintiff could maintain a class action for violations of New York law in federal court under Federal Rule of Civil Procedure 23, if that plaintiff seeks statutory damages. The Supreme Court held that such a class action could proceed in federal court, because the prerequisites for class certification in federal court are governed by Rule 23, not those for maintaining a class action in New York state court. 559 U.S. at 410.

The dissent in *Shady Grove* detailed the enactment of § 901(b). Justice Ginsburg explained that "[a]iming to

avoid 'annihilating punishment of the defendant,' the New York Legislature amended the proposed statute to bar the recovery of statutory damages in class actions." *Id.* at 444 (Ginsburg, J., dissenting) (quoting V. Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 104 (2006)). Justice Ginsburg further noted that "[i]n his signing statement, Governor Hugh Carey stated that the new statute 'empowers the court to prevent abuse of the class action device and provides *a controlled remedy*.'" *Id.* (Ginsburg, J., dissenting) (quoting Memorandum on Approving L. 1975, Ch. 207, reprinted in 1975 N.Y. Laws, at 1748).

Justice Ginsburg reasoned that "suits seeking statutory damages are arguably best suited to the class device because individual proof of actual damages is unnecessary." *Id.* at 445 (Ginsburg, J., dissenting). One would presume that the pursuit of statutory damages, then, would be encouraged in the class action context. Based on the statutory history and the backdrop of the requirements for class certification, Justice Ginsburg explained "New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind." *Id.* (Ginsburg, J., dissenting). This backdrop illuminates that even if the pursuit of statutory damages on an individual basis was created to incentivize lawsuits and provide a minimum

amount of recovery for someone who has been harmed, the New York legislature views the aggregation of those penalties across a class as a punitive measure.

The legislature's explicit concern about the punitive nature of aggregated statutory damages differentiates this case from others involving high awards of statutory damages. Many of the cases cited by the parties involve violations of the federal Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. sections 227, *et seq*, which provides for a $500 penalty for each violation of the statute. If a defendant makes thousands or even millions of calls in violation of the statute, the statutory damages reach atmospheric levels. As another district court in this circuit has noted when declining to reduce statutory damages in a TCPA case, "Congress expected class actions to be available when it enacted the statutory damages provision of the TCPA." *Wakefield v. ViSalus, Inc.*, No. 3:15-CV-1857-SI, 2020 U.S. Dist. LEXIS 146959, 2020 WL 4728878, at *5 (D. Or. Aug. 14, 2020) (explaining that "Congress enacted the TCPA in 1991, well after the Supreme Court created the presumption that class actions are available absent express congressional intent to the contrary"). In contrast, the New York legislature here has expressed a clear preference that statutory damages not be made available in class actions for violations of New York law.

Little to no guidance exists within the realm of reducing statutory damages. This lack of guidance was a concern for the district court in *Perez v. Rash Curtis & Assocs.*, No. 4:16-CV-03396-YGR, 2020 U.S. Dist. LEXIS 68161, 2020 WL 1904533 (N.D. Cal. Apr. 17, 2020). In

Perez, another judge in this district explained that none of the cases cited by the defendant, who advocated for the reduction of a statutory damage award in a TCPA case, "contain[ed] any methodology for how a district court is to reduce an alleged unconstitutionally excessive [statutory] damages amount." 2020 U.S. Dist. LEXIS 68161, [WL] at *9 (discussing *Golan v. Veritas Ent., LLC*, No. 4:14CV00069 ERW, 2017 U.S. Dist. LEXIS 144501, 2017 WL 3923162 (E.D. Mo. Sept. 7, 2017), *aff'd sub nom. Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019), *Maryland v. Universal Elections, Inc.*, 862 F. Supp. 2d 457 (D. Md. 2012), *aff'd*, 729 F.3d 370 (4th Cir. 2013), and *United States v. Dish Network LLC*, 256 F. Supp. 3d 810 (C.D. Ill. 2017), *aff'd in part, vacated in part, remanded sub nom. United States v. Dish Network L.L.C.*, 954 F.3d 970 (7th Cir. 2020)). Instead, in all the cited cases, the court in question "arbitrarily reduced the damages amount to a lower number without any well-reasoned analysis." *Id.* The court in *Perez* declined to lower the amount of statutory damages, and the parties settled the matter before the Ninth Circuit reviewed the case on appeal. *See Perez v. Rash Curtis & Assocs.*, No. 20-15946, 2021 U.S. App. LEXIS 30204, 2021 WL 4553023 (9th Cir. Aug. 23, 2021) (order remanding to district court to consider proposed settlement).

Appellate review of the district court decisions cited in *Perez* has not elucidated much further guidance. Indeed, in *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019), the Eighth Circuit affirmed the district court's reduction of a $1.6 billion TCPA verdict. The Eighth Circuit held that given the facts in the case, in which the defendant

"plausibly believed it was not violating the TCPA[,]" the verdict of "$1.6 billion is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" 930 F.3d at 962-63 (quoting *Williams*, 251 U.S. at 67). The Eighth Circuit, however, did not provide any framework for assessing why the reduction to $32,424,930 in damages, a total of $10 per call rather than the TCPA's standard of $500 per call was warranted. *See id.*

In another recent TCPA case, the Seventh Circuit directed the district court "to start from harm rather than wealth, then add an appropriate multiplier, after the fashion of the antitrust laws (treble damages) or admiralty (double damages), to reflect the fact that many violations are not caught and penalized." *United States v. Dish Network L.L.C.*, 954 F.3d 970, 980 (7th Cir. 2020). In doing so, the court analogized to cases involving the reduction of punitive damages.

Given that the New York legislature expressly viewed the present situation as creating immense punitive consequences, rather than simply seeking to incentivize individual lawsuits or create deterrence, the analysis used for assessing the constitutionality of an award of punitive damages is a helpful point of comparison. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). The Supreme Court has set out three guideposts for assessing whether an award

of punitive damages is unconstitutionally large: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418. Here, Plaintiff's request to impose $91,436,950 in statutory damages—a multiplier of over 61 times greater the actual damages of $1,488,078.49—is grossly excessive.

Considering first reprehensibility, the "most important indicium of the reasonableness of a punitive damages award[,]" *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), there is significant evidence of reprehensibility. Reprehensibility is judged by "considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm*, 538 U.S. at 419. The conduct at issue here certainly involved repeated actions, namely the choice to continue marketing its product as containing joint health benefits. Despite the arrival of numerous studies pointing to a lack of benefits from glucosamine and chondroitin in the dosage at issue, Premier Nutrition continued to market its product not just to people seeking joint health benefits, but more specifically to people seeking joint pain and arthritis relief. Defendant also encouraged customers

to make repeat purchases, recommending that they drink a bottle a day, and with packaging that recommended purchasing on a weekly or monthly basis, depending on the size of the pack. As for the intentionality of the act, Plaintiff put on evidence that Defendant was aware of the changing tide in the science yet continued without hesitation.

The harm, however, was purely economic and not physical. There is no allegation that Joint Juice caused physical harm to any consumer; instead, the only harm is wasted money. Further, there is no evidence that "the target of the conduct had financial vulnerability," *State Farm*, 538 U.S. at 419. There is, however, the intangible harm of lost hope. Lead Plaintiff Mary Beth Montera testified to her disappointment in still having to undergo knee surgery, despite her daily consumption of Joint Juice. While Joint Juice never came close to advertising that use of its product could take the place of a major surgery, it did advertise that daily use would lead to healthy joints. Montera's hope was therefore not farfetched based on the vision Joint Juice wanted its customers to conjure up. Premier Nutrition may not have targeted people with financial vulnerability, but it did target people in pain who were desperate for relief. Thus, the reprehensibility factors point in both directions.

Second, the ratio of the statutory damages is immense as compared to the actual damages. The Supreme Court has held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425.

Here, the ratio of the statutory damages is over sixty times greater than the actual damages. Even though evaluation of this case is not bound by the same considerations as a case involving punitive damages, the ratio is nonetheless immense.

The third consideration, "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases[,]'" *id.* at 428 (quoting *Gore*, 517 U.S. at 575), is not quite applicable here. In this case, the statutory damage calculation stems from civil penalties authorized. A relevant point of comparison, however, is the consideration that statutory damages would not be available if this action had been litigated in New York state court. *See* N.Y. C.P.L.R. § 901(b). That the same conduct, litigated using the same cause of action, could result in a $91,436,950 or $1,488,078.49 award merely depending on the selection of a federal forum rings of arbitrariness.

The factors relevant for the consideration of whether an award of punitive damages is unconstitutionally excessive do not map perfectly onto the consideration of whether the award of statutory damages here is excessive. They are, however, a useful guide, and the award of $91,436,950 in this case is "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable[,] *Williams*, 251 U.S. at 66-67, and thus violative of the Due Process Clause. Given the mixed evidence on reprehensibility, a more appropriate award of statutory damages is $8,312,450, which would be the amount of statutory damages owed under GBL § 349(h),

$50 per unit sold. This award of statutory damages is approximately 5.59 times greater than the amount of actual damages.[3]

B. Prejudgment Interest

The parties also dispute whether prejudgment interest is available for statutory damages, and if so, when the interest should begin to accrue. Plaintiff proposes a calculation from their damages expert, Colin Weir, using sales data. Weir calculated prejudgment interest from the purchase date (where available), and from the end of a reporting period if a retailer did not report sales on a daily basis.[4]

Under New York law, "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property." N.Y. C.P.L.R. § 5001(a). Interest is fixed at 9%. *Id.* at § 5004(a). "Interest shall be computed

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3. As the award of damages here is equivalent to the statutory damages allowed under one of the relevant New York statutes, Defendant's arguments about double recovery under both GBL §§ 349 and 350 need not be addressed. Further, the Court notes that based on the evidence presented at trial, the award of $50 in statutory damages per unit will be higher than the actual damages available to any plaintiff, as even though the price of a unit of Joint Juice varied, the price was well below $50.

4. For example, if a retailer reported sales on a monthly basis, all purchases would be treated as if they were made on the last day of the month, leading to a more conservative estimate.

from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." *Id.* at § 5001(b).

"The purpose of pre-judgment interest is to compensate a plaintiff for loss of the use of funds ultimately awarded." *Mfrs. Hanover Tr. Co. v. Drysdale Sec. Corp.*, 801 F.2d 13, 28 (2d Cir. 1986). "Courts applying § 5001(a) have without qualification awarded interest as a matter of right whenever any tortious conduct causes pecuniary damage to tangible or intangible property interests." *Mallis v. Bankers Tr. Co.*, 717 F.2d 683, 695 (2d Cir. 1983). Courts have held that fraud and misrepresentation are types of offenses that should be awarded prejudgment interest under § 5001. *Barkley v. United Homes, LLC*, 848 F. Supp. 2d 248, 269 (E.D.N.Y. 2012); *Mallis*, 717 F.2d at 694-95. Moreover, courts have applied prejudgment interest under § 5001 to damages beyond actual or compensatory damages. *See, e.g., Prop. Owners Ass'n of Harbor Acres, Inc. v. Ying*, 137 A.D.2d 509, 524 N.Y.S.2d 252, 255 (1988) (stating that plaintiff was entitled under § 5001(a) to interest on total sum of award, including treble damages); *H & P Rsch., Inc. v. Liza Realty Corp.*, 943 F. Supp. 328, 331-32 (S.D.N.Y. 1996) ("Plaintiff is, however, entitled to recover prejudgment interest on the treble damages[.]").

Defendant points to a long list of cases in which courts have declined to impose prejudgment interest for

statutory damages. Most of these cases, however, involve federal causes of action. "Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts." *Lodges 743 and 1746, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975). For the cases that involved statutory damages under state law, no explanation was provided for why prejudgment interest was not allowed for statutory damages. *See Cazares v. 2898 Bagel & Bakery Corp.*, No. 18CV5953 (AJN) (DF), 2022 U.S. Dist. LEXIS 65113, 2022 WL 1410677, at *18 (S.D.N.Y. Apr. 7, 2022), *report and recommendation adopted*, No. 18CV5953AJNVF, 2022 U.S. Dist. LEXIS 81202, 2022 WL 1406203 (S.D.N.Y. May 4, 2022) ("Cazares is entitled to prejudgment interest on her damages for unpaid minimum wages, unpaid overtime, and unpaid spread-of-hours pay (but not on her statutory damages for wage-statement and wage-notice violations)."). These citations, therefore, provide little support for the proposition that prejudgment interest is never allowed under § 5001 for statutory damages.

Considering the limited authority on this issue, the imposition of prejudgment interest for the adjusted award of statutory damages in this case is appropriate. The next question is when the interest starts to accrue. Section 5001(b) requires that "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed" and that "[w]here such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred[.]" Defendant argues that interest does not accrue until the end of the class period,

citing a long list of federal securities cases. The end of a class period in a securities case, however, is when the "inflation of the stock price return[s] to zero," *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 2013 U.S. Dist. LEXIS 170394, at *23 (N.D. Ill. Oct. 4, 2013), and thus when the claim accrued. Here, most claims in the class accrued earlier than the last day of the class period, because the claims accrued at the time of purchase. Weir's methodology is appropriate in this situation, and notably Defendant does not challenge the reliability of his calculation other than his choice of when to begin the calculation of prejudgment interest. Further, other courts have approved similar calculations of prejudgment interest under § 5001. *See Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 91 (2d Cir. 1998) (affirming district court's award of prejudgment interest based on a calculation of "unpaid wages as they accrued on a monthly basis"). Prejudgment interest is therefore awarded in the amount of $4,583,004.90.[5]

V. MOTION TO DECERTIFY THE CLASS

A. Legal Standard

Under Federal Rule of Civil Procedure 23(c)(1)(C), "[a] district court may decertify a class at any time."

5. Plaintiff's submission on prejudment interest from her expert, Colin Weir, indicated that prejudgment interest for $50 in statutory damages per transaction would be $4,416,983.25 as of the date of trial, and would accrue at the rate of $2,049.65 per day. The $4,583,004.90 total includes the accrual of interest until and including the date of entry of judgment.

Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 966 (9th Cir. 2009). The standard used to review a motion to decertify is the same standard used when reviewing a motion for class certification. *Ries v. Arizona Bev. USA LLC*, No. 10-01139, 2013 U.S. Dist. LEXIS 46013, 2013 WL 1287416, at *3 (N.D. Cal. March 28, 2013); *see also Marlo v. UPS, Inc.*, 639 F.3d 942, 947 (9th Cir. 2011). Still, a motion for decertification will generally only succeed where there has been some change in the law or facts that justifies reversing the initial certification decision. *In re Myford Touch Consumer Litig.*, No. 13-cv-03072, 2018 U.S. Dist. LEXIS 129261, 2018 WL 3646895, at *1 (N.D. Cal. Aug. 1, 2018).

A plaintiff seeking class certification must satisfy all four requirements set forth in Rule 23(a) and must also satisfy the requirements of Rule 23(b)(1), 23(b)(2), or 23(b)(3). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Among other requirements in Rule 23(a), a plaintiff must show that "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(b). A plaintiff seeking to satisfy Rule 23(b)(3) must specifically establish (1) common questions predominate over questions affecting only individual class members, and (2) a class action is superior to other methods of adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

B. Discussion

As described in the April 26, 2022 order denying Defendant's earlier motion for class decertification, issues

of causation and damages are appropriate for resolution on a class-wide basis. Contrary to Defendant's arguments, evidence sufficient to establish causation and damages was presented at trial. These arguments are therefore denied for the same reason the Court denied them less than four months ago.

The only new argument presented in this motion to decertify is the superiority argument. Defendant argues that a class action is not a superior method for resolving this dispute because of the amount of statutory damages available when using a per transaction calculation. Even a recovery in the tens of thousands of dollars would not necessarily be sufficient to pursue an individual claim in this litigation, as such a recovery still "pales in comparison with the cost of pursuing litigation." *Nevarez v. Forty Niners Football Co.*, LLC, 326 F.R.D. 562, 589 (N.D. Cal. 2018). For Plaintiff to prove her case in this trial, she had to present significant amounts of scientific evidence and retain numerous experts. It is unclear how an individual plaintiff would be incentivized to undertake those costs, even if the possible recovery was in the tens of thousands of dollars. Further, Defendant's concerns are lessened given that statutory damages will only be awarded in the amount of $50 per transaction. In short, a class action remains a superior method of adjudicating this controversy, and the motion to decertify the class is denied.

VI. CONCLUSION

For all the foregoing reasons, Plaintiff and the class are entitled to $8,312,450 in statutory damages and

$4,583,004.90 in prejudgment interest. Defendant's motion for judgment as a matter of law is denied. Defendant's motion to decertify the class is denied.

IT IS SO ORDERED.

Dated: August 12, 2022

/s/ Richard Seeborg
RICHARD SEEBORG
Chief United States District Judge

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, FILED APRIL 26, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-06980-RS

MARY BETH MONTERA,

Plaintiff,

v.

PREMIER NUTRITION CORPORATION,

Defendant.

Filed April 26, 2022

ORDER ON MOTIONS TO EXCLUDE EXPERT TESTIMONY AND MOTION TO DECERTIFY CLASS

I. INTRODUCTION

In this false advertising class action averring violations of New York's General Business Law ("GBL") §§ 349 and 350, Lead Plaintiff Mary Beth Montera and Defendant Premier Nutrition Corporation ("Premier") each bring motions to exclude the testimony of various expert witnesses. For all the foregoing reasons, Defendant's

motion to exclude certain opinions of Dr. Farshid Guilak is granted, and Defendant's motion to exclude some of the opinions of Dr. Derek Rucker is granted in part and denied in part. Defendant's other motions to exclude testimony are denied. Plaintiff's motions to exclude the expert testimony of Dr. Kevin Stone and Lance Palumbo are granted. The motions to exclude the testimony of Dr. Stuart Silverman and Dr. Daniel Grande are granted in part and denied in part. The motions to exclude testimony of Dr. Joel Steckel, Dr. William Choi, and Hal Poret are denied.[1]

Defendant also brings a motion to decertify the class, arguing Plaintiff does not have common proof to establish Article III standing, causation under the relevant New York laws, or damages, and thus the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) is not satisfied. Plaintiff has, however, adduced common proof one these topics and individual questions will not predominate over common issues. The motion to decertify the class is therefore denied.[2]

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1. Plaintiff also brought two administrative motions to file materials under seal pursuant to Civil Local Rule 79-5(e). *See* Dkt. Nos. 118, 146. Plaintiff explains that the sealed material contains information Defendant had designated as confidential. Defendant does not oppose denying the administrative motions to file under seal, *see* Dkt. Nos. 131, 148, and therefore the motions are denied. Plaintiff is directed to file unredacted versions of all the redacted materials on the public docket within five days of this order.

2. As the Court noted during the hearing on the motions to exclude testimony of expert witnesses, this matter is suitable for determination without oral argument pursuant to Civil Local Rule 7-1(b) and the hearing scheduled for May 5, 2022 is vacated.

Appendix D

II. PROCEDURAL BACKGROUND[3]

This case is one of numerous certified class actions pending before this Court alleging false advertising and other claims in Defendant Premier Nutrition's promotion of Joint Juice, a line of joint health dietary supplements. Each class action concerns a set of plaintiffs in a different state; this action concerns consumers in New York. In November 2021, the Court set this case for trial on May 23, 2022, the first of these related cases to proceed to trial. Defendant brings four motions to exclude expert testimony; Plaintiff brings seven motions. Defendant also brings a motion to decertify the class, relying on the expert reports it proffers and noting perceived absences in the evidence proffered by Plaintiff.

III. LEGAL BACKGROUND AND STANDARDS

A. New York's General Business Law §§ 349 and 350

New York General Business Law § 349(a) declares unlawful any "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state[.]" GBL § 350 makes unlawful "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state[.]" "The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 n.1, 774 N.E.2d 1190,

3. The Court provides only a brief background, as other orders in this case and the related cases detail the factual and procedural background of these class actions.

746 N.Y.S.2d 858 (N.Y. 2002). "To successfully assert a claim under General Business Law § 349 (h) or § 350, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice[.]" *Koch v. Acker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941, 967 N.E.2d 675, 944 N.Y.S.2d 452 (2012) (internal quotation marks and citation omitted). Although "[i]ntent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim[,]" to recover compensatory damages the plaintiff must show "that a material deceptive act or practice caused actual, although not necessarily pecuniary, harm[.]" *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55-56, 720 N.E.2d 892, 698 N.Y.S.2d 615 (1999) (internal quotation marks, citation, and emphasis omitted).

B. Legal Standard for Motions to Exclude Expert Witnesses

To testify at trial as an expert, Rule 702 of the Federal Rules of Evidence requires that the witness be qualified by "knowledge, skill, experience, training, or education." Fed R. Evid. 702. Even if a witness is qualified as an expert in a particular field, any scientific, technical, or specialized testimony is admissible only if it (a) "will help the trier of fact to understand the evidence or to determine a fact in issue," (b) "is based upon sufficient facts or data," (c) "is the product of reliable principles and methods," and (d) "the expert has reliably applied the principles and methods to the facts of the case." *Id.*

Rule 702 does not permit irrelevant or unreliable testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Expert opinions are relevant if the knowledge underlying them has a "valid connection to the pertinent inquiry." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006) (internal quotation marks and alteration omitted). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 590. Expert opinion testimony is reliable if such knowledge has a "basis in the knowledge and experience of [the relevant] discipline." *Id.* at 592. Courts should consider the following factors when evaluating whether an expert's proposed testimony is reliable: (1) "whether a theory or technique . . . can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication[,]" (3) the known or potential error rate of the particular scientific theory or technique, and (4) the degree to which the scientific technique or theory is accepted in a relevant scientific community. *Id.* at 593-94. This list is not exhaustive, however, and the standard is flexible. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The *Daubert* inquiry "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Id.* at 141.

The task is not to "decid[e] whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury." *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969-70 (9th Cir. 2013). Courts may not exclude testimony because it is impeachable. *Id.* at 969. "Vigorous cross-examination,

presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. The focus of the inquiry is thus on the principles and methodology employed, not the conclusions reached by the expert. *See id.* at 595. Ultimately, the purpose of the assessment is to exclude speculative or unreliable testimony to ensure accurate, unbiased decision-making by the trier of fact. "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Kumho*, 526 U.S. at 157 (internal quotation marks and citation omitted).

C. Legal Standard for Motion to Decertify Class

Under Federal Rule of Civil Procedure 23(c)(1)(C), "[a] district court may decertify a class at any time." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). The standard used to review a motion to decertify is the same standard used when reviewing a motion for class certification. *Ries v. Ariz. Bevs. USA LLC*, No. 10-01139, 2013 U.S. Dist. LEXIS 46013, 2013 WL 1287416, at *3 (N.D. Cal. March 28, 2013); *see also Marlo v. UPS, Inc.*, 639 F.3d 942, 947 (9th Cir. 2011). Still, a motion for decertification will generally only succeed where there has been some change in the law or facts that justifies reversing the initial certification decision. *In re Myford Touch Consumer Litig.*, No. 13-cv-03072, 2018 U.S. Dist. LEXIS 129261, 2018 WL 3646895, at *1 (N.D. Cal. Aug. 1, 2018).

A plaintiff seeking class certification must satisfy all four requirements set forth in Rule 23(a) and must also satisfy the requirements of Rule 23(b)(1), 23(b)(2), or 23(b)(3). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). A plaintiff seeking to satisfy Rule 23(b)(3) must specifically establish (1) common questions predominate over questions affecting only individual class members, and (2) class action is superior to other methods of adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

IV. PREMIER'S MOTIONS TO EXCLUDE EXPERT WITNESS TESTIMONY

A. Farshid Guilak, Ph.D.

Plaintiff offers the opinions of Farshad Guilak, Ph.D., an osteoarthritis researcher. Premier moves to exclude Dr. Guilak's opinions concerning studies he performed on pig cartilage, in which he refined off-the-shelf pills from other glucosamine and chondroitin supplements into a liquid form, and injected the ingredients into the pig cartilage to study the supplements' effects.[4] Premier argues that these opinions should be excluded because (1) his methods were developed solely for litigation and have never been peer-reviewed or published; (2) he did not apply his methodology reliably to this case, because he used pills from other glucosamine supplement brands which did not contain the same formulation of ingredients as Joint Juice; and (3) his opinions are irrelevant because

4. Plaintiff notes that Premier has not challenged Dr. Guilak's opinions about the physiology of joints or the opinions in his Rebuttal Report, and thus these opinions are not excluded.

he did not test the formulation of ingredients present in Joint Juice.

Defendants first argue that Dr. Guilak's opinions should be excluded because his methods were developed solely for litigation, have not been published or subject to peer review, and are not generally accepted in the scientific community. As a threshold matter, that Dr. Guilak developed this specific methodology for litigation cannot alone make it unreliable. *Cover v. Windsor Surry Co.*, No. 14-cv-05262-WHO, 2017 U.S. Dist. LEXIS 231091, at *60 (N.D. Cal. July 24, 2017) ("An opinion that relies on established and accepted scientific methods is not made unreliable simply because it was prepared for the purposes of litigation — all expert reports are prepared for litigation."). Dr. Guilak's report provides support for Plaintiff's assertion that his in vitro culture experiments are a well-accepted scientific method. Plaintiff does not have support, however, for Dr. Guilak's process of taking off-the-shelf pills and turning them into liquid formulations. Dr. Guilak describes that he is following a process, and his process involves much more than simply grinding up pills, contrary to what Defendant suggests. But Plaintiff fails to identify any specific study in which Dr. Guilak's method or a similar procedure has been used to dissolve off-the-shelf pills.

When an expert's "testimony is not based on 'pre-litigation' research or if the expert's research has not been subjected to peer review, then the expert must explain precisely how he went about reaching his conclusions and point to some objective source, a learned treatise, the

policy statement of a professional association, a published article in a reputable scientific journal or the like, to show that he has followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in his field." *In re Novatel Wireless Sec. Litig.*, 846 F. Supp. 2d 1104, 1107 (S.D. Cal. 2012) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318-19 (9th Cir. 1995) ("*Daubert II*")). The proponent of the testimony bears the burden of establishing its admissibility. *Id.* It is certainly possible that Dr. Guilak's process for dissolving off-the-shelf pills for use on cartilage explants is reliable and accepted in the scientific community. Plaintiff, however, fails to meet her burden of providing evidence to demonstrate such reliability and acceptance. Defendant's motion to exclude the opinions of Dr. Guilak concerning his studies of other glucosamine and chondroitin supplements on pig cartilage is therefore granted.

B. J. Michael Dennis, Ph.D.

Premier argues that Dr. Michael Dennis's survey deviates from accepted principles of survey design because it "relies on improper closed-ended and leading questions, lacks a control, and manipulates the sample to an incorrect universe of respondents." Motion to Exclude Michael Dennis, at pg. 1. Plaintiff argues that any concerns regarding the survey go to weight, not admissibility. Defendant points to numerous cases in which courts have excluded surveys conducted by Dr. Dennis due to unreliable methodology, and Plaintiffs in response point to a considerable number of courts which

have admitted his surveys using similar methodologies to the one proffered in this case.[5]

The general rule is that "as long as [the survey] is conducted according to accepted principles and is relevant," the "technical inadequacies in a survey, including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility." *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010) (internal quotation marks, citation, and alterations omitted). Effective cross-examination will expose the weaknesses of a survey and conclusions drawn from those results. Courts, however, still review surveys to determine whether they are conducted according to accepted principles. "Substantial deficiencies in the design or execution of a survey of individuals is grounds for its complete exclusion." *In re Autozone*, No. 10-md-02159-CRB,

5. The cases in which Dr. Dennis's testimony has been excluded or a court has declined to consider the testimony include *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, 2018 U.S. Dist. LEXIS 244569, 2018 WL 11354864, at *8 (C.D. Cal. January 24, 2018), and *Senne v. Kansas City Royals Baseball Corp.*, 315 F.R.D. 523, 561 (N.D. Cal. 2016), *on reconsideration in part*, 2017 U.S. Dist. LEXIS 32949, 2017 WL 897338 (N.D. Cal. Mar 7, 2017). The cases in which Dennis's testimony has been admitted include *Pettit v. P&G*, No. 15-cv-02150-RS, 2017 U.S. Dist. LEXIS 122668, at *10 (N.D. Cal. Aug. 3, 2017); *Sharpe v. A&W Concentrate Co.*, No. 19- cv-768, 2021 U.S. Dist. LEXIS 160177, at *22-23 (E.D.N.Y. July 23, 2021); *Testone v. Barlean's Organic Oils, LLC*, No. 19-CV-169 JLS (BGS); 2021 U.S. Dist. LEXIS 185896, at *48-51 (S.D. Cal. Sept. 28, 2021); *In re Scotts EZ Seed*, No. 12 CV 4727 (VB), 2017 U.S. Dist. LEXIS 125621, at *21-22 (S.D.N.Y. Aug. 8, 2017).

2016 U.S. Dist. LEXIS 105746, 2016 WL 4208200, at *16 (N.D. Cal. Aug 10, 2016) (internal quotation marks and citation omitted). A court can exclude a survey suffering from substantial methodological flaws under either Rule 403, which concerns relevance, or Rule 702. *Dongguk Univ. v. Yale Univ.*, No. 3:08CV441 TLM, 2012 U.S. Dist. LEXIS 76575, 2012 WL 1977978, at *3 (D. Conn. June 1, 2012).

First, the survey's reliance on closed-ended questions does not merit exclusion. Plaintiff and Defendant set forth various guidelines in support of or against the use of closed-ended questions. *See, e.g.*, Federal Judicial Center, *Reference Manual on Scientific Evidence*, p. 394 (3d ed. 2011) ("Open-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent's mind, but closed-ended questions are more suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives."); Federal Judicial Center, *Manual for Complex Litigation*, p. 103 (4th ed. 2004), ("Manual for Complex Litigation") ("[I]n assessing the validity of a survey, the judge should take into account . . . whether the questions asked were clear and not leading[.]"). Unlike in cases in which a survey created by Dr. Dennis has been excluded, the questions here do not appear to "ultimately test[] reading comprehension and common sense rather than the likelihood of consumer [beliefs]." *Strumlauf v. Starbucks Corp.*, No. 16-CV-01306-YGR, 2018 U.S. Dist. LEXIS 2409, 2018 WL 306715, at *7 (N.D. Cal. Jan. 5, 2018). Although the questions are closed-ended, they are written in clear language and give the reader the opportunity to respond affirmatively or negatively.

Defendant may cross-examine Dr. Dennis about his choice to use closed-ended questions, but the survey will not be excluded on that basis.

Second, Dr. Dennis's survey and opinions should not be excluded because of the failure to include a control group. It is unclear how a control group could be structured for this survey, which showed respondents the entire Joint Juice label, including the product name, ingredients, and images. Defendant argues the survey should have controlled for preexisting beliefs. But as Plaintiff rebuts, "[i]f advertising reinforces an incorrect belief, it is still false advertising." Opposition to Motion to Exclude Michael Dennis, at pg. 17; *see also Alvarez v. NBTY, Inc.*, 331 F.R.D. 416, 424 n.2 (S.D. Cal. 2019) ("No matter what prompted a consumer to go to the store to buy the Product, that consumer was still subjected to the same advertising on the label.").

Third, Dr. Dennis's choice to exclude respondents below the age of 35 does not render his survey unreliable based on a manipulated sample. Deposition testimony of Premier employees and Premier's internal documents repeatedly show that the typical joint juice consumer—and the type of consumer targeted by Premier—was in their forties, fifties, and sixties. Dr. Dennis's choice of respondents was not a random or entirely illogical choice, and in any event his choice of sample size is a proper grounds for cross-examination, rather than rendering the survey inadmissible. *See Marketquest Grp., Inc. v. BIC Corp.*, No. 11-cv-618-BAS (JLB), 2018 U.S. Dist. LEXIS 62360, at *9 (S.D. Cal. Apr. 12, 2018) ("The selection of

an inappropriate universe generally affects the weight of the resulting survey data, not its admissibility."). In short, the motion to exclude Dr. Dennis's survey is denied. Any concerns about the methodology of the survey go to weight, not admissibility, and Premier may explore these issues on cross-examination.

C. Derek Rucker, Ph.D.

Derek Rucker, Ph.D., is a professor of marketing who Plaintiff has retained to opine about the marketing and advertising of Joint Juice, and how the "message" from Joint Juice advertising influences consumers. Rucker's testimony both synthesizes Defendant's internal documents about marketing strategies, and opines how consumers interpreted Defendant's marketing. Premier argues that Dr. Rucker's analysis is not based on any methodology or recognized scientific principle. Premier also argues that Dr. Rucker's opinion is cumulative of Dr. Dennis's, and that Dr. Rucker merely parrots back the conclusions of the Dennis survey.

Dr. Rucker's testimony concerning general marketing principles, the marketing strategies at play for Joint Juice, and Defendant's intended message and target audience are admissible. Contrary to Defendant's position, Plaintiff has demonstrated that Defendant applied reliable methods to his analysis of Defendant's internal documents and how Defendant chose target audiences for its marketing. Further, as the cases cited by both Defendant and Plaintiff show, courts regularly admit marketing testimony that explains what a company intended to convey through

their marketing.[6] *See Schwab v. Philip Morris USA, Inc.*, No. CV 04-1945 (JBW), 2005 U.S. Dist. LEXIS 21610, 2005 WL 2401647, at *5 (E.D.N.Y. Sept. 29, 2005) (allowing expert testimony as to how defendant's advertising activities "were designed to influence the beliefs and activities of consumers" because "[a]dvertising methodologies are esoteric [and] the average juror could be helped by an explanation of how they work and were used by defendants"); *Tershakovec v. Ford Motor Co.*, No. 17-21087-CIV, 2021 U.S. Dist. LEXIS 152551, 2021 WL 3578011, at *3 (S.D. Fla. Aug. 13, 2021) (allowing expert testimony concerning defendant's "marketing strategy, tactics, and execution"). Further, Rucker's proposed testimony "offers [] more than a factual narrative of [Premier's] documents." *Johns v. Bayer Corp.*, No. 09CV1935 AJB DHB, 2013 U.S. Dist. LEXIS 51823, 2013 WL 1498965, at *28 (S.D. Cal. Apr. 10, 2013)

In contrast, Dr. Rucker's testimony concerning how consumers interpreted the intended message is not admissible. Dr. Rucker provides little support for his opinion on how consumers actually interpreted the messages beyond the results of the Dennis Survey,

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6. Although Defendant argues that this portion of Dr. Rucker's testimony is inadmissible, when discussing why Dr. Rucker's opinions on consumer perceptions are inadmissible, Defendant concedes that courts may allow expert testimony on a company's marketing method. *See* Reply in Support of Motion to Exclude Derek Rucker, at pg. 4 ("[W]hile a marketing expert may opine as to a defendant's marketing scheme in general, or intended marketing message, he may not opine as to consumers' perceptions as Dr. Rucker has done here.").

results Plaintiff may introduce via Dr. Dennis himself. Other courts have distinguished between a marketing expert's testimony on a company's marketing strategies and testimony on how those messages were actually received. *See Schwab*, 2005 U.S. Dist. LEXIS 21610, 2005 WL 2401647, at *4 (explaining that an expert's proposed testimony was "not about smokers' reactions to 'light' cigarette advertising, but about the design and intent of the industry in dealing with the use of 'light' and 'low tar' issues in its contacts with consumers"). Defendant's motion is therefore granted as to his opinion about how the intended marketing message was interpreted by consumers, and denied as to all other opinions.

D. Colin Weir

Weir is an economist Plaintiffs retained to provide calculations on statutory damages. Premier argues that Weir's calculation of statutory damages relies on incorrect assumptions concerning the relevant New York statutes, GBL §§ 349(h) and 350-e. Section 349(h) provides that "any person who has been injured by reason of any violation of this section may bring an action . . . to recover his actual damages or fifty dollars, whichever is greater[.]" N.Y. Gen. Bus. L. § 349(h). Section 350-e(3) similarly states "[a]ny person who has been injured by reason of any violation of section [350] . . . may bring an action . . . to recover his or her actual damages or five hundred dollars, whichever is greater[.]" *Id.* at § 350-e(3). Premier argues that New York consumer protection statutes dictate that statutory damages are awarded on a per person basis, rather than a per transaction or unit basis, and that Weir's testimony

presumes the availability of per unit statutory damages. Plaintiff argues New York law allows statutory damages on a per unit basis.

None of the cases cited by either Plaintiff or Defendant is particularly helpful, and courts across the country have reached different answers as to the legal question of whether GBL §§ 349(h) and 350-e allow damages on a per person or per unit basis. The two Northern District of California cases cited by Premier, *Sharpe v. Puritan's Pride, Inc.*, No. 3:16-cv-06717-JD, 2017 U.S. Dist. LEXIS 16531, 2017 WL 475662, at *2 (N.D. Cal. Feb. 6, 2017) and *Farar v. Bayer AG*, No. 14-CV-04601-WHO (N.D. Cal. Oct. 26, 2018), are of only limited persuasive value, because neither discussed the reasoning underlying their conclusion that only per person statutory damages are available. In *Puritan's Pride*, the court simply stated that GBL 349(h) "provides for the greater of actual damages or $50 in statutory damages per person." *Puritan's Pride*, 2017 U.S. Dist. LEXIS 16531, 2017 WL 475662, at *2. In *Farar v. Bayer*, the court reached the conclusion that statutory damages are awarded on a per person basis in a minute order with no citations to any authority.[7]

7. The full analysis by the district court in *Farar* is as follows: "Considering the language of the relevant statutes (New York General Business Law Sections 349(h) & 350-e), the Court holds that statutory damages are available only on a per person, not a per transaction, basis. The conclusion is supported by the plain text of the statutes, including the New York Legislature's use of broader 'for each violation' language with respect to the Attorney General's ability to seek statutory damages, as well as the legislative history." *Farar v. Bayer AG*, No. 14-CV-04601-WHO (N.D. Cal. Oct. 26, 2018).

The cases Defendant cites from within the Second Circuit are similarly of limited value. In *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70 (2d Cir. 2015), the Second Circuit stated that when reviewing a district court's class certification analysis that "statutory damages under GBL § 349 can be assessed on the basis of common proof, as they are capped at $50." *Id.* at 87. The Second Circuit did not provide an explanation for its reasoning, nor did it specify that damages were capped on a per person basis, rather than a per purchase basis.[8] Similarly, the courts in *Allegra v. Luxottica Retail N. Am.*, No. 17-CV-5216 (PKC) (RLM), 341 F.R.D. 373, 2021 U.S. Dist. LEXIS 249124, 2022 WL 42867, at *8 (E.D.N.Y. Jan. 5, 2022), and *Madden v. Midland Funding*, 237 F.Supp.3d 130, 161 (S.D.N.Y. 2017), stated without analysis that statutory damages were capped on a per person basis.

A case Plaintiff cites, *Chery v. Conduent Educ. Servs., LLC*, No. 1:18-CV-75, 581 F. Supp. 3d 436, 2022 U.S. Dist. LEXIS 10859, 2022 WL 179876 (N.D.N.Y. Jan. 20, 2022), provided more analysis but is also distinguishable from this case. In *Chery*, which concerned a loan servicer's

8. District courts within the Second Circuit following *Sykes* have stated that damages are allowed on a per purchase basis—similarly with little analysis—indicating that courts have not treated *Sykes* as establishing that statutory damages under sections 349 and 350 are available on only a per person basis. *See Chery v. Conduent Educ. Servs., LLC*, No. 1:18-CV-75, 581 F. Supp. 3d 436, 2022 U.S. Dist. LEXIS 10859, 2022 WL 179876, at *10 (N.D.N.Y. Jan. 20, 2022); *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 526 (E.D.N.Y. 2017); *In re Amla Litig.*, 328 F.R.D. 127, 136 (S.D.N.Y. 2018).

failure to process a certificate in a timely manner resulting in additional months of loan payments for consumers, the district court concluded that "a Section 349 violation in this case occurred every payment period for every loan packet delayed[,]" and awarded statutory damages for each violation. 2022 U.S. Dist. LEXIS 10859, 2022 WL 179876, at *10 (internal quotation marks omitted). Although *Chery* is not a consumer goods case and thus is not directly analogous, the court reasoned that one person could experience a section 349 violation multiple times, and thus be entitled to statutory damages for each of those violations.

Other cases cited by Plaintiff state that damages are available on a per purchase basis, but do not provide an analysis for their conclusions. *See, e.g., Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 526 (E.D.N.Y. 2017) ("The statutory damages for many multiple purchasers is potentially enormous: it is $50 or $500 per purchase plus attorneys' fees."); *Koch v. Greenberg*, 14 F.Supp.3d 247, 262 (S.D.N.Y. 2014) (letting stand a jury verdict returning statutory damages on a per bottle basis, in a case involving the sale of 24 counterfeit bottles of wine); *In re Amla Litig.*, 328 F.R.D. 127, 136 (S.D.N.Y. 2018) (noting that "the damages methodology proposed by plaintiffs - multiplying the number of New York purchases of the product by $50 - is quite reliable, since NYGBL § 349 provides for statutory damages"); *Famular v. Whirlpool Corp.*, No. 16 CV 944 (VB), 2019 U.S. Dist. LEXIS 44907, 2019 WL 1254882, at *11 (S.D.N.Y. Mar. 19, 2019) ("The statutory damage calculation is the number of units sold in New York (15,380) multiplied by the $50 statutory minimum for

GBL Section 349 violations and $500 statutory minimum for GBL Section 350 violations, which equals $769,000 and $7,690,000, respectively").

Plaintiffs also cite to a Second Circuit case discussing GBL sections 349 and 350 in another context, *Orlander v. Staples, Inc.*, 802 F.3d 289 (2d Cir. 2015). In *Orlander*, the court explained that to state a false advertising claim in a consumable goods case, "a plaintiff must allege that, on account of a materially misleading practice, she purchased a product and did not receive the full value of her purchase." *Id.* at 302. Plaintiff construes this language in *Orlander* to mean "[t]he injury to the consumer occurs at the time of purchase." Opposition to Motion to Exclude Colin Weir, at p. 3. Plaintiff's interpretation of the language in *Orlander* requires a bit of a jump in logic, but it nonetheless makes sense in the context of the statute. After all, when a consumer makes a purchase of Joint Juice or another consumable good, the consumer is presented with the label, and then makes the purchase. The conveyance of false messages on the label happens at the time of purchase.

Defendant's strongest support comes from legislative history it points to, and the provisions of GBL § 350 which concern the New York attorney general's authorization to bring a lawsuit under the section. Defendant points out that GBL § 350-d allows "the New York attorney general to bring an action of "not more than five thousand dollars for each violation[,]" and that neither of the private rights of action codified at GBL §§ 349(h) and 350-e use the "for each violation" language. Defendant also cites a floor

debate in the New York Assembly in which a legislator indicated that a person could only recover $50 in statutory damages for a violation of section 349(h). But the language in the floor debate does not specify whether the cap exists for a single violation or multiple violations of the statute, and thus suffers from the same lack of clarity as much of the cited caselaw.

Plaintiff counters that the plaint text of the statute supports her position. "The text of a statute is the clearest indicator of [] legislative intent and courts should construe unambiguous language to give effect to its plain meaning[.]" *Avella v. City of New York*, 29 N.Y.3d 425, 434, 58 N.Y.S.3d 236, 80 N.E.3d 982 (2017) (internal quotation marks and citation omitted). Plaintiff notes that sections 349(h) and 350-e(3) both utilize the phrase "any violation" when discussing when a person may recover statutory damages. Further, Plaintiff points out that Premier concedes that actual damages would be allowed for each unit of Joint Juice a consumer purchased—meaning that a consumer is not harmed just the first time a product is purchased, but rather every time.

The answer to the question of whether statutory damages are allowed on a per person or per unit basis does not have a clear answer, as shown by the divergence of views amongst highly regarded district courts across the country. When considering all of the authorities laid out by Plaintiff and Defendant, the Plaintiff's position is more compelling. A violation of sections 349 and 350 occurs when a consumer views the label and purchases the product. This means a plaintiff may experience multiple violations

of the statutes. Indeed, Premier marketed its product to encourage consumers to drink the product regularly and to make multiple purchases. Consumers were repeatedly exposed to the label, and repeatedly made the choice to buy the product. A reading of sections 349 and 350 that recognizes a plaintiff experiences a violation each time the product is purchased is consistent with the text and intent of the statute. Thus, GBL §§ 349(h) and 350-e allow statutory damages on a per unit basis. The motion to exclude the portion of Weir's testimony concerning per unit damages calculations is therefore denied.

V. PLAINTIFF'S MOTIONS TO EXCLUDE EXPERT WITNESS TESTIMONY

E. Stuart L. Silverman, M.D.

Dr. Stuart Silverman is a rheumatologist Premier offers to provide testimony on health benefits of Joint Juice. Plaintiff seeks to exclude his testimony, raising a variety of objections to his report. First, Plaintiff critiques the studies Dr. Silverman cites in support of his opinions, such as his purported failure to account for contrary evidence, along with his reliance on biomarker, animal, and small sample size studies. Second, Plaintiff argues his personal observations are irrelevant, unreliable, and prejudicial, since Dr. Silverman does not have recorded data of his patients' experiences with glucosamine supplements. Third, Plaintiff argues Dr. Silverman's opinions on bioavailability and microbiota lack a connection to the science in this case. Fourth, Plaintiff argues that Dr. Silverman is not qualified to opine about governmental

regulations and the approval for use of glucosamine by a regulator abroad. Fifth, Plaintiff argues Dr. Silverman cannot opine about the safety of standard treatments for glucosamine and the need for alternative treatments.

Dr. Silverman's failure to address certain studies goes to the weight, not admissibility, of his testimony. *See Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) (explaining that "lack of textual authority for [an expert's] opinion[] go[es] to the weight, not the admissibility, of his testimony"). Similarly, Dr. Silverman's opinion that there is scientific support for health benefits of glucosamine and chondroitin is admissible, and Plaintiff's counsel may cross-examine him on the weaknesses of the studies he cites in support of his opinion, whether that concerns how much one can learn from biomarker studies, the use of animal studies, or the small sample sizes used in many of the cited studies.

The result is different for Dr. Silverman's opinions on microbiome and bioavailability studies. Just because Dr. Silverman is qualified to testify about osteoporosis, bone health, and related issues does not mean he is qualified to testify on all other medical topics. *See Rogers v. Raymark Indus.*, Inc., 922 F.2d 1426, 1431 (9th Cir. 1991) ("A person qualified to give an opinion on one subject is not necessarily qualified to opine on others."). At best, Dr. Silverman has stated in his deposition that he is "aware" of the microbiome and that rheumatologists like himself should take information about the microbiome into account in their rheumatology practices. Awareness of and appreciation for an area of knowledge, however,

is insufficient to render someone an expert. Similarly, Defendant offers no basis to conclude that Dr. Silverman has any expertise in bioavailability, which concerns the absorption and distribution of a substance throughout the body. Defendant has failed to demonstrate how Dr. Silverman is qualified to testify about the gut microbiome and bioavailability, and thus his opinions on those topics are excluded.

Next, Dr. Silverman's opinions concerning regulatory approvals abroad are excluded. In his report, Dr. Silverman provided no support for his assertion that glucosamine has received regulatory approval in Taiwan, and Premier has agreed not to raise this purported approval at trial. *See* Opposition to Motion to Exclude Stuart Silverman, at pg. 21 n.14. The only remaining regulatory approval listed in Dr. Silverman's opinion concerns a 2006 document from the European Medicines Agency ("EMEA") that recommended approval of glucosamine in the EU. Dr. Silverman, however, does not provide any information about the EMEA's regulatory authority, the weight a recommendation from the EMEA carries, or any other context to understand the "recommendation" found in this document. Dr. Silverman's opinions about regulatory approval abroad are therefore unreliable and are excluded.

Further, Dr. Silverman's opinions on the effectiveness of glucosamine from his clinical observations are also excluded. Although an expert may testify based on their "personal knowledge or experience[,]" *Kumho Tire*, 526 U.S. at 150, courts have excluded doctors' observations about rates of patient outcomes "where the expert was

unable to provide verifiable data from the expert's practice." *Rose v. Bos. Sci. Corp.*, No. 2:20-CV-00716-BJR, 2020 U.S. Dist. LEXIS 128682, 2020 WL 4195470, at *1 (W.D. Wash. July 21, 2020). Here, Dr. Silverman has conducted no tracking of his patients' use of glucosamine supplements, their outcomes, or the outcomes of his colleagues' patients. These personal observations thus lack support, and are excluded.

Finally, Dr. Silverman's opinions about the safety of standard osteoarthritis treatments are excluded. Dr. Silverman opines that the adverse effects of some standard treatments, such as NSAIDs or opioids, creates a need for alternative treatments for osteoarthritis. This opinion is irrelevant to the crux of this case: whether the advertising of Joint Juice is false or misleading. Glucosamine is only a viable alternative to other osteoarthritis treatments if it has positive effects for osteoarthritis patients. That second question—and not Dr. Silverman's opinions about other osteoarthritis treatments—is the relevant question for trial.

In summary, the motion to exclude Dr. Silverman's testimony is granted as to his opinions on microbiome and bioavailability studies, the effectiveness of glucosamine from his clinical observations, and the importance of developing alternative osteoarthritis treatments. The motion is denied as to the other challenges to his testimony.

F. Daniel A. Grande, Ph.D.

Dr. Grande is a specialist in cartilage repair and regeneration, offered by Premier to opine on scientific

studies about the effects of glucosamine. Plaintiff seeks to exclude his opinions for reasons similar to the reasons for which she sought to exclude Dr. Silverman: that he relies too heavily on biomarker studies, he ignores clinical trial studies in favor of discussing the microbiome and prebiotics, and he relies on studies such as animal and in vitro studies that are unreliable.[9]

Just as with Dr. Silverman, Plaintiff's concerns about the studies he relies on largely go to weight, not admissibility. Plaintiff may cross-examine Dr. Grande about the perceived weaknesses of biomarker, animal, and in vitro studies, and his failure to address other studies she finds more reliable, but Dr. Grande's opinions on those studies are not excluded. As for Dr. Grande's opinions on the microbiome and bioavailability, Dr. Grande cannot offer opinions on either subjects. Premier concedes that

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9. Plaintiff also sought to exclude opinions previously excluded by this Court. In *Mullins v. Premier Nutrition Corp.*, 178 F.Supp.3d 867 (N.D. Cal. 2016), this Court excluded Grande's testimony as to "(1) opinions about clinical studies or practices and the treatment protocols for cartilage degeneration; (2) his view that consumers can drink Joint Juice 'daily for healthy, flexible joints'; and (3) his stance that the statement 'originally developed for pro athletes by orthopedic surgeon Kevin R. Stone' is not misleading." *Id.* at 904. Plaintiff argues that Grande reoffers those same stricken opinions, and that his additional opinions should be excluded as well. Premier states that despite Grande's Supplemental Expert Report incorporating his 2017 Expert Report, which contained the previously excluded opinions, Premier does not seek to offer those opinions at trial. To the extent any previously excluded opinions are offered in this trial, they will be excluded.

Dr. Grande is not an expert on the gut microbiome, and has agreed not to offer any opinions on studies of the microbiome. *See* Opposition to Motion to Exclude Daniel Grande, at pg. 9 n.4. As for bioavailability, the studies Dr. Grande relies upon offer no more than speculation, and thus his opinions on the subject are not reliable. For example, one of the studies upon which Dr. Grande bases his opinion concludes that "[t]he results of this study *suggest* that differences in the pharmacokinetic parameters of glucosamine and resulting plasma concentrations *could, at least in part, be a possible reason* for the observed discrepancy in clinical outcomes in patients with [osteoarthritis]." *See* Declaration of Jessica Grant in Support of Opposition of Motion to Exclude Testimony of Daniel Grande, Ex. H, Asthana (2020) (emphasis added). This statement is couched in numerous qualifiers minimizing the certainty of the conclusion. Further, the studies Dr. Grande relies on were pilot studies designed to evaluate whether more in-depth study is warranted. These studies thus provide the kind of speculation that is inadmissible under *Daubert. See Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 677 (6th Cir. 2010) ("[W]hat science treats as a useful but untested hypothesis the law should generally treat as inadmissible speculation."). Plaintiff's motion is therefore granted as to Dr. Grande's opinions on the microbiome and bioavailability, and denied as to the other grounds.

G. William S. Choi, Ph.D.

Dr. Choi is a rebuttal expert offered by Premier to opine on damages. Plaintiff argues his testimony must be

excluded because (1) he is not a proper rebuttal witness, as his testimony does not respond to other experts; (2) his opinions on damages are irrelevant, because they concern the actual price class members paid for Joint Juice rather than the higher statutory damages amounts allowed; and (3) if his rebuttal is proper and his opinions are relevant, his opinion is nonetheless based on a flawed methodology.

A rebuttal expert's role is limited, as the evidence they present must be "intended solely to contradict or rebut evidence on the same subject matter identified by another party[.]" Fed. R. Civ. P. 26(a)(2)(D)(ii). "Although a defendant need not put forth expert opinions to challenge affirmative theories on which the plaintiff bears the burden of proof, such as damages, a defendant's rebuttal expert is limited to offering opinions rebutting and refuting the theories set forth by plaintiff's expert(s)." *Clear-View Techs., Inc. v. Rasnick*, No. 13-CV-02744-BLF, 2015 U.S. Dist. LEXIS 72601, 2015 WL 3509384, at *2 (N.D. Cal. June 3, 2015). Failure to disclose information required by Rule 26(a) within the time requirements means a party may not use that information at trial, unless the failure is harmless. Fed. R. Civ. P. 37(c)(1).

Dr. Choi was not disclosed until after the deadline to disclose initial expert reports, and thus his opinion may only be considered if the report is properly considered a rebuttal report, or if any failure to disclose his opinion in a timely manner was harmless. Defendant argues that Dr. Choi's opinion rebuts Colin Weir's report, in which Weir calculated the number of Joint Juice units sold, the average retail price, and the total sales. Dr. Choi does not contest

Weir's calculation; instead he opines that consumers place economic value on the other attributes of Joint Juice, which should be reflected in the damages. In effect, he advances a price premium theory, in which Plaintiffs would not be entitled to a full refund.

As described in the discussion of Defendant's decertification motion, the question of whether Plaintiff may pursue a full refund damage theory is a legal question—and the answer is yes—but it is a question of fact for the jury whether Joint Juice was valueless for its advertised purpose. Plaintiffs will need to prove that question of fact to be entitled to full refund damages. Since Dr. Choi's report is related to rebutting and refuting an opinion set forth by Plaintiff's expert on a topic for which Plaintiff has the burden of proof, Dr. Choi's report is properly considered a rebuttal report.

Plaintiff also argues that Dr. Choi's opinion is irrelevant because statutory damages will be higher than actual damages, and his opinion concerns the measure of damages for actual damages. As explained in the discussion of the motion to exclude testimony of Colin Weir, statutory damages are available on a per unit basis, and thus it is almost certain that statutory damages will exceed actual damages. The statute, though, allows for the greater of actual damages or statutory damages. *See* GBL §§ 349(h), 350-e(e). To award statutory damages, there must still be evidence at trial of the amount of actual damages, so that a determination can be made based on the evidence that statutory damages are indeed higher. Thus, evidence concerning actual damages is relevant. Finally, as for

Plaintiff's concerns with Dr. Choi's methodology, those concerns are properly addressed on cross-examination, rather than being grounds for exclusion. The motion to exclude testimony of Dr. Choi is therefore denied.[10]

H. Hal Poret

Hal Poret created a survey which addressed why consumers purchase Joint Juice as compared to other glucosamine products. Plaintiff challenges Poret's survey under both Rule 702 and Rule 401, arguing that the survey is irrelevant based on unreliable methods. Concerning relevancy, Plaintiff argues that Poret's survey is irrelevant because it addresses why people who choose to purchase a glucosamine supplement choose Joint Juice over other supplements, and thus does not address the question at issue in this litigation.

Rule 702(a) requires that the expert's "knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]" "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010), *as amended* (Apr. 27, 2010) (internal quotation marks and citation omitted).

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10. The Court notes that it has made a determination that a full refund measure of damages is available if Joint Juice was valueless for its advertised purpose. Thus, Dr. Choi's testimony should be limited to the facts of this case and his views on the value consumers derived from aspects of the Joint Juice product, rather than on opining on the appropriateness of full refund measures of damages at large.

Federal Rule of Evidence 401 states that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action." Fed. R. Evid. 401.

Recognizing that "[t]he relevancy bar is low," *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014), Poret's survey appears to have limited probative value in this case, but is nonetheless relevant. Plaintiff has presented numerous arguments about the shortcomings of the survey in terms of questions not asked and assumptions made, but these issues may be addressed on cross-examination. Similarly, any concerns about the methodology are grounds for cross-examination, not exclusion. The motion to exclude the testimony of Poret is therefore denied.

I. Joel Steckel, Ph.D.

Plaintiff moves to exclude three opinions advanced by rebuttal expert Dr. Joel Steckel, who responded to the Dennis Survey: (1) his view that had Dr. Dennis used open-ended questions, survey respondents would have responded differently; (2) his opinion about Dr. Dennis's failure to use a control group to account for survey respondents' preexisting knowledge about the glucosamine market; and (3) that materiality questions in the Dennis Survey suffer from order effects, the phenomenon that the order in which questions are asked may influence answers. Plaintiff argues these opinions "amount to nothing more than untested hypotheses and

theories" as they are couched with the terms "might," "possible," and "potentially." Motion to Exclude Testimony of Joel Steckel, at pg. 3. Plaintiff argues these opinions do not meet the criteria of Rule 702 and *Daubert*.

Although Dr. Steckel did not conduct his own testing or survey, he supports each of the challenged opinions with citations. Notably, his role in this case is limited—as he is a rebuttal witness—and Plaintiff does not challenge his qualifications. His testimony is relevant to evaluating the reliability of the Dennis Survey, and thus is relevant to a factual matter in this case. Any concerns about Dr. Steckel's failure to produce his own survey or data may be addressed on cross-examination. Thus, Plaintiff's motion to exclude three of Dr. Steckel's opinions is denied.

J. Kevin Robert Stone, M.D.

Plaintiff seeks to exclude the expert testimony of Dr. Kevin R. Stone, an orthopedic surgeon who created the Joint Juice product and founded Premier Nutrition. Defendant seeks to offer Dr. Stone, who was affiliated with the company until 2013, as a non-retained expert witness. Plaintiff argues that (1) Defendant did not provide an adequate summary of his proposed testimony; (2) the types of opinions for which Defendant seeks to offer Dr. Stone require that he provide a full written report; and (3) that expert testimony offered by Dr. Stone should be excluded because it is unreliable and cumulative.

First, Dr. Stone's summary of the opinions he plans to provide is insufficient. Federal Rule of Civil Procedure

26(a)(2)(C) requires expert witnesses who are not required to provide a written report to state "the subject matter on which the witness is expected to present evidence" and to provide "a summary of the facts and opinions to which the witness is expect to testify." Dr. Stone provides only general categories of topics, such as "experience and expertise relating to the efficacy, methods of action, and benefits provided by glucosamine and chondroitin in general" and "the joint health benefits provided by the ingredients of Joint Juice." The summary "fails to include any facts on which [Dr. Stone] will rely, nor does it state the opinions to which [he is] expected to testify. *Pineda v. City & County of San Francisco*, 280 F.R.D. 517, 523 (N.D. Cal. 2012); *see also Christensen v. Goodman Distrib.*,, No. 2:18-CV-2776-MCE-KJN, 2021 U.S. Dist. LEXIS 4156, 2021 WL 71799 (E.D. Cal. Jan. 8, 2021) (excluding non-retained expert witnesses as disclosures "fail[ed] to summarize the experts' actual opinions").

Further, Defendant's failure to provide a proper summary is not "'substantially justified' or 'harmless[,]'" *id.* (citing Fed. R. Civ. P. 37(c)(1)), so as to prevent exclusion. Defendant argues the admission of Stone's opinions would be harmless because "Plaintiff has deposed Dr. Stone twice, at length, about his opinions related to the efficacy of glucosamine and chondroitin." Opposition to Motion to Exclude Testimony of Kevin Stone, at pg. 7. However, just because Plaintiff has deposed Dr. Stone before does not mean Plaintiff is on notice of the specific opinions Dr. Stone seeks to provide at trial. *See Monster Energy Co. v. Integrated Supply Network, LLC*, No. ED CV 17-548-CBM-RAO, 2018 U.S. Dist. LEXIS 226883, at

*4 (C.D. Cal. Aug. 23, 2018) ("The fact that [a non-retained expert] was previously deposed, however, does not satisfy Defendant's expert disclosure obligations under Rule 26(a)(2)(C)."). Therefore, exclusion is warranted.

Second, even if exclusion was not proper for the reasons described above, to the extent Defendant seeks to have Dr. Stone opine on studies that he only reviewed in preparation for litigation, Dr. Stone would have needed to provide a written report. "[T]he critical distinction between retained and non-retained experts is the nature of the testimony the expert will provide, and whether it is based only on percipient knowledge or on information reviewed in anticipation [of] trial." *Shrader v. Papé Trucks, Inc.*, No. 218CV00014KJMCKD, 2020 U.S. Dist. LEXIS 159441, 2020 WL 5203459, at *2 (E.D. Cal. Sept. 1, 2020) (internal quotation marks and citation omitted). Here, Dr. Stone testified in his deposition that he had only reviewed some studies after Premier's attorneys had provided them to him. To the extent Defendant sought to have Dr. Stone testify about matters that he learned of in anticipation of litigation rather than through percipient knowledge, he was required to provide a written report, and any such opinions concerning those studies is excluded from trial.

K. Lance Palumbo

Palumbo is a former Brand Director of Joint Juice. Premier offers Palumbo as a nonretained expert witness, and Plaintiff seeks to exclude him for reasons similar to the exclusion of Dr. Stone. As with Dr. Stone, the provided

summary lists a variety of topics but "fails to include any facts on which [Palumbo] will rely, nor does it state the opinions to which [Palumbo] expected to testify." *Pineda*, 280 F.R.D. at 523. Further, exclusion is warranted because the fact Plaintiff deposed Palumbo in 2014 does not mean the failure to give notice of the specific opinions and facts at issue is substantially justified or harmless.

Additionally, even if his proposed expert testimony was not excluded, Palumbo would not be qualified to opine on scientific matters. Defendant proposes that he will "testify regarding studies on the efficacy of glucosamine and/or chondroitin" and "the benefits of Joint Juice[.]" It is unclear how Palumbo has any of the requisite scientific experience to opine about scientific studies in front of the jury. *See* Fed. R. Evid. 702(a) (requiring "scientific, technical, or other specialized knowledge" for an expert to provide opinion testimony). Thus, even if Palumbo were allowed to provide expert testimony, any expert testimony concerning scientific matters and studies would be excluded pursuant to Federal Rule of Evidence 702.

VII. MOTION TO DECERTIFY THE CLASS

Following the close of discovery, Premier argues that Plaintiff does not have common evidence of causation necessary for both the causation element of her substantive claims and Article III standing, and thus individualized issues will defeat predominance. Further, Defendant also argues that Plaintiff has no evidence to support a "full refund" measure of damages under New York law, and thus individual issues will predominate as to damages.

Appendix D

A. Causation under GBL §§ 349 and 350

Defendant argues that the class must be decertified because common evidence does not predominate as to Plaintiff's proof of causation necessary for her claims under GBL §§ 349 and 350. Defendant argues that Plaintiff's theory of causation is not viable under New York caselaw, and that Plaintiff has not advanced common proof of causation.

First, Plaintiff has alleged a causal nexus within the meaning of GBL sections 349 and 350. Defendants argue that *Small v. Lorillard Tobacco Co.* controls this case and forecloses Plaintiff's theory of causation, but Defendant's reading of *Small* goes too far. In *Small*, purchasers of cigarettes averred they would not have purchased cigarettes had they known that cigarettes were addictive, but did not advance a theory that they had actually become addicted. *Small*, 94 N.Y.2d at 56. The plaintiffs framed their injury as "that defendants' deception prevented them from making free and informed choices as consumers." *Id.* The Court of Appeals of New York held that "[w]ithout addiction as part of the injury claim, there is no connection between the misrepresentation and any harm from, or failure of, the product." *Id.* "*Small* stands for the simple proposition that one cannot recover merely for having been deceived — the deception must have caused an injury." *In re AMLA Litig.*, 320 F.Supp.3d 578, 595 (S.D.N.Y. 2018) (citing *Small*, 94 N.Y.2d at 56). "[T]he plaintiffs in [*Small*] did not 'allege that the cost of cigarettes was affected by the alleged misrepresentation[.]'" *In re Amla Litig.*, 328 F.R.D. at 135 (quoting *Small*, 94 N.Y.2d at 56). In contrast

to the plaintiffs in *Small*, Montera avers that she and class members purchased Joint Juice for joint health benefits that Premier advertised but they never received, making the injury "not Premier's deception, but the money spent on the product that did not do what it was sold to do." Opposition to Motion to Decertify, p. 14. Plaintiff alleges that the cost of Joint Juice was affected by the alleged misrepresentation, and thus has alleged a cognizable injury and theory of causation under GBL §§ 349 and 350.

Second, contrary to Defendant's argument, Plaintiff has presented common evidence that Premier's marketing statements caused class members to purchase Joint Juice. This Court's previous orders on class certification and summary judgment details common evidence about Premier's advertising and marketing, and that Joint Juice users purchase the product to obtain joint health benefits. *See Mullins*, 2016 U.S. Dist. LEXIS 51140, at *8-10, 13-17; *Mullins*, 178 F. Supp. 3d at 877-80. At class certification, the Court noted the "hundreds of pages of factual discovery demonstrating that Premier engaged in a coordinated advertising campaign which caused customers to buy Joint Juice because of its purported health benefits." *See Mullins*, 2019 U.S. Dist. LEXIS 229365, at *4. This evidence is further bolstered by expert evidence Plaintiff has proffered specifically for this New York case, such as Dr. Dennis's survey about how consumers interpret Joint Juice's label. Common evidence will therefore predominate over individual issues as to proof of causation under GBL §§ 349 and 350.[11]

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11. Poret's survey does not change the calculus here. Poret's survey looked to the reasons beyond joint health a consumer

B. Article III Standing

Defendant relies on *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021), to argue that Plaintiffs have not shown that each class member has Article III standing. Article III standing requires a "causal connection between the injury and the conduct complained of[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "Because the Supreme Court has clarified that '[e]very class member must have Article III standing in order to recover individual damages,' Rule 23 also requires a district court to determine whether individualized inquiries into this standing issue would predominate over common questions[.]" *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, No. 19-56514, 31 F.4th 651, 2022 U.S. App. LEXIS 9455, 2022 WL 1053459, at *9 n.12 (9th Cir. Apr. 8, 2022) (quoting *TransUnion*, 141 S.Ct. at 2208).

As explained above, Plaintiff has provided common evidence of causation necessary to prove violations of GBL §§ 349 and 350. This common evidence would also naturally demonstrate the required "causal connection between the injury and the conduct complained of[.]" *Lujan*, 504 U.S. at 560. Thus, "individualized inquiries into this standing

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would purchase Joint Juice, and he testified in his deposition that people buy glucosamine supplements for joint health. *See* Deposition of Hal Poret II at 226:5-9 ("It's fairly evident that all the glucosamine products are presented as joint health products and that, for the most part, people buy glucosamine products as joint health products.").

issue" will not predominate over common questions. *See Olean*, 2022 U.S. App. LEXIS 9455, 2022 WL 1053459, at *9 n.12.

C. Damages

Defendants next argue that predominance is no longer satisfied because Plaintiffs cannot pursue a full refund theory of liability, and individual issues will predominate as to damages. Repeating earlier arguments, Defendants assert that Plaintiffs have not put forth evidence that all class members purchased Joint Juice for its joint health benefits, and that some purchasers bought Joint Juice for its other attributes, like the vitamins included in the drink. Defendants argue that even if Plaintiffs establish that all class members bought Joint Juice for its joint health benefits, Joint Juice nevertheless has other attributes of value and thus a price premium theory of damages, in which class members would not recoup the full amount of their purchase, is the appropriate measure of damages.

Plaintiffs may pursue a full refund theory of liability. First, New York law does not require that plaintiffs pursue a price premium theory.[12] *See Orlander*, 802 F.3d 289

12. Under the price premium theory, "deceived consumers may nevertheless receive—and retain the benefits of—something of value, even if it is not precisely what they believed they were buying." *Dash v. Seagate Tech. (U.S.) Holdings, Inc.*, 27 F.Supp.3d 357, 361-62 (E.D.N.Y. 2014) (quoting *Servedio v. State Farm Ins. Co.*, 889 F.Supp.2d 450, 452 (E.D.N.Y.2012)). Plaintiff argues that rather than Joint Juice being "not precisely what [consumers] believed they were buying[,]" *id.*, Joint Juice was nothing like what they thought they were buying and thus valueless for them.

at 302 ("Defendant argues that New York courts have recognized the payment of a plaintiff's purchase price as a Section 349 injury only when the plaintiff paid a 'price premium.' But there is no such rigid 'price premium' doctrine under New York law."). A full refund theory of liability may be viable when a plaintiff alleges that a product is valueless. *See In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 412 (S.D.N.Y. 2015) (allowing plaintiffs to pursue a full refund theory of damages as it "match[ed] plaintiffs' . . . theory of liability[,]" that the product was "valueless"); *Yamagata v. Reckitt Benckiser LLC*, 445 F.Supp.3d 28 (N.D. Cal. 2020) (allowing plaintiffs in a GBL 349 and 350 action concerning a glucosamine supplement to pursue a full refund theory of damages, and concluding that "[i]f the plaintiffs received none of the advertised joint health benefits, they are entitled to a full refund").

This case is distinguishable from cases in which only a price premium theory was permitted. Some price premium cases concern labels which indicated a consumer would get more of a product than they actually received. *See, e.g. Daniel v. Mondelez Int'l, Inc.*, 287 F.Supp.3d 177, 195 (E.D.N.Y. 2018) (plaintiff alleged harm because labeling on candy product indicated a higher amount of product per package, causing plaintiff "to pay a higher price per unit of candy," rather than a product entirely different from the product represented on the packaging). Other price premium cases involve a product which has some similarity with the advertised product—and thus is of some utility to the consumer—but differs in some material way. *See, e.g. Greene v. Gerber Prods. Co.*, 262 F. Supp. 3d 38 (E.D.N.Y. 2017) (plaintiff alleged she paid

a 41% premium for infant formula that falsely claimed to trigger fewer allergies as compared to standard formula). If a product provides no benefit to the consumer, though, a plaintiff may be entitled to their entire purchase price. In a case involving a product advertised to reduce cold symptoms and the length of colds, Plaintiff alleged that studies found the product was "ineffective in treating cold symptoms[.]" *Weisblum v. Prophase Labs, Inc.*, 88 F.Supp.3d 283, 287 (S.D.N.Y. 2015). Plaintiff sought the full purchase price, asserting in his complaint that he was "damaged in the amount of the purchase price of the Cold–EEZE Products, i.e., the difference in value between the Cold–EEZE Products as advertised and the Cold–EEZE Products as actually sold[,]" and was permitted to proceed on this theory of liability. *Id.* at 292-293. Plaintiffs allege a theory of liability similar to the Cold–EEZE case: that the difference in value between the Joint Juice product as advertised and the Joint Juice product as sold is the full value of the product, because the product was valueless for its advertised purpose.

It is a question of fact for the jury whether Joint Juice is valueless for its advertised purpose. This will be Plaintiff's burden to prove at trial. At this stage of the proceeding, though, they have demonstrated predominance on this question. Plaintiff has presented evidence from scientific experts supporting her argument that Joint Juice provides no joint health benefits, and has also presented evidence that Joint Juice was advertised to provide those precise benefits, which was the reason consumers purchased Joint Juice. Common evidence will therefore predominate over individual issues as to whether Joint Juice is valueless for

its advertised purpose. Thus, decertification on this issue is not warranted.

Finally, the availability of statutory damages on a per unit basis separately establishes that predominance is satisfied as to damages, because it appears statutory damages will likely exceed any actual damages. "Once an injury is established, statutory damages can be precisely calculated for each class member." *Kurtz*, 321 F.R.D. at 551. Thus, predominance is also satisfied via the availability of per unit statutory damages.

VII. CONCLUSION

Defendant's motion to exclude certain opinions of Dr. Farshid Guilak is granted, and Defendant's motion to exclude opinions of Dr. Derek Rucker is granted in part and denied in part. Defendant's other motions to exclude testimony are denied. Plaintiff's motions to exclude the expert testimony of Dr. Kevin Stone and Lance Palumbo are granted. The motions to exclude the testimony of Dr. Stuart Silverman and Dr. Daniel Grande are granted in part and denied in part. The motions to exclude testimony of Dr. Joel Steckel, Dr. William Choi, and Hal Poret are denied. The motion to decertify the class is denied.

IT IS SO ORDERED.

Dated: April 26, 2022

/s/ Richard Seeborg
RICHARD SEEBORG
Chief United States District Judge

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, FILED JUNE 20, 2016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 13-cv-01271-RS

VINCENT D. MULLINS, *et al.*,

Plaintiffs,

v.

PREMIER NUTRITION CORPORATION,

Defendant.

Filed June 20, 2016

ORDER DENYING MOTION TO EXPAND CLASS CERTIFICATION BEYOND CALIFORNIA CONSUMERS

I. INTRODUCTION

Plaintiff Kathie Sonner represents a class of California consumers who purchased Joint Juice, a drinkable glucosamine hydrochloride and chondroitin sulfate supplement. She has sought to expand those classes to include members: (1) who purchased Joint Juice in all fifty states or, in the alternative, (2) who purchased the product in ten specific states. Questions remained about whether

the nationwide or ten-state class could proceed where the claims are based on California law, and therefore the parties were directed to file briefs addressing that issue.

The responses submitted by the parties exposed the material conflicts between California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, and the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1770, on the one hand, and the laws of other effected states. Premier demonstrated there are at least some states with laws that materially conflict with the UCL and CLRA and, on balance, the interests of the states where the advertising occurred outweigh those of California. Sonner concedes the existence of true conflicts between the law of some states and California law, thereby making a nationwide class improper. Similarly, Premier has demonstrated there are material conflicts between the laws of those ten states in the alternative sub-group, and that those states have more interest in applying their laws to the advertisements at issue than does California.

Sonner now offers a new proposal: to carve out those states whose laws materially conflict with the UCL or CLRA. The trouble, however, is that the material conflicts that Premier has identified conflict with the UCL, but not the CLRA, or vice versa. Sonner has not offered a proposal that resolves all conflicts cleanly. Nor has Premier had the opportunity to challenge Sonner's new proposal. Accordingly, because Sonner has not demonstrated that California law should apply to the two classes originally proposed, she will represent only a class of California consumers who have purchased Joint Juice since March 1,

2009. Her request to represent a larger class of consumers therefore must be denied.

II. PROCEDURAL HISTORY[1]

Plaintiff Kathie Sonner seeks to represent consumers in all fifty states, or, in the alternative, consumers in ten specific states in this class action premised on California consumer-protection statutes. Sonner satisfied her burden to prove that the consumer claims she advances are amenable to classwide adjudication and that common questions predominate. Accordingly, at a minimum, a class of California consumers who have purchased Joint Juice since March 1, 2009, was certified. Difficult questions remained, however, about whether, under California's government-interests test, California law could apply nationwide or to the proposed ten-state subclass in light of *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). To assist with these issues, the parties submitted additional briefs addressing the following two questions:

> (1) Does California's government-interests test require a categorical approach, where the existence of a scienter requirement, for example, always gives rise to a material conflict between the UCL and the CLRA and the consumer-protection laws of other states? Or must Premier prove that this

1. An account of the factual basis underlying Sonner's claims appears in the order denying Premier's motion for summary judgment.

differing element is seriously in dispute in this case?

(2) Why do scienter and reliance elements and differing damages models make a difference in this case in terms of the geographic scope of the putative class? When answering this question, the parties should examine the specific facts of this case.

III. LEGAL STANDARD

"A federal court sitting in diversity must look to the forum state's choice of law rules to determine the controlling substantive law." *Mazza*, 666 F.3d at 589 (internal quotation marks omitted). Thus, in this case, California's choice-of-law rules apply. Application of California law to class members from other jurisdictions is permissible only if Sonner shows "doing so comports with both (1) due process, and (2) California's choice of law rules." *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *12 (N.D. Cal. Feb. 8, 2016) (citing *Mazza*, 666 F.3d at 589). Sonner has already demonstrated application of California law to California-based Premier will not offend due process, and thus the only remaining question is whether California's choice of law rules are satisfied here. Premier bears the burden to show "'foreign law, rather than California law, should apply to class claims.'" *Mazza*, 666 F.3d at 590 (quoting *Wash. Mut. Bank, F.A. v. Superior Court*, 24 Cal. 4th 906, 921, 103 Cal. Rptr. 2d 320, 15 P.3d 1071 (2001)).

There are typically three steps to decide which state's law applies. The first task is to determine whether the laws of the affected jurisdictions are "the same or different." *Id.* at 590 (quoting *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 81-82, 105 Cal. Rptr. 3d 378, 225 P.3d 516 (2010)). If the laws are different, the second step requires an examination of "each jurisdiction's interest in the application of its own law" to determine whether a true conflict exists. *Id.* If it does, then the final step involves analyzing "which state's interest would be more impaired if its policy were subordinated to the law of the other state." *Id.*

IV. DISCUSSION

A. The Impact of *Mazza*

The language used by the *Mazza* court speaks broadly, suggesting nationwide consumer class actions are never permissible because some states require proof of reliance or scienter, or have different methods for compensating victims of consumer fraud. *See Mazza*, 666 F.3d at 592-93 ("Each of our states has an interest in balancing the range of products and prices offered to consumers with the legal protections afforded to them. Each of our states also has an interest in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available . . . ." (internal quotation marks omitted)). Yet, the court was careful to limit its holding to "the facts and circumstances of this case," *id.* at 594, and thus district courts routinely require fact- and case-specific analysis to determine whether to apply California law

to absent class members in other jurisdictions. *See, e.g., Forcellati v. Hyland's, Inc.*, 876 F. Supp. 2d 1155, 1160-61 (C.D. Cal. 2012) ("Defendants can only meet [their] burden by engaging in an analytically rigorous discussion of each prong of California's 'government interests' test based on the facts and circumstances of *this* case and *this* Plaintiff's allegations." (emphasis in original)); *In re Clorox Consumer Litig.*, 894 F. Supp. 2d 1224, 1237 (N.D. Cal. 2012) ("Since the parties have yet to develop a factual record, it is unclear whether applying different state consumer protection statutes could have a material impact on the viability of Plaintiffs' claims."); *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 658 (C.D. Cal. 2014); *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 550 (C.D. Cal. 2012) ("Defendants cannot profitably rely on the work of a different party in a different case with different facts—or on the Ninth Circuit finding error in a district court rejecting an argument Defendants did not themselves present to this Court—to correct their failure" to show "the law of other states conflicted with California law *as applied to this particular case*." (emphasis in original)).

Premier correctly notes that when district courts have permitted nationwide class actions involving claims for violations of consumer protection laws, the defendants failed to offer any analysis of states' laws or case-specific discussion whatsoever. *See Allen*, 300 F.R.D. at 643; *Forcellati*, 2014 U.S. Dist. LEXIS 50600, 2014 WL 1410264, at *3; *Bruno*, 280 F.R.D. at 549-50. Of course, defendants need do more than simply submit a table of state law to show the UCL and CLRA are inapplicable nationwide; they must demonstrate the elements at issue are actually in dispute and amount to true conflicts.

This fact-specific approach comports with the California Supreme Court's decision to abandon its prior categorical rule "that in tort actions the law of the place of the wrong was the applicable law in a California forum regardless of the issues before the court." *Hurtado v. Superior Court*, 11 Cal. 3d 574, 579, 114 Cal. Rptr. 106, 522 P.2d 666 (1974). Instead, the court chose to adopt the more flexible government-interests test. Thus, under that test, "[t]he fact that two states are involved does not itself indicate there is a 'conflict of laws' or 'choice of law' problem. There is obviously no problem where the laws of the two states are identical." *Id.* at 580. In other words, the analysis begins by identifying whether the statutes are worded differently, and, if so, whether the differences rise to the level of substantive requirements. "The key step in this [choice of law] process is delineating the issue to be decided." *Id.* at 584.

B. Nationwide Class

Neither party seriously disputes the fact the consumer protection statutes of all fifty states vary. Instead, they clash about whether the conflicts identified—reliance, scienter, and remedies—are true or false conflicts. Sonner contends most of the conflicts identified are of no consequence. To some extent, her assessment is accurate. She acknowledges, however, that at least some conflicts cannot be reconciled, rendering inappropriate the application of California law nationwide.

The issue of reliance, for example, makes a nationwide class difficult to maintain. The CLRA requires proof of "damage," Cal. Civ. Code § 1780(a), and thus named and

unnamed plaintiffs must prove the alleged deceptive conduct caused that damage. *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 156, 104 Cal. Rptr. 3d 329 (2010). In the context of claims asserting alleged misrepresentations, a showing that the alleged misrepresentation was material suffices to establish damage. *Id.* at 156-57. In contrast, the UCL requires class representatives to prove reliance as part of the statute's standing requirement, but does not require absent class members to do so. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 324-26, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009). A plaintiff satisfies the burden of proving reliance by showing the alleged "misrepresentation was an immediate cause of the injury-producing conduct"—not that it was the only cause—or that the misrepresentation was material. *Id.* at 326-27. When a misrepresentation is material, a presumption of reliance arises. *Id.* at 327. Sonner agrees that most states, like the CLRA, require proof of reliance. Thus, most states' laws materially conflict with the UCL. Idaho and North Dakota, however, do not mandate such proof, and therefore conflict with the CLRA, but not the UCL.

Sonner argues nonetheless that any conflict as to the level of proof of reliance is not meaningful here as that element is not seriously in dispute. To the contrary, on summary judgment, she successfully demonstrated that a dispute of fact exists about whether Premier's alleged misrepresentations were material (thereby giving rise to a presumption of reliance), and whether consumers actually relied on the advertising. Those questions are not beyond dispute, and therefore a true conflict exists.

Scienter is also a stumbling block for Sonner's attempt to apply California law nationwide. South Dakota and Pennsylvania would require a plaintiff to prove Premier intended to deceive consumers. *See Coleman v. Commonwealth Land Title Ins. Co.*, 684 F. Supp. 2d 595, 619 (E.D. Pa. 2010) (citing *Weinberg v. Sun Co.*, 565 Pa. 612, 777 A.2d 442, 445-46 (2001); *Santana Products, Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 136 (3d Cir. 2005) ("To bring a claim of fraud under the UTPCPL, Pennsylvania state court precedent requires Plaintiffs to meet the elements of common law fraud. . . . Under Pennsylvania law, common law fraud requires: (1) a misrepresentation, (2) material to the transaction, (3) made falsely, (4) with the intent of misleading another to rely on it, (5) justifiable reliance resulted, and (6) injury was proximately caused by the reliance."); S.D. Codified Laws § 20-10-1 ("One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.").

Sonner's response to this conflict is to assert that Premier's intent to deceive consumers is not seriously in dispute. While the Ninth Circuit has not offered specific guidance about whether a judge or jury resolves factual disputes necessary to choose which state law should apply, the better practice would be for courts to resolve those factual disputes at the choice-of-law stage. *See generally In re Facebook Biometric Info. Privacy Litig.*, No. 15-CV-03747-JD, 2016 U.S. Dist. LEXIS 60046, 2016 WL 2593853, at *2-4 (N.D. Cal. May 5, 2016). Premier hotly contests that it and its employees intended to deceive

the public and has proffered evidence demonstrating how seriously that question is in dispute. Accordingly, it is not proper to conclude as a matter of law that Premier intended to deceive consumers, and therefore the CLRA and ULC materially conflict with the statutes of South Dakota and Pennsylvania.

In the face of these true conflicts, Sonner does not attempt to argue that California's interest in the application of its law outweighs the other states' interests in the same.[2] Instead, she proposes carving out these four states from the class or proceeding with two different classes: one class that includes consumers in states whose laws do not conflict with the UCL, and a second class of

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2. For the sake of completeness, the government-interests test reveals application of California law nationwide would be inappropriate under the facts and circumstances of this case. The next step requires identifying the interests at stake and to determine which state's interests outweigh the others. States take varying approaches on how to strike the right balance between consumer protection and business protection. *See Mazza*, 666 F.3d at 592. California chose to put its thumb on the scale in favor of protecting consumers and accordingly opted to relax the standard for proving reliance. *See id.* ("California[] [has] potentially more comprehensive consumer protection laws . . . ."). *Mazza* instructs that the state where the advertising took place has the greater interest in regulating the communications used to consummate a transaction and the reliance thereon. *See id.* at 593-94. Even the fact that the corporation creating the advertisements is located in California and conducts business there is insufficient to overcome the interests of the state where the transaction occurred. *See id.* at 594. California's interest in the transaction is attenuated, and therefore the law of the foreign states should apply. *Id.*

consumers from states whose statutes do not conflict with the CLRA. There are two problems with this proposal. First, this approach requires clearly delineating which states have material conflicts with the UCL and which have conflicts with the CLRA, and there are notable differences between the UCL and the CLRA. As the proponent of a nationwide (or 46-state) class, Sonner bears the burden to demonstrate the solution she proposes is proper. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 n.9 (9th Cir. 2009) ("The party seeking certification bears the burden of demonstrating that he has met the requirements of Rule 23(b)."). She has not, in the end, persuasively demonstrated that the solution she proposes is workable or would adequately resolve these conflicts.

Second, Premier has not had the opportunity to respond to this proposal. At the outset, Sonner offered three proposed class definitions: nationwide, ten-state, or California. Premier responded to those three proposals with specific, targeted analysis. To change the definitions of the proposed class at the last minute would be unfair under these circumstances, when Premier has already carried its burden to show that the government-interests test does not favor application of California law nationwide or, as explained below, to the claims of consumers in the specific ten states Sonner identifies. Accordingly, a nationwide class will not be certified.

C. Ten-State Class

Sonner's second proposal is to certify a class of consumers from the following ten states: California,

Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington. Again, the central dispute is whether the conflicts identified are real and material. As explained below, Premier has demonstrated the existence of material conflicts and that each individual state's interest in the application of its laws outweighs California's interest in applying its law to certain members among the proposed ten-state group.

1. *Reliance*

Premier contends Minnesota's consumer protection statute conflicts with the UCL and the CLRA because it (1) requires proof of reliance, and (2) demands an individualized examination of evidence rebutting the presumption of reliance. As explained above, the CLRA requires proof of reliance, whereas the UCL does not require such proof for absent class members. Clearly, the Minnesota law materially conflicts with the UCL because it requires proof of reliance. The more difficult question is whether it conflicts with the CLRA.

Minnesota permits defendants to "negat[e] a plaintiff's direct or circumstantial showing of causation and reliance." *In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008). The extent to which Minnesota's statute actually differs from California law remains unclear. At least one federal district court has concluded the reliance requirements under California and Minnesota law are similar. *Khoday v. Symantec Corp.*, No. CIV. 11-180 JRT/TNL, 2014 U.S. Dist. LEXIS 43315, 2014 WL 1281600, at *29-31 (D. Minn. Mar. 31, 2014) ("[S]imilar

to California, Minnesota courts have found that class members' awareness of misrepresentations provides a sufficient causal nexus between a violation of the consumer protection statutes and damages in the form of restitution."). Indeed, class actions under the CLRA have failed where the evidence showed the defendant's message was not uniform, consumers received information about the product from myriad sources, and some consumers would use the product despite the risks. *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 133-34, 103 Cal. Rptr. 3d 83 (2009).

All in all, doubts remain about whether Premier has identified a true conflict. In this circumstance, one of the guiding principles of federalism breaks the tie: "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Thus, each state must decide for itself how to resolve these unanswered questions about the scope and evidentiary requirements needed to establish reliance. Until state courts clarify otherwise, this potential difference between the Minnesota and California statutes presumably is material. As discussed above, Minnesota's interest in regulating transactions occurring within its borders outweighs California's interest in the same. Given the fact that California's interest in transactions in Minnesota is attenuated, the law of Minnesota should apply. *See Mazza*, 666 F.3d at 594.

2. *Scienter*

In *Mazza*, the Ninth Circuit observed, "[i]n cases where a defendant acted without scienter, a scienter requirement will spell the difference between the success and failure of a claim." 666 F.3d at 591. Premier asserts numerous states require proof of scienter that materially differs from those at issue under the CLRA. In particular, Premier contends the following states included in Sonner's proposed ten-state class require proof of various types of scienter: Michigan (intent to deceive) and Illinois and Minnesota (intent to induce reliance).

Sonner has shown that scienter is not an impediment to proceeding with a class of consumers from the ten states she has identified under the CLRA, which offers numerous ways to prove an unfair business practice some of which have a scienter requirement in place, such as "intent not to sell [goods] as advertised." Cal. Civ. Code § 1770(a)(9). This intent requirement aligns with the intent requirements of Michigan. *Compare* Mich. Comp. Laws Ann. § 445.903(1)(e) ("Representing that goods or services are of a particular standard, quality, or grade . . . if they are not"), *with* Cal. Civ. Code § 1770(a)(7) ("Representing that goods . . . are of a particular standard, quality, or grade . . . if they are not."); *see also Brownlow v. McCall Enters., Inc.*, No. 325843, 2016 Mich. App. LEXIS 778, 2016 WL 1576919 (Mich. Ct. App. Apr. 19, 2016) (rejecting the contention that plaintiffs had to prove the defendant had actual knowledge of the misrepresentation or reckless disregard for the truth when asserting goods were advertised as having qualities they did not).

The trouble for Sonner is that, in contrast to the CLRA, "[t]he UCL does not impose a scienter requirement." *Lazebnik v. Apple, Inc.*, No. 5:13-CV-04145-EJD, 2014 U.S. Dist. LEXIS 121408, 2014 WL 4275008, at *7 (N.D. Cal. Aug. 29, 2014); *see also Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 181, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (2000) ("[A] plaintiff need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct."). The fact Illinois, Michigan, and Minnesota impose any intent requirement at all therefore renders Michigan's law materially in conflict with the UCL. As explained above, California's interest in the application of its law to transactions occurring in Michigan is attenuated, and therefore Michigan's law should govern these potential claims.

3. *Remedies Available*

The remedies the CLRA and UCL offer vary considerably. The UCL offers limited remedies—restitution and injunctive relief. *In re Vioxx* Cases, 180 Cal. App. 4th 116, 131-32, 103 Cal. Rptr. 3d 83 (2009), whereas the CLRA offers plaintiffs a chance to obtain actual and punitive damages, restitution, injunctive relief, and mandatory attorney fees for a prevailing plaintiff. Cal. Civ. Code §§ 1780(a), (e). Premier has identified differences in the way all fifty states have chosen to compensate victims of misleading advertising. Some states, like California, award punitive damages, while some do not. Other states agree with the policies underlying awards of punitive damages, but choose instead to authorize treble damages. Moreover, some states take different approaches to the

calculation of actual damages. All of these differences, Premier argues, are material and preclude application of California law to the proposed ten-state group. Sonner lumps the two statutes together without differentiating the two, an unsatisfactory approach—particularly in light of the variations between remedies offered under the ten state statutes.

a. *Punitive Damages*

Premier points out that Florida and Michigan do not affirmatively permit plaintiffs to recover punitive damages; each of these states remains silent on the issue. *See* Fla. Stat. Ann. § 501.211(2); Mich. Comp. Laws Ann. § 445.911; Minn. Stat. §8:31(3a). State and federal courts interpreting these statutes have read this silence to mean punitive damages are unavailable under these statutes. *Nowicki-Hockey v. Bank of Am., N.A.*, 593 F. App'x 420, 421 (6th Cir. 2014) ("[W]e note that the MCPA lacks express language permitting exemplary damages. . . . The absence of such language in the authorizing statute—or clear legislative intent—precludes an award of exemplary damages under Michigan law." (citation omitted)); *LaFerney v. Scott Smith Oldsmobile, Inc.*, 410 So. 2d 534, 535-36 (Fla. Dist. Ct. App. 1982) ("[T]he court reversed an attorney fee award under [Fla. Stat. Ann. §] 501.2105 because it included time spent on a punitive damage claim, which is outside the scope of Chapter 501."); *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, No. 99-MD-1309(PAM/JGL), 2004 U.S. Dist. LEXIS 7789, 2004 WL 909741, at *7 (D. Minn. Apr. 28, 2004) ("Because the statute that gives rise to Plaintiffs' cause of action contains no authorization for punitive

damages, the Court finds that punitive damages are not available in actions based on the CFA.").

Sonner apparently concedes the statutes that do not permit punitive-damages awards materially conflict with the CLRA, but insists California's interests outweigh those of Florida, Michigan, and Minnesota. To support this contention, she relies on the fact California believes strongly in awarding punitive damages for violations of the CLRA as a mechanism to remedy a public wrong. Indeed, at least one district court concluded "punitive damages are . . . a 'fundamental' part of the [CLRA's] statutory scheme." *Walter v. Hughes Communs., Inc.*, 682 F. Supp. 2d 1031, 1041 (N.D. Cal. 2010). In contrast, Sonner contends, the legislatures of Florida, Michigan, and Minnesota are agnostic about the value of punitive damages, which she views as tantamount to indifference.

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Our federal system allows states to reach different conclusions about whether to authorize punitive damages and when to permit awards of such damages. *See id.* at 568-72 (describing the various consumer protection statutes as "a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States."). The silence of Florida, Michigan, and Minnesota should not be taken as an expression of indifference. In many respects, their silence speaks volumes: they have chosen not to adopt California's preferred mechanism for

protecting consumers. States need not affirmatively state they decline to expose business to the threat of punitive damages for it to be so. Moreover, states may choose to limit corporations' liability in an effort to "attract[] foreign businesses, with resulting increase in commerce and jobs" by limiting liability and punishment. *Mazza*, 666 F.3d at 592. Thus, the interests of those states that choose not to permit punitive damages overshadow California's separate interest.

b. *Treble Damages*

Premier further notes Massachusetts and Washington have chosen to make available treble damages instead of punitive damages in the appropriate circumstances.[3] New Jersey has chosen to make treble-damages awards mandatory. *See* N.J. Stat. Ann. § 56:8-19. Sonner suggests there is no true conflict between punitive damages in cases of oppression,[4] fraud, or malice,[5] *Trammell v. W.*

3. Premier argues New York permits treble damages; however, no such remedy is available when a plaintiff brings class claims. *Alicea v. Circuit City Stores, Inc.*, No. 07 CIV. 6123DC, 2008 U.S. Dist. LEXIS 7336, 2008 WL 170388, at *1 (S.D.N.Y. Jan. 22, 2008) ("[B]ecause Alicea is bringing a class claim under N.Y. GBL § 349(h), N.Y. Civil Procedure Law & Rules . . . 901(b) precludes Alicea from seeking treble damages." (citing N.Y. C.P.L.R. § 901(b) (McKinney 2006)).

4. "California defines "oppression" as "subjecting a person to cruel and unjust hardship in conscious disregard of his rights." *Trammell*, 57 Cal. App. 3d at 557.

5. Malice" is "a motive and willingness to vex, harass, annoy or injure." *Trammell*, 57 Cal. App. 3d at 557. Plaintiffs may prove a

Union Tel. Co., 57 Cal. App. 3d 538, 557, 129 Cal. Rptr. 361 (1976), and treble damages for willful or knowing violations because both systems are designed to punish more culpable actors and to deter future misconduct, *see Kraft Power Corp. v. Merrill*, 464 Mass. 145, 981 N.E.2d 671, 685-86 (Mass. 2013) ("Like punitive damages in tort actions, multiple damages . . . can no longer achieve the goals of punishing a defendant or deterring him from future misconduct when the wrongdoer has died . . . .").

Despite some similarities, treble damages differ from punitive damages in one significant way: there is a set maximum amount a plaintiff may receive. In Washington, for example, the Consumer Protection Act caps treble damages at $25,000. Wash. Rev. Code §19.86.090. Washington's decision to limit treble damages reflects a policy decision to limit the risk of advertising and selling in an effort to encourage businesses to offer products within its borders. Thus, as in *Mazza*, application of California's law would impair the policy preferences of the states where the advertising occurred. *See* 666 F.3d at 594 (concluding the state where the communication of advertisements took place have an interest in the application of their laws to transactions between their citizens and businesses operating in the state). Here, that would mean the interests of Massachusetts, New Jersey, and Washington outweigh those of California.[6]

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defendant acted with malice by showing "the defendant's wrongful conduct was willful, intentional, and done in reckless disregard of its possible results." *Id.* (internal quotation marks omitted).

6. Sonner contends these conflicts can be resolved by awarding the New Jersey plaintiffs automatic treble damages if she prevails at trial. While that solution may be responsive on the

c. *Actual Damages vs. Restitution*[7]

The final material differences at issue concern restitution and actual damages and the different approaches to calculating actual damages. The UCL permits plaintiffs to recover only restitution—the "difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015).[8] In contrast, Washington does not; it awards only actual damages under their consumer protection laws. *See Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1217 (W.D. Wash. 2011) (restitution is permitted

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issue of predominance for class certification, it is not helpful to the choice-of-law analysis required here.

7. Some states choose to include emotional or mental distress damages under the umbrella of "actual damages" in appropriate circumstances. *See Lozada v. Dale Baker Oldsmobile, Inc.*, 136 F. Supp. 2d 719, 728 (W.D. Mich. 2001) ("Michigan law permits the recovery of mental distress damages in cases under the MCPA when those damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated." (internal quotation marks omitted)). Sonner excludes claims for personal injury or emotional distress damages, and therefore there is no material conflict with the law of Michigan or of any other state that would permit such claims.

8. Contrary to Premier's assertion, the rule for calculating restitution articulated in *Pulaski* was the standard applied in this case. Sonner may prove consumers would not have paid any money if the Joint Juice package did not advertise the purported joint health benefits of glucosamine and chondroitin.

only in actions the attorney general initiates) (citing Wash. Rev. Code § 19.86.080; *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 510 P.2d 233, 241-42 (Wash. 1973)).

Washington's preference for actual damages creates a conflict with the UCL, but not the CLRA, which permits recovery of actual damages. In her motion for class certification, however, Sonner focused on whether restitution could be determined on a classwide basis and did not offer argument or evidence with respect to actual damages. Accordingly, there is no basis to conclude she seeks actual damages under the CLRA, and the conflict remains.[9]

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9. Whether California calculates "actual damages" differently from other states remains unclear. The CLRA does not define "actual damages," but "in the context of common law fraud, California courts have defined [the term] to mean 'those which compensate someone for the harm from which he or she has been proven to currently suffer or from which the evidence shows he or she is certain to suffer in the future.'" *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1146 (N.D. Cal. 2005) (quoting *Saunders v. Taylor*, 42 Cal. App. 4th 1538, 1543, 50 Cal. Rptr. 2d 395 (1996)). Some states—Illinois and Florida, for example—calculate damages using the "benefit of the bargain" model: the difference between the market value of the product received and the value of the product if it performs as advertised. *See Guido v. L'Oreal, USA, Inc.*, No. CV 11-1067 CAS JCX, 2013 U.S. Dist. LEXIS 94031, 2013 WL 3353857, at *14 (C.D. Cal. July 1, 2013) (describing how to calculate the benefit of the bargain); *Baptist Hosp., Inc. v. Baker*, 84 So. 3d 1200, 1204 (Fla. Dist. Ct. App. 2012) (noting that under the FDUTPA plaintiffs must prove "actual damages" defined as "the difference in the market value

In sum, Premier has carried its burden to show that California's interest in applying its law to the consumers in the specific ten states is weak. Sonner's proposed ten-state class is therefore not appropriate under the facts and circumstances of this case.

IV. CONCLUSION

The facts and circumstances presented in this case compel the conclusion that neither a nationwide class nor a ten-state class is appropriate. Accordingly, the class will remain limited to California consumers.

IT IS SO ORDERED.

Dated: June 20, 2016

/s/ Richard Seeborg
RICHARD SEEBORG
United States District Judge

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of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties."); *Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954, 957 (N.D. Ill. 2008) (stating that Illinois's consumer protection law entitles a plaintiff "to be placed in the same financial position she would have been absent the misrepresentation."). Neither party has offered any argument about whether these methods conflict, and therefore there is no need to address that point now.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 18, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 22-16375, 22-16622

D.C. No. 3:16-cv-06980-RS
Northern District of California, San Francisco

MARY BETH MONTERA, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

PREMIER NUTRITION CORPORATION,
FKA JOINT JUICE, INC.,

Defendant-Appellee.

Filed October 18, 2024

ORDER

Before: S.R. THOMAS, HAMILTON* and CHRISTEN, Circuit Judges.

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* The Honorable David F. Hamilton, United States Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

Appendix F

Judge Christen votes to deny the petition for rehearing en banc, and Judge Thomas and Judge Hamilton have so recommended. The full court has been advised of Defendant-Appellees' 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.

The petition for rehearing en banc (Dkt. #75) is DENIED.

APPENDIX G — MOTION FOR CERTIFICATION TO THE NEW YORK COURT OF APPEALS, FILED APRIL 28, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 22-16375, 22-16622

MARY BETH MONTERA,

Plaintiff-Appellant-Cross-Appellee,

v.

PREMIER NUTRITION CORPORATION,

Defendant-Appellee-Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of California
Civil No. 3:16-cv-06980-RS
The Honorable Richard Seeborg

Filed April 28, 2023

DEFENDANT-APPELLEE-CROSS-APPELLANT'S MOTION FOR CERTIFICATION TO THE NEW YORK COURT OF APPEALS

Appendix G

INTRODUCTION

This is a New York class action based on New York sales of Joint Juice, a drinkable glucosamine supplement. Plaintiff Mary Beth Montera, a New York resident, raises claims under New York's General Business Law ("GBL") §§ 349 and 350, which forbid deceptive practices and advertisements.

Clear New York law governing the element of injury and providing a regulatory safe harbor require this Court either to enter judgment for Defendant Premier Nutrition Corporation ("Premier") or, at minimum, to order a new trial with corrected jury instructions. Premier addresses these issues in its contemporaneously filed principal and response brief.

New York law governing the elements of causation and a deceptive practice or advertisement further require the Court either to enter judgment for Premier or to decertify the class. Although Premier believes that New York law compels a ruling in its favor on these points as well, it recognizes that the New York Court of Appeals has not yet directly addressed them. If this Court believes that those issues present a close question of law and otherwise satisfy the criteria for certification, *see infra*, it should certify the following questions to the New York Court of Appeals:

Question 1: Whether GBL §§ 349 and 350 authorize claims based on substantiated statements regarding a product's efficacy.

Question 2: Whether plaintiffs who allege that their injury was buying a product they otherwise would not have purchased must prove that they made the purchases because of the alleged deceptive practice or false advertising to satisfy GBL §§ 349(h) and 350-e(3)'s requirement that the plaintiff was "injured by reason of [the] violation."

Both questions will have wide-ranging and long-lasting effects on millions of New York consumers and the countless businesses that sell products to them. The New York Court of Appeals has not had an opportunity to answer these questions, and it may *never* have such an opportunity on direct appeal because class actions for statutory damages under GBL §§ 349(h) and 350-e(3) cannot be brought in state court. The certification process thus presents the only real opportunity for these questions to be addressed.

When questions like this arise, this Court has long held that certification is desirable to allow a state's high court the opportunity to interpret state law in the first instance. Therefore, if the Court does not find that New York law is clear, Premier requests certification to the New York Court of Appeals.[1] *See* N.Y. Ct. of Appeals Rule

1. Plaintiff opposes this motion. The district court's order denying Premier's motions for judgment as a matter of law and to decertify and granting Plaintiff's motion for entry of final judgment is attached as Exhibit A to this motion. The district court's order denying Premier's renewed motion for judgment as a matter of law and motion for a new trial is attached as Exhibit B to this motion.

500.27 (accepting certification of "dispositive question of law" where no "controlling precedent of the Court of Appeals exists").

If the Court certifies the above two liability questions, the Court may also certify two further questions addressing remedies if it does not find the law clear:

Question 3: Whether GBL §§ 349(h) authorizes a plaintiff "to recover his actual damages or fifty dollars, whichever is greater," as the statute states, or instead the plaintiff's actual damages or fifty dollars per *transaction*, as the district court held. And likewise, whether GBL §§ 350-e(3) authorizes a plaintiff "to recover his actual damages or five hundred dollars, whichever is greater," as the statute states, or instead the plaintiff's actual damages or five hundred dollars per *transaction*, as the district court held.

Question 4: Whether a court may award prejudgment interest on statutory damages under GBL §§ 349(h) and 350-e(3), and if so, to what extent.

ARGUMENT

Certification to a state's highest court "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). As this Court has recognized,

state courts should be accorded the first opportunity to decide significant issues of state law through the certification process. *See Yamashita v. LG Chem., Ltd.*, 48 F.4th 993, 1003 (9th Cir. 2022) (certifying a question of state law and explaining that this Court "opt[s] not to deprive [the state] of this opportunity, potentially rare, to interpret its own law"). Indeed, the principles of federalism and comity require as much. *See id.*; *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003) ("In a case such as this one that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause us to seek certification.").

Against that backdrop, this Court may certify a question to the highest court of a state after considering "(1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.'" *High Country Paving, Inc. v. United Fire & Casualty Co.*, 14 F. 4th 976, 978 (9th Cir. 2021) (quoting *Kremen*, 325 F.3d at 1037-38).

These factors are present across the questions outlined above.

A. The Proposed Questions Present Important, Unresolved Question by the New York Court of Appeals.

First, the proposed certified questions present "'important public policy ramifications' yet unresolved

by the state court." *See id.* Specifically, by addressing the core of liability under the GBL §§ 349 and 350 and the scope of available relief, these questions directly implicate New York's policy choices on the balance between protecting New York consumers from deceptive practices and protecting businesses operating in New York from unfounded, annihilating statutory damages.

For example, the first question, regarding whether GBL §§ 349 and 350 authorize claims based on substantiated statements regarding a product's efficacy, addresses whether one small set of individuals sitting on a jury—perhaps, as in this case, not even individuals from New York—can decide for everyone else in New York whether they can even be given information about a product and make their own choices. Questions of efficacy are notoriously difficult to answer. The science is often uncertain. Deciding whether substantiated statements addressing efficacy will be effectively precluded in New York because they may also be subject to a jury's subjective judgment of deceptiveness is a critically important issue of policy that should be decided by New York's high court.

Relatedly, the third question, regarding whether statutory damages are awarded per person or per transaction basis, determines whether a company that predicts incorrectly which scientific studies a jury will choose to believe will be subject to a large judgment or instead an annihilating one. Similarly, whether prejudgment interest is available on statutory damages that exceed any possible measure of actual harm is a question with equally significant consequences for the

marketplace. As explained in Premier's principal brief, the New York Court of Appeals is clear that prejudgment interest is not meant to be a penalty. *J. D'Addario & Co. v. Embassy Indus.*, 980 N.E.2d 940, 942-43 (N.Y. 2012). If this Court finds it unclear, the New York Court of Appeals should be afforded the chance to address the issues.

All four questions presented address not only how to construe a New York statute but also how to understand the core of the GBL's legislative intent. The New York Court of Appeals is in the best position to make that determination in the first instance. *Cf. Barlow v. State*, 38 F.4th 62, 66-67 (9th Cir. 2022) (certifying a question of state law and explaining that "certification is 'particularly appropriate' where, as here, the issues of law are not only unsettled but also have 'significant policy implications'") (quoting *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 793 F.3d 1087, 1089 (9th Cir. 2015)).

B. The Proposed Questions Raise Substantial Issues of Broad Application.

Second, the proposed questions raise issues that are substantial and of broad application. New York is home to nearly 20 million consumers, and countless companies conduct business in the State. If the judgment below stands, it threatens to unleash a wave of litigation against a wide range of manufacturers and retailers. In addition, the questions concern the core elements of any claim asserted under GBL §§ 349 or 350, along with the way in which damages are awarded. As a consequence, these questions are likely to recur, especially in the federal courts.

In addition, one of the questions will entirely evade direct review by the New York appellate courts and the others are unlikely to arise on direct appeal. Namely, the question whether the unit of analysis for statutory damages under the GBL is the purchasing consumer or the purchase itself will recur in virtually every case that arises under GBL §§ 349 or 350 and will determine whether the GBL operates as reasonable tool in New York's consumer-protection toolkit or instead a cudgel that coerces settlement of even marginal claims. For example, in this case, Plaintiff's own damages would vary from $1,000 in actual damages (if GBL § 350's $500 statutory damages are awarded on a per-person basis and therefore in an amount less than her actual damages) to over $60,000 (if statutory damages are awarded on a per-transaction basis). 7-ER-1132:17-1133:1.

This question will likely *never* surface to the New York Court of Appeals because New York law bars the recovery of statutory damages in class actions. *See* N.Y. C.P.L.R. § 901(b). After *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), plaintiffs are, however, free to bring class actions and seek aggregate statutory damages in federal court. This puts federal courts in the position of repeatedly determining how to wield the GBL without the benefit of insight from any of the New York appellate courts, let alone the New York Court of Appeals. Where a question will evade review by the state's highest court without certification, certification is especially appropriate. *See Yamashita*, 48 F.4th at 1002-03 (certifying a question of state law where "there is a chance that any such cases

[raising the question] end up in federal court—thereby indefinitely denying the state an opportunity to pass upon its own law") (citation omitted).

This case is not the first time this question has surfaced to a federal court without resolution. *See Porsch v. LLR, Inc.*, 18cv9312 (DLC), 2019 WL 3532114, at *3 n.2 (S.D.N.Y. Aug. 2, 2019) (noting that the defendant argued that "statutory damages under GBL § 349 are only available per plaintiff, not per transaction, and that the number of class plaintiffs is far lower than the number of transactions at issue here" but declining to resolve the question "[b]ecause the claimed damages do not aggregate to $5 million under either theory" and instead assuming, for purposes of the decision, "without deciding that statutory damages are available per violation under GBL § 349").

Even though the other questions could eventually surface in the New York courts, it is unlikely they will arise outside the context of a class action, which means they will recur most frequently in federal court. Hence, there is no reason to "deprive [New York] of this opportunity, potentially rare, to interpret its own law" and address the scope of claims and available relief under its consumer-protection regime. *Id.* at 1003.

C. The Spirit of Comity and Federalism Weighs in Favor of Certification.

Third, certifying the proposed questions would further the "the spirit of comity and federalism." *See*

High Country Paving, Inc., 14 F. 4th at 978; *Lehman Brothers*, 416 at 391 (determining certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism").

These questions address foundational issues concerning the types of claims the New York legislature authorized, the scope of relief available for such claims, and the potential interaction between this statute and background constitutional principles protecting free speech. Respect for New York as a distinct sovereign and for the New York Court of Appeals as the final authority on the construction of that state's positive laws weigh heavily in favor of certification. *See Yamashita*, 48 F.4th at 1002 (explaining that by assuming the answer to unresolved questions of state law, "[this] Court would inadvertently infringe the sovereign power of a state in denying the state's courts' an opportunity first to answer the question").

Moreover, as this Court recently explained, this problem is compounded by the fact that "[a]lthough only state courts may issue authoritative interpretations of state law, parties and lower courts often heed the Ninth Circuit's state-law musings." *Id.* As a result, absent certification, "should a future case arise in the Ninth Circuit, it is almost certain that [this] Court will simply cite back to its first case to consider the issue, without even considering certification." *Id.* Doing so will continue to deprive the New York Court of Appeals of the opportunity to interpret New York law and answer these questions in the first instance.

As discussed above, these questions require a close understanding of the critical value judgments and public policy choices made by the New York Legislature in crafting the GBL. Principles of federalism have long held that that type of inquiry is best suited for the highest state court rather than the "speculation by a federal court." *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring))).

D. The New York Court of Appeals Accepts Sufficiently Important Questions Such as These Questions.

Finally, although the New York Court of Appeals' caseload is robust, it nevertheless accepts certified questions when they are sufficiently important to the people and law of New York, as these questions are. *See*, *e.g.*, *Donohue v. Cuomo*, 184 N.E.3d 860, 865-66 (N.Y. 2022) (answering two questions certified by the Second Circuit regarding vesting of retiree health insurance rights when construing a collective bargaining agreement under New York law); *CIT Bank, N.A. v. Schiffman*, 168 N.E.3d 1138, 1141 (N.Y. 2021) (answering two questions certified by the Second Circuit regarding New York's Real Property Actions and Proceedings Law); *NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 488 (N.Y. 2011) (answering three questions certified by the Second Circuit

regarding the proper construction of bond provisions and the calculation of prejudgment interest under New York law); *Penguin Group (USA) Inc. v. American Buddha*, 946 N.E.2d 159 (N.Y. 2011) (answering a question certified by the Second Circuit, which recognized a split of authority in the New York district courts regarding the New York's long-arm jurisdiction in copyright infringement cases).

CONCLUSION

For the foregoing reasons, if the Court has any doubts about the conclusiveness of the answers to the questions outlined above, Premier requests that the questions be certified to the New York Court of Appeals.

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Appendix G

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