

APPENDIX TABLE OF CONTENTS

Appendix A: Opinion of the United States Court of Appeals for the Ninth Circuit (May 19, 2026)	1a
Appendix B: Order by the United States Court of Appeals for the Ninth Circuit (January 24, 2025)	6a
Appendix C: Order by the United States District Court for the District of Oregon (September 27, 2024)	8a
Appendix D: Order by the United States District Court for the District of Oregon (July 16, 2024)	11a
Appendix E: United States Constitution, art. III, §§ 1, 2.	53a
Appendix F: Fed. R. Civ. P. 23	55a

APPENDIX A

NOT FOR PUBLICATION

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

[DATE STAMP]

FILED

MAY 19 2026

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

ELISHA SOLANO; KATHLEEN ZACH;
DENISE CONROY, individually and on
behalf of other customers,

Plaintiffs - Appellees,

v.

THE KROGER CO., DBA Fred Meyer, Inc.,
Defendant - Appellant.

No. 25-536

D.C. No. 3:18-cv-01488-AR

MEMORANDUM*

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

Appeal from the United States District Court
for the District of Oregon
Jeffrey J. Armistead, Magistrate Judge, Presiding

Argued and Submitted February 3, 2026
Portland, Oregon

Before: CHRISTEN, HURWITZ, and DESAI, Circuit
Judges.

The Kroger Company (Fred Meyer) appeals a district court order granting class certification.¹ We have jurisdiction pursuant to 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). We review standing de novo, *In re Palmdale Hills Prop., LLC*, 654 F.3d 868, 873 (9th Cir. 2011), and the decision to certify a class for abuse of discretion, *DZ Rsrv. v. Meta Platforms, Inc.*, 96 F.4th 1223, 1231 (9th Cir. 2024). Underlying factual findings are reviewed for clear error. *In re Palmdale*, 654 F.3d at 873; *DZ Rsrv.*, 96 F.4th at 1232.

Fred Meyer argues that Article III precludes class certification because the class includes unnamed members who have not suffered an injury, and the named plaintiffs' injuries are self-inflicted. It also argues common issues do not predominate over individual issues. *See* Fed. R. Civ. P. 23(b)(3). We reject those arguments and affirm.

¹ Because the parties are familiar with the facts, we do not recount them here.

1. Fred Meyer contends that some unnamed class members did not suffer injury as of the time the complaint was filed because they received refunds for the bottle deposits Fred Meyer wrongfully collected from them. In Fred Meyer's view, this precludes certification because "[n]o class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006). To the contrary, we have squarely held that "Article III's requirements are satisfied before a class is certified as long as at least one named plaintiff has standing," regardless of "whether the class action seeks money damages or equitable relief." *Healy v. Milliman, Inc.*, 164 F.4th 701, 706 (9th Cir. 2026). Thus, even if the class contains uninjured, unnamed members, at class certification, our standing inquiry focuses on the named plaintiffs. *See id.* at 708 (holding that unnamed class members must demonstrate evidence of standing "after class certification but prior to trial at summary judgment").

2. Fred Meyer argues the named plaintiffs' claimed injuries cannot support standing because they failed to seek refunds from Fred Meyer for the wrongfully collected bottle deposits. To be sure, "self-inflicted injuries . . . not fairly traceable" to the defendant's conduct do "not give rise to standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *see also McConnell v. FEC*, 540 U.S. 93, 228 (2003). But the named plaintiffs' injuries were not self-inflicted, as the record shows only the possibility that they might have been able to obtain a refund if they sought one. Fred Meyer did not issue a product recall, expressly offer refunds, or even notify

consumers that it had erroneously charged bottle deposits. Some consumers may have been able to obtain refunds through Fred Meyer’s generic customer service programs, but the evidence suggests that Fred Meyer did not consistently provide refunds to customers who requested them. On this record, refunds were not so readily available that the failure to seek them may be fairly characterized as an instance of Plaintiffs “merely . . . inflicting harm on themselves.” *Clapper*, 568 U.S. at 416.

3. Fred Meyer argues the district court abused its discretion by concluding that Plaintiffs satisfied the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). Fred Meyer posits that any class member who received a refund has not suffered an injury and contends that determining whether each class member received a refund requires complex, individualized inquiries. But even assuming that some class members were adequately compensated through refunds, the district court reasonably found that common issues predominated over individual ones.

The possibility that a class “potentially includes more than a de minimis number of uninjured class members” does not preclude certification. *Olean v. Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc); *see also Lytle v. Nutramax Lab’ys, Inc.*, 114 F.4th 1011, 1026-27 (9th Cir. 2024). “When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions.” *Olean*, 31 F.4th

at 668; *see also Van v. LLR, Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023).

Here, the district court’s predominance determination “falls within a broad range of permissible conclusions.” *Olean*, 31 F.4th at 669 (citation modified). All class members suffered a common, ascertainable injury as a result of common conduct: they each paid a 10-cent premium for their orange juice products because Fred Meyer erroneously collected a bottle deposit. According to Fred Meyer, class members who received refunds either received a full refund for the orange juice they purchased or a refund of 10 cents. Thus, class members either: (i) received no refund; (ii) received a refund of 10 cents; or (iii) received a refund for the entire purchase price. Determining the category into which each class member falls may be an individualized inquiry, but it is not a particularly “involved” one. *See Lara v. First Nat’l Ins. Co. of Am.*, 25 F.4th 1134, 1139 (9th Cir. 2022); *see also Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469-71 (9th Cir. 2023). Nor does it demand an examination “into the circumstances and motivations behind” tens of thousands of individual discounts. *See Van*, 61 F.4th at 1069.

AFFIRMED.

APPENDIX B

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

[DATE STAMP]

FILED

JAN 24 2025

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

ELISHA SOLANO; et al.,
Plaintiffs - Respondents,

v.

THE KROGER CO., DBA Fred Meyer, Inc.,
Defendant - Petitioner.

No. 24-6235

D.C. No. 3:18-cv-01488

District of Oregon, Portland

ORDER

Before: BYBEE and MILLER, Circuit Judges.

The motion for leave to file a reply (Docket Entry
No. 5) is granted.

The petition for permission to appeal is granted.

See Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959-60 (9th Cir. 2005) (describing factors this court considers in analyzing a Rule 23(f) petition). Within 14 days, petitioner must comply with Federal Rule of Appellate Procedure 5(d)(1).

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

ELISHA SOLANO, DENISE CONROY, and
KATHLEEN ZACH, *individually and on behalf of
other customers*,
Plaintiffs,

v.

THE KROGER CO., *dba Fred Meyer*,
Defendant.

Case No. 3:18-cv-01488-AR

ORDER ADOPTING F&R

Michael R. Fuller, OlsenDaines, US Bancorp Tower,
111 SW 5th Ave., Ste. 3150, Portland, OR 97204.
Daniel Nichols, JurisLaw LLP, Three Centerpointe
Drive, Ste. 160, Lake Oswego, OR 97035. Kelly D.
Jones, Law Office of Kelly D. Jones, 819 SE Morrison
St., Ste. 225, Portland, OR 97214. Young Walgenkim,
Hanson & Walgenkim, LLC, 838 Commercial St. NE,
Salem, OR 97301. Attorneys for Plaintiffs.

Jacob M. Harper, James H. Moon, and Peter Bae
Davis Wright Tremaine, LLP, 865 South Figueroa St.,
Ste. 2400, Los Angeles, CA 90017. Kevin H. Kono,
Davis Wright Tremaine, LLP, 560 SW 10th Ave., Ste.
700, Portland, OR 97205. Frederick B. Burnside, Davis

Wright Tremaine, LLP, 920 5th Ave., Ste. 3300, Seattle, WA 98104. Attorneys for Defendant.

IMMERGUT, District Judge.

Before this Court is a Motion for Class Certification filed by Plaintiffs Elisha Solano, Denise Conroy, and Kathleen Zach, individually and on behalf of other class members, ECF 117, and a Motion to Deny Class Certification filed by Defendant Kroger Co. (Fred Meyer), ECF 113. On July 16, 2024, Magistrate Judge Armistead issued his Findings and Recommendation (“F&R”). ECF 151. Judge Armistead recommends that this Court grant Plaintiffs’ Motion for Class Certification; appoint plaintiffs Solano, Conroy, and Zach as Class Representatives; appoint plaintiffs’ attorneys as Class Counsel; and deny Fred Meyer’s Motion to Deny Class Certification. *See id.* Defendant timely filed objections to Judge Armistead’s F&R on August 20, 2024 (“Objections”). ECF 157. Plaintiffs timely filed a response to Defendant’s objections on September 17, 2024 (“Resp.”). ECF 160.

After de novo review of the F&R, objections, and response, this Court adopts the F&R.

DISCUSSION

Under the Federal Magistrates Act (“Act”), as amended, the court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). If a party objects to a magistrate judge’s F&R, “the court shall make a de novo determination of

those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.* But the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149–50 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Nevertheless, the Act “does not preclude further review by the district judge, sua sponte” whether de novo or under another standard. *Thomas*, 474 U.S. at 154.

This Court has reviewed de novo the portions of Judge Armistead’s F&R to which Defendant objected. This Court agrees with Judge Armistead’s analysis and ADOPTS the F&R, ECF 151, in full. Plaintiffs’ Motion for Class Certification, ECF 117 is GRANTED. Plaintiffs Solano, Conroy, and Zach are appointed as Class Representatives. Plaintiffs’ attorneys Michael Fuller, Kelly D. Jones, Daniel J. Nichols, and Young Walgenkim are appointed as Class Counsel. Fred Meyer’s Motion to Deny Class Certification, ECF 113, is DENIED.

IT IS SO ORDERED.

DATED this 27th day of September, 2024.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT DISTRICT OF OREGON

ELISHA SOLANO, DENISE CONROY, and
KATHLEEN ZACH, *individually and on
behalf of other customers*,
Plaintiffs,

v.

THE KROGER CO., *dba Fred Meyer*,
Defendant.

Case No. 3:18-cv-01488-AR

FINDINGS AND RECOMMENDATION ON CLASS CERTIFICATION

ARMISTEAD, Magistrate Judge

Plaintiffs Elisha Solano, Denise Conroy, and Kathleen Zach,¹ individually and on behalf of other customers, bring this putative class action against defendant The Kroger Co. (Fred Meyer) for alleged violations of Oregon's Unfair Trade Practices Act (UTPA), Oregon Revised Statutes §§ 646.608(1)(e) and

¹ A fourth named plaintiff, Carolyn Espinoza, passed away and her next of kin informed plaintiffs' counsel that Espinoza's estate does not wish to participate as proposed named plaintiff. (Pls.' Mot. Class Cert. at n.1, ECF No. 117.)

(s), and for unjust enrichment. Plaintiffs allege that Fred Meyer wrongfully collected 10-cent bottle deposits on their purchases of Florida's Natural Orange Juice (FNOJ) that were not redeemable because beverages in containers larger than 1.5 liters and in cartons were not covered by Oregon's Bottle Bill. Presently before the court are plaintiffs' motion for class certification and Fred Meyer's motion to deny class certification under Federal Rule of Civil Procedure 23. As explained below, Fred Meyer's motion should be DENIED, and plaintiffs' motion should be GRANTED.

BACKGROUND²

Oregon passed the Bottle Bill in 1971 to reduce litter and, since then, has successfully encouraged the recycling of beverage containers. The Bottle Bill requires retailers to pay beverage distributors a deposit (initially five cents, now 10 cents) for each beverage container (such as water, soda, beer) it purchases. The cost of that deposit is passed on to consumers who pay the deposit to the retailer when purchasing those beverages. Consumers may recoup or "redeem" their deposits when they return their empty beverage containers to a retail store, redemption center, or Bottle Drop Center in Oregon. Retailers provide the empty beverage containers to beverage distributors, who then return deposits to the retailer.

² The parties are familiar with factual background and procedural history of this case, and the court recounts it here only as necessary to resolve the pending motions.

For many years, the beverage containers covered by the Bottle Bill were limited to water, flavored water, soda water, mineral water, carbonated soft drinks, and beer and other malt beverages in container sizes up to three fluid liters. (Hillenbrand Decl. Ex. C, ECF No. 114-3.)

After redemption rates declined, the amount of the bottle deposit doubled from five cents to 10 cents in April 2017. (*Id.*) See generally ORS §§ 459A.700 *et seq.* The Oregon legislature also expanded the types of beverages and containers subject to the Bottle Bill. As of January 1, 2018, the expansion covered kombucha, hard seltzer, sports drinks, tea, coffee, fruit juice, energy drinks, and coconut water that are packaged in sealed glass, metal, and plastic containers in sizes from four fluid ounces to 1.5 liters (50.72 fluid ounces). ORS § 459A.702. (Hillenbrand Decl. Exs. A-C.) Beverages packaged in cartons, foil pouches, or drink boxes have never been subject to the Bottle Bill. (Nichols Decl. Ex. 15 at 2, ECF No. 121-15.) The Oregon Liquor Control Commission (OLCC) published several Frequently Asked Questions (FAQs) about the Bottle Bill expansion, including one on November 9, 2017, that stated that the “beverages covered under the Bottle Bill expansion will only have a refund value if they are in sealed glass, metal, or plastic bottles or cans in sizes from 4 ounces up to an including 1.5 liters” and that “[b]everages in cartons . . . are exempt even if they would otherwise qualify.” (*Id.*) And a January 2018 FAQ provided that “beverages in cartons . . . are not included even if the beverage and container size would otherwise have a refund value.” (*Id.* Ex. 16 at 2, ECF No. 121-16.)

After the Bottle Bill expansion took effect, Fred Meyer repeatedly charged a 10-cent deposit on purchases of beverages that were in cartons or were in containers too large to be redeemable. Fred Meyer admits that in 2018, it received 21 complaints from customers (directly or indirectly through the OLCC) about charging deposits on juice containers larger than 1.5 liters. (Nichols Decl. Ex. 47 at 14-16, ECF No. 121-47.) On February 1, 2018, Becky Voelkel with OLCC's Bottle Bill Program mailed a letter to Fred Meyer's corporate office concerning its compliance with the Bottle Bill. (Nichols Decl. Ex. 17, ECF No. 121-17.) That year, from February 5 to August 22, Voelkel emailed Fred Meyer managers many times about the erroneous deposit charges for juice containers. (Nichols Decl. Exs. 21-31, ECF Nos. 121-21 – 121-31.) Internal Fred Meyer emails confirm that it was aware of the complaints that OLCC received about erroneous bottle deposits. (Nichols Decl. Ex. 18, ECF No. 121-18.) Thousands of Fred Meyer customers, in plaintiffs' view, were charged 10-cent deposits on nonredeemable items in 2018. (Nichols Decl. Ex. 2 (Hillenbrand Dep. (3/11/22)) 58:24–59:4, ECF No. 121-2.)

Plaintiffs Solano, Zach, and Conroy purchased two types of FNOJ in 59-ounce cartons in the summer of 2018: (1) Florida's Natural 100% Premium Florida Orange Juice – No Pulp, UPC 1630016564 (FNOJ 564); and (2) Florida's Natural 100% Premium Florida Orange Juice – No Pulp with Calcium & Vitamin D, UPC 1630016567 (FNOJ 567). (Nichols Decl. Exs. 32-38 (plaintiffs' receipts), 46 (container images), ECF Nos. 121-32 to 121-38, 121-46.) Plaintiffs assert that FNOJ 564 and 567 were not redeemable because they

were cartons and were larger than 1.5 liters. Plaintiffs each were charged 10-cent deposits when they bought their FNOJ 564 and FNOJ 567 beverages, and none have received refunds or redeemed their deposits. In this putative class action, plaintiffs allege that by charging a 10-cent deposit for containers that were not redeemable, Fred Meyer violated Oregon's UTPA, ORS §§ 646.608(1)(e) and (s), and was unjustly enriched.

Plaintiffs seek to certify a Class defined as follows:

Oregon Fred Meyer customers who, (a) on or after January 1, 2018, and on or before November 1, 2018, (b) paid an additional 10-cent deposit charge to Fred Meyer, (c) for a Florida's Natural 100% Premium "No Pulp" (UPC 1630016564) or No Pulp with Calcium (UPC 1630016567) orange juice product, which was not redeemable for a refund of the 10-cent deposit charge under Oregon law.

(Pls.' Mot. Class Cert. at 8, ECF No. 117.) Plaintiffs request two additional orders: (1) appointing Solano, Conroy, and Zach as Class representatives; and (2) appointing their attorneys, Michael Fuller, Kelly D. Jones, Daniel J. Nichols, and Young Walgenkim, as Class counsel. According to plaintiffs, they satisfy the Rule 23(a) & (b)(3) requirements and will represent the thousands of Oregonians who suffered an ascertainable loss of 10 cents for each purchase of FNOJ 564 and FNOJ 567 that were not redeemable under the Bottle Bill.

Fred Meyer opposes class certification and separately moves to deny class certification as permitted by Rule 23(c)(1)(A). In that motion, Fred Meyer argues that, because Solano, Zach, and Conroy did not attempt to receive a refund of their deposits from Fred Meyer or otherwise redeem their orange juice containers, they lack Article III standing to challenge Fred Meyer's conduct because they have not suffered an injury-in-fact. Rule 23(c)(1)(A) permits a defendant to bring a preemptive motion to deny class certification. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009); FED. R. CIV. P. 23(c)(1)(A) (providing that the court should decide whether to certify a class action “[a]t an early practicable time”).

Because standing is a threshold determination, the court begins with Fred Meyer's motion, then turns to class certification under Rule 23.³ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 556 (1992); *Perez v. Nidek Co.*, 711 F.3d 1109, 1113-14 (9th Cir. 2013) (discussing Article III standing before class certification); *see also Flecha v. Medicredit, Inc.*, 946 F.3d 762, 769 (5th Cir.

³ Plaintiffs argue that Fred Meyer's motion to deny class certification is a disguised Rule 12(b)(1) factual challenge to this court's subject matter jurisdiction. Plaintiffs suggest that Fred Meyer's motion is untimely or intended to delay. Those arguments are not well taken. It is well-settled that standing is fundamental to this court's authority and may be raised at any time. *See In re Apple iPhone Litig.*, 846 F.3d 313, 319 (9th Cir. 2017), *aff'd sub nom. Apple v. Pepper*, 139 S. Ct. 1514 (2019); FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

2020) (“[I]f it is the *class representative* who presents a standing problem, then *that* standing issue must be addressed first, prior to deciding class certification. After all, if the class representative lacks standing, then there is no Article III suit to begin with – class certification or otherwise.”).

DISCUSSION

A. *Fred Meyer’s Motion to Deny Class Certification*

To establish standing under Article III of the Constitution, plaintiffs must show the “irreducible constitutional minimum,” meaning they have: “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An “injury in fact” is “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (simplified); *Van v. LLR, Inc.*, 61 F.4th 1053, 1063 (9th Cir. 2023). “Article III standing requires a concrete injury even in the context of a statutory violation.” *Spokeo*, 578 U.S. at 341; *TransUnion, LLC v. Ramirez*, 594 U.S. 413, 427 (2021) (“[A]n injury in law is not an injury in fact.”).

The elements of standing “must be supported at each stage of litigation in the same manner as any other essential element of the case.” *Lujan*, 504 U.S. at 560-61. Plaintiffs must show standing for “each claim

that they press and for each form of relief that they seek (for example, injunctive relief and damages).” *Id.* (providing that “standing is not dispensed in gross”). “Because the preponderance of the evidence standard applies at the class certification stage, standing at the time of class certification must be established by a preponderance of the evidence.” *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1240 (9th Cir. 2024). “In a class action, standing is satisfied if at least one named plaintiff meets the requirements.” *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir. 2014). Finally, “[e]very class member must have Article III standing in order to recover individual damages.” *TransUnion*, 594 U.S. at 431 (“Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring))).

“If a defendant has caused a physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.” *TransUnion*, 594 U.S. at 425. “For standing purposes, a loss of even a small amount of money is ordinarily an injury.” *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) (internal quotation marks omitted). The Ninth Circuit recently underscored that sentiment: “[a]ny monetary loss, even one as small as a fraction of a cent, is sufficient to support standing.” *Van*, 61 F.4th at 1064 (citing *TransUnion*, 594 U.S. at 425).

Fred Meyer argues that plaintiffs lack Article III standing to assert their claims because none of them attempted to return their FNOJ containers and did not

suffer an actual injury under the UTPA. Fred Meyer contends that under plaintiffs' deposit-based claim, they can establish an injury-in-fact only if they can show that they attempted to return their empty FNOJ containers and were denied. (Def.'s Reply at 2, 12.) As support, Fred Meyer proffers evidence that thousands of other Fred Meyer customers received bottle deposit refunds and that about 1,275 customers received refunds of FNOJ 564 and 567 bottle deposits under its refund programs. That evidence, Fred Meyer contends, shows that plaintiffs could have received refunds of their bottle deposits had they tried. Because plaintiffs did not attempt to return their FNOJ containers, in Fred Meyer's view, their injuries are self-inflicted and they lack Article III standing, relying on *Hamilton v. General Mills*, Civ. No. 6:16-cv-382-MC, 2016 WL 4060310, at *1, (D. Or. July 27, 2016), and *Nguyen v. Cree, Inc.*, Case No. 3:18-cv-02097-SB, 2019 WL 7879879, *adopted in part by* 2019 WL 6917887, at *2 (D. Or. Dec. 17, 2019).⁴

Plaintiffs have adequately demonstrated an injury-in-fact under Article III and an ascertainable loss under Oregon's UTPA to establish standing; Fred Meyer's arguments to the contrary are unavailing for three fundamental reasons. First, plaintiff's diminished value theory of ascertainable loss is the

⁴ Fred Meyer contends that the court need not distinguish between Article III standing and statutory standing under the UTPA because both injuries require plaintiffs to show that they paid more than the objective market value and that the alleged overpayment was due to Fred Meyer's conduct. (Def.'s Reply at 10-11 n.6, ECF No. 146.)

type of economic injury that that the Ninth Circuit has repeatedly determined satisfies the injury-in-fact element of standing under Article III. *See McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 706 (9th Cir. 2020) (explaining that the Ninth Circuit has “consistently recognized that a plaintiff can satisfy the injury in fact requirement by showing that she paid more for a product than she otherwise would have due to a defendant’s false representations about the product”); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) (holding that allegations that plaintiffs “were relieved of their money by Honda’s deceptive conduct” was an injury-in-fact under Article III), *overruled on other grounds by Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (“Plaintiffs claim that, as a result of defendants’ actions, they paid more for their homes than the homes were worth at the time of sale. . . . Allegedly, plaintiffs spent money that, absent defendants’ actions, they would not have spent. This is a quintessential injury-in-fact.” (citations omitted)); *see also In re Arris Cable Modem Consumer Litig.*, 327 F.R.D. 334, 354 (N.D. Cal. 2018) (stating allegations that plaintiff bought modems they would not have otherwise, or paid more for modems than they otherwise would have had they understood their true capabilities, was classic injury-in-fact to support Article III standing).

Second, plaintiffs need not return their empty containers to *Fred Meyer* to “redeem” them under Oregon’s Bottle Bill. As discussed above, Oregon’s Bottle Bill permits consumers to redeem their deposits

in several ways, such as returning their empty beverage containers to a retail store, placing them in a reverse vending machine, returning them to a redemption center, or returning them to a Bottle Drop center. Consumers need not return their empty beverage containers to the retail store from which those beverages were purchased to receive a refund of their 10-cent deposit. Thus, plaintiffs need not show that they sought refunds of their FNOJ 564 and 567 bottle deposits from *Fred Meyer* to show that their empty containers were not “redeemable” under Oregon law.⁵

And, even if plaintiffs were required to show that they attempted to redeem their empty FNOJ containers, representative Zach did attempt to “redeem” her empty FNOJ container as permitted under Oregon’s Bottle Bill. Zach testified in her deposition that she fed her empty FNOJ container through a reverse vending machine multiple times, that the container was rejected, and that she did not receive her 10 cents back at that time. (Harper Decl. Ex. G, Zach Dep. 26:14-17, 57:24–58:3 (stating that she attempted to run the container through the

⁵ Fred Meyer asserts that all bottle deposits it collects, including those from FNOJ 564 and 567, are segregated for accounting purposes, and are remitted to the state under the “auspices of the Oregon Recycling Bottle Collective.” (See Hillenbrand Supp. Decl. ¶ 4, ECF No. 142.) Plaintiffs contend that the state does not play a role in the collection of bottle deposits. (Pls.’ Reply Class Cert. at 45-46, ECF NO. 147.) That factual dispute is best left for the merits phase of litigation and need not be resolved here.

redemption machine a few times, it was rejected, then she put it in the trash), ECF No. 115-2.)⁶ Therefore, to the extent plaintiffs are required to show that they attempted to “redeem” their FNOJ containers to demonstrate standing as argued by Fred Meyer, they have done so. *Ollier*, 768 F.3d at 865 (“In a class action, standing is satisfied if at least one named plaintiff meets the requirements.” (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)).⁷

⁶ Fred Meyer contends that because Zach identified the orange juice container as “clear plastic,” it is questionable whether she purchased a product that is part of this class action. (Def.’s Mot. Deny Class Cert. at 8, ECF No. 113.) Zach produced a receipt bearing UPC 567. (Nichols Decl. Ex. 33, ECF No. 121-33.) On a motion for class certification, plaintiffs’ burden is to show by a preponderance of the evidence that class certification is an appropriate method of adjudication. Plaintiffs have satisfied this burden. Any discrepancy between Zach’s description of the container at her deposition and her product receipt relates to her credibility as a witness, an inquiry best explored during the merits phase of discovery or trial.

Plaintiffs also cite other evidence showing that other Fred Meyer customers that attempted to redeem exempt containers at Redemption Centers were unable to do so. (Nichols Decl. Nos. 121-25 & 121-27 (emails to OLCC stating that Redemption Center would not accept empty containers, and that they should recover deposits from Fred Meyer).)

⁷ Because plaintiffs have established they have an injury-in-fact under their primary argument (the loss of 10 cents due to the improper bottle deposit), the court declines to address plaintiffs’ alternative argument that the “time value of money” also qualifies as an injury-in-fact.

And third, the evidence shows that Fred Meyer's refund programs are far afield from the ones in *Hamilton* and *Nguyen*, making those cases distinguishable. In *Hamilton*, a trucking incident led to wheat flour contaminating oat flour that was used to make gluten-free Cheerios cereal on specific production dates. General Mills, the Cheerios manufacturer, worked with the United States Food and Drug Administration to issue "a widely-advertised voluntary recall and refund program for the cereals produced on those dates." 2016 WL 4060310, at *1. Plaintiff Christopher Hamilton, who had celiac disease, purchased two twin-packs of the mislabeled cereal and sought to bring a class action on behalf of consumers alleging various claims, including Oregon's UTPA. District Judge Michael McShane determined that, although Hamilton purchased the mislabeled Cheerios because he thought they were gluten-free, he failed to show an injury-in-fact under Article III and an ascertainable loss necessary to establish statutory standing. Judge McShane reasoned that Hamilton's UTPA claim for false labeling, marketing, and promotion were (1) based on a "manufacturing mishap" for which he was entitled to refund that was widely advertised and therefore, he did not allege a concrete, particularized injury-in-fact; and (2) he did not show an ascertainable loss under the UTPA given that General Mills offered a refund. *Id.* at *5.

In *Nguyen*, Don Nguyen filed a putative class action against defendant Cree, Inc., a corporation that manufactured and sold LED light bulbs, which it promoted as better performing than standard light bulbs and guaranteed to last for 15 years. *Nguyen*,

2019 WL 7879879, at *1. Nguyen alleged that he purchased four Cree LED light bulbs, paying a price premium, based on Cree's representations. *Id.* After all four bulbs burned out within two years, he sued alleging various claims, including UTPA violations, unjust enrichment, fraudulent misrepresentation, and breach of implied and express warranty. *Id.* Cree moved to dismiss, in part, on standing grounds. Magistrate Judge Stacie Beckerman found that Nguyen had standing, distinguishing *Hamilton*. *Id.* at *2-3.

On review, District Judge Michael W. Mosman declined to adopt Judge Beckerman's reasoning relating to standing. *Nguyen*, 2019 WL 6917887, at *2. Judge Mosman examined evidence produced by Cree that documented Nguyen's use of Cree's warranty, including his purchase and replacement of 13 bulbs – accounting for more bulbs than were alleged to be faulty in his complaint. *Id.* Yet in Nguyen's briefing, Judge Mosman noted, he claimed to have purchased more lightbulbs than he received replacements for before filing his lawsuit. *Id.* That factual discrepancy, Judge Mosman determined, “gives rise to a possibility that that [Nguyen] has purchased some bulbs that he has not received a remedy for, which would convey him standing.” *Id.* (citing *Hamilton*). Judge Mosman clarified that, in his view, if Nguyen received a refund or “received replacement bulbs for every bulb that he purchased,” he would not have standing under *Hamilton*. Continuing:

Unless Plaintiff can show that (1) he purchased bulbs from Defendant that have

not been replaced through the warranty program, and (2) that the warranty program is, in some way, a mere façade, he cannot show that he has standing.

Id.

According to Fred Meyer, plaintiffs had the opportunity to obtain refunds of their 10-cent bottle deposits – but did not – and consequently, their injuries are self-inflicted and they lack standing as in *Hamilton* and *Nguyen*. Not so.

As plaintiffs argue, unlike *Hamilton* and *Nguyen*, the evidence here shows that Fred Meyer’s customer service refund policies were not tailored to address the erroneous bottle deposit charges, were not uniformly implemented, and were never conveyed to them. For example, a declaration from Richard Hillenbrand, a Corporate Item Setup Manager, states that in late 2017 through 2018, Fred Meyer maintained general refund policies which provided refunds of bottle deposits it charged to customers for any beverage it sold “regardless [of] whether it ultimately did or did not fall within the scope of the Bottle Bill.” (Hillenbrand Decl. ¶ 13, ECF No. 139.) Due to the lack of clarity from the OLCC about Bottle Bill changes, Hillenbrand provides that store managers were instructed to “take back any containers and return ten cents back.” (*Id.* at ¶¶ 13-14.) Hillenbrand attests that if the customer had a receipt, the manager or associate would run the code associated with the Bottle Bill charge in its database (UPC 9090). (*Id.* at ¶ 14a.) If the customer did not have a receipt, Hillenbrand states

that the manager or associate would return the Bottle Bill deposit under its “I Can Make It Right” (ICMIR) program, under which Fred Meyer broadly accepts returns if there is an issue. (*Id.* at ¶ 14b.) According to Hillenbrand, between January 1 and December 31, 2018, Fred Meyer processed around 2,089 Bottle Bill refunds under UPC 9090 and 26,686 returns under the ICMIR program in 2018, and that it is unknown how many of ICMIR returns were for specifically for Bottle Bill deposits.⁸ (*Id.* at ¶¶ 15-16.)

Fred Meyer also relies on the declaration of Todd Heinle, a Process Improvement Manager and Acting Operations Manager, who attests that the ICMIR program began in 2015 and empowers store employees to remediate customer concerns by providing refunds, exchanges, or offering price adjustments (up to \$20), with no questions asked. (Heinle Decl. ¶ 2, ECF No. 140.) Heinle attests that the ICMIR program was heavily advertised when it was implemented, the program was implemented at all stores, the program remained in place in 2018, all employees received training about the program during its roll-out, and the program remains part of its training program. (*Id.* at ¶¶ 4-5.)

Even so, as plaintiffs argue, Fred Meyer’s refund policies were not advertised widely in 2018. During his deposition, Heinle said that Fred Meyer promoted the ICMIR program extensively in 2015, but acknowledged

⁸ Heinle echoed Hillenbrand’s statements in his deposition. (Heinle Dep. 27:7-16, ECF No. 136-2.)

that in the years afterward, it pivoted to other messages. (Nichols Decl. Ex. 2, Heinle Dep. 49:22–50:8, ECF No. 136-2.) Heinle also admitted that: (1) he did not know how many bottle deposits were refunded under the ICMIR program in 2018; (2) if *any* 2018 bottle deposit refunds were for orange juice cartons; and (3) he did not know a single customer who received a refund for an erroneous bottle deposit under the ICMIR program in 2018. (*Id.* at 24:17-22, 42:7-18, 45:18-24.) Heinle further testified that he was unaware of any advertisements or communications to customers in 2018 that they could be refunded improperly charged bottle deposits, for FNOJ 564 and 567 or other beverages, under the ICMIR program or any policy. (*Id.* at 66:16–67:9.) Based on that evidence, plaintiffs refer to the ICMIR program as a “customer experience policy” and argue that Fred Meyer presents no evidence that the ICMIR program was advertised in 2018 generally, or that it attempted to inform customers in 2018 that bottle deposits charged for FNOJ 564 or 567 could be refunded. (*Id.* at 6:7:2-14, 51:7-16.)

Although Hillenbrand’s Declaration states that “Fred Meyer’s records do not differentiate between Bottle Bill returns and other returns,” in its Reply, Fred Meyer states that for FNOJ 564 and 567, it provided 510 bottle deposit refunds under UPC 9090 and 765 bottle deposit refunds under the ICMIR program during the relevant class period. (Reply Mot. Deny Class Cert. at 5, ECF No. 146 (citing Nichols Decl. Ex. 3 (attaching Fred Meyer’s responses to plaintiffs’ Third Set of Interrogatories), ECF No. 136-3).) Fred Meyer does not explain the discrepancy.

(Compare ECF No. 139 with ECF No. 136-3.) In any case, the evidence showing 1,275 bottle deposit returns for FNOJ 564 and 567 does not distinguish between returns based solely on the erroneous bottle deposits charge and returns of those products (and the attendant bottle deposit) for other reasons. Thus, unlike *Hamilton* and *Nguyen*, Fred Meyer has not shown that its customer service refund programs were aimed at the erroneous bottle deposit charges on FNOJ 564 and 567.

Plaintiffs also point to evidence casting doubt on whether Fred Meyer customers consistently were given refunds for the erroneous bottle deposit charges. (See Nichols Decl. Ex. 20, 121-20.) Plaintiffs highlight complaints received by the OLCC from customers showing that Fred Meyer refused to refund bottle deposits it charged for nonredeemable containers, stating that it was “not only charging a 10 cent deposit on non-eligible items but also refusing to refund the customer for the deposit charged.” (*Id.* Ex. 25, ECF No. 121-25; see also *id.* Exs. 28-29, ECF Nos. 121-28-29 (stating refunds of deposits not provided by Fred Meyer).) And Fred Meyer admits that in 2018, it received 21 complaints from customers (directly or indirectly through the OLCC) about charging deposits on juice containers larger than 1.5 liters. (*Id.* Ex. 47 at 14-16, ECF No. 121-47.)

At bottom, plaintiffs have shown that Fred Meyer did not inform its customers generally, or plaintiffs specifically, that they could obtain refunds of the 10-cent bottle deposits on their FNOJ 564 and 567 containers. And the evidence shows that despite the

customer service policies, refunds were not consistently provided. The facts here are distinguishable from the “widely-advertised recall/refund” policy at issue in *Hamilton*. And unlike the warranty evidence in *Nguyen*, it is undisputed that none of plaintiffs have received a refund of their 10 cents and that Fred Meyer’s customer service policies may not have reliably resulted in a refund. Plaintiffs have shown a concrete and particularized injury-in-fact under Article III and have shown an ascertainable loss of money to confer standing under Oregon’s UTPA. Accordingly, Fred Meyer’s motion to deny class certification should be denied. The court turns to plaintiffs’ motion for class certification. *Melendres v. Arpaio*, 784 F.3d 1254, 1261-62 (9th Cir. 2015) (“[O]nce the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met.”).

B. *Plaintiffs Motion for Class Certification*

As noted above, plaintiffs move to certify a class under Rule 23(a) and (b)(3) defined as:

Oregon Fred Meyer customers who, (a) on or after January 1, 2018, and on or before November 1, 2018, (b) paid an additional 10-cent deposit charge to Fred Meyer, (c) for a Florida’s Natural 100% Premium “No Pulp” (UPC 1630016564) or “No Pulp with Calcium” (UPC 1630016567) orange juice product, which was not redeemable for a

refund of the 10-cent deposit charge under Oregon law.

(Pls' Mot. Class Cert. at 8, 28.) Plaintiffs request that plaintiffs Solano, Conroy, and Zach be appointed as Class representatives, and that their attorneys Michael Fuller, Kelly D. Jones, Daniel J. Nichols, and Young Walgenkim, be appointed as Class counsel. (*Id.* at 9.)

Fred Meyer opposes Class certification because plaintiffs have proposed an improper “fail-safe” class as currently defined, they have not demonstrated commonality under Rule 23(a)(2), and that individualized issues will overwhelm common issues, precluding certification under Rule 23(b)(3).

1. Class Definition

A “fail-safe” class is “one that is defined so narrowly as to ‘preclude[] membership unless the liability of the defendant is established.’” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1142 n.7 (9th Cir. 2016) (quoting *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010)). Fail-safe class definitions are disfavored because “a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). The Ninth Circuit has not “ruled directly on the appropriateness of fail-safe classes” and “does not look favorably on precluding class certification under the fail-safe class theory.” *Brown v. DirectTV, LLC*, 330 F.R.D. 260, 268 (C.D.

Cal. 2019) (citing *Melgar v. CSK Auto, Inc.*, 681 F. App'x 605, 607 (9th Cir. 2017) (observing that “our circuit’s caselaw appears to disapprove of the premise that a class can be fail-safe”)).

Fred Meyer argues that defining the class to include persons who paid an additional 10- cent deposit charge for their FNOJ product “which was not redeemable for a refund of the 10- cent deposit charge under Oregon law” is an impermissible “fail-safe” class. (Def.’s Opp’n to Class Cert. at 18, ECF No. 138.) This definition is “palpably unfair,” Fred Meyer contends, because the class is comprised only of class members who have established it violated Oregon law. (*Id.* at 18-19 (citing *In re AutoZone, Inc. Wage & Hour Emp. Pracs. Litig.*, 289 F.R.D. 526, 545-46 (N.C. Cal. 2012), *aff’d* 789 F. App'x 9 (9th Cir. 2019)). Fred Meyer asserts that if it demonstrates that the bottle deposits were appropriate under Oregon law, as currently defined, no member of the Oregon class can exist.

The court disagrees with Fred Meyer here. Fred Meyer’s liability turns on whether plaintiffs can establish UTPA violations or an unjust enrichment claim, which require establishing more than whether the containers were redeemable, such as whether Fred Meyer acted with the requisite scienter. Because required elements for proving the UTPA violations and unjust enrichment claims are not included in plaintiffs’ proposed definition, no fail-safe problem exists. Moreover, contrary to Fred Meyer’s suggestion, refining the definition is the applicable solution should the court find the proposed class definition problematic. *Olean*, 31 F.4th at 669 n.14 (observing

that problems with class definitions “can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis” (quoting *Messner*, 669 F.3d at 825)); *In re White*, 64 F.4th 302, 314-15 (D.C. Cir.) (same), *cert. denied* 144 S. Ct. 487 (2023). Because plaintiffs have not proposed a fail-safe class, no modification is necessary.

2. Rule 23 Legal Standards

Plaintiffs seeking class certification must satisfy the requirements of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. FED. R. CIV. P. 23(a). After meeting those requirements, plaintiffs must demonstrate the class action satisfies one of the categories under Rule 23(b). Here, plaintiffs seek certification under Rule 23(b)(3) which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3); *Lytle v. Nutramax Labs, Inc.*, 99 F.4th 557, 569 (9th Cir. 2024). The predominance inquiry goes further than the commonality element of Rule 23(a)(2) and “asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Lytle*, 99 F.4th at 569 (quoting *Tyson Foods*, 577 U.S. at 453).

The district court must conduct a “rigorous analysis” of the Rule 23 prerequisites before certifying a class. *Lytle*, 99 F.4th at 569; *Olean*, 31 F.4th at 664.

“The plaintiffs must ‘actually prove – not simply plead – that their proposed class satisfies each requirement of Rule 23.” *Lytle*, 99 F.4th at 569 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014)). Plaintiffs’ burden under Rule 23 is a preponderance of the evidence. *Olean*, 31 F.4th at 665. Class certification is *not* a determination on the merits, and the court decides only if a class action is “a suitable method of adjudicating the case.” *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015); *Olean*, 31 F.4th at 666-67 (“[A] district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial.”). “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

a. Numerosity, Typicality, and Adequacy

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1); *A.B. v. Haw. State Dep’t of Educ.*, 30 F.4th 828, 838-39 (9th Cir. 2022) (holding more than 300 class members was “large” by any metric and that joinder was impracticable, satisfying numerosity); *see also McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, No. 3:18-cv-1921-SI, 2020 WL 1970812, at *4 (D. Or. Apr. 24, 2020) (noting that 40 class members is enough to satisfy numerosity). Plaintiffs present evidence showing about 11,000 improper bottle deposits were

charged during the class period. (Nichols Decl. Exs. 44-45.) Fred Meyer does not contest that numerosity. Accordingly, the court finds this element is satisfied.

Rule 23(a)(3) requires plaintiffs to show that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” FED. R. CIV. P. 23(a)(3). “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (simplified). Their injuries “need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (“Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members[.]”), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)). “Because the considerations underlying the two requirements overlap considerably, the Supreme Court has noted that the commonality and typicality requirements of Rule 23(a) tend to merge.” *A.B.*, 30 F.4th at 839 (simplified). Fred Meyer does not contest typicality. For the reasons discussed below concerning commonality, this element is satisfied.

The adequacy of representation under Rule 23(a)(4) asks whether the representatives “will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). “To satisfy constitutional due process concerns, absent class members must be

afforded adequate representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at 1020. This requirement turns on two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Id.*

Plaintiffs have submitted evidence of their counsel’s experience litigating class actions and complex cases and contend that there are no conflicts between themselves and other putative class members. (Decl. of Kelly D. Jones, ECF No. 118; Decl. of Michael Fuller, ECF No. 119; Decl. of Young Walgenkim, ECF No. 120; Decl. of Daniel J. Nichols, ECF No. 121; Pls.’ Mot. Class Cert. at 40-47.) Fred Meyer does not challenge the adequacy of plaintiffs’ counsel or class representatives and likewise does not contend that conflicts exist between the class representatives and other class members. Accordingly, the court finds that plaintiffs satisfy the adequacy requirement.

b. Commonality

To establish commonality, plaintiffs must show that their claims “depend upon a common contention” that is “of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 564 U.S. at 350; *Olean*, 31 F.4th at 666 (assessing commonality requires court to determine “whether the evidence establishes that a common question is capable of class-wide resolution”).

Commonality is satisfied when the common question or questions “are apt to drive the resolution of the litigation, no matter their number.” *Jimenez v. Allstate Ins.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quotation marks and citation omitted). “For purposes of Rule 23(a)(2) even a single common question will do.” *Wal-Mart*, 564 U.S. at 359 (simplified). “Whether a question will drive the resolution of the litigation necessarily depends on the nature of the underlying legal claims that the class members have raised.” *Id.*

Plaintiffs are pursuing two UTPA claims under ORS §§ 646.608(1)(e) and (s). Under Oregon’s UTPA, plaintiffs must show: “(1) they suffered an ascertainable loss, (2) as a result of Fred Meyer’s unlawful trade practice, and (3) that Fred Meyer acted with the requisite scienter.” *Solano v. Kroger Co.*, Case No. 3:18-cv-01488-AC, 2020 WL 7028473, at *3 (D. Or. Nov. 30, 2020). As a class action, “plaintiffs may recover statutory damages [of \$200] only if they suffered an ascertainable loss ‘as a result of a reckless or knowing use or employment’ of an unlawful trade practice.” *Id.* (quoting ORS § 646.638(8)(a)). As Judge Mosman explained when denying Fred Meyer’s motion to dismiss, plaintiffs are advancing a “diminished value theory of ascertainable loss,” which requires them to show that “Fred Meyer misrepresented the beverages to be worth ten cents more than they actually were. The ascertainable loss is the difference between the price as misrepresented and the actual value: ten cents.” *Id.*

Fred Meyer reprises its argument that because refunds were available that plaintiffs did not attempt

to receive, they have not suffered a common class-wide injury, defeating commonality. Plaintiffs cannot rely on the “non-redeemability” of the empty FNOJ containers to create an injury, in Fred Meyer’s view, when none of them sought a refund of their 10 cents. (Def.’s Opp’n Mot. Class Cert. at 22.) As discussed above, the court is not persuaded that plaintiffs needed to seek or obtain a refund of their FNOJ containers to establish an injury-in-fact under Article III, and likewise were not required to do so to establish commonality. Fred Meyer’s remaining arguments are addressed under the court’s more rigorous predominance analysis.

As plaintiffs argue, they have alleged many common questions of law and fact, including their diminished value theory of ascertainable loss and that they suffered identical injuries – payment of a 10-cent bottle deposit for their FNOJ 564 and 567. (Nichols Decl. Exs. 32-38 (attaching receipts).) Other common questions of law and fact also are apparent, such as whether Fred Meyer was aware of complaints made to the OLCC and to its various store employees concerning erroneous bottle deposit charges. Plaintiffs will rely on that common evidence to establish whether Fred Meyer violated the UTPA, and to establish if its conduct was knowing or reckless. Answers to those questions will drive resolution of the litigation in one stroke. *Hanlon*, 150 F.3d at 1019 (“Rule 23(a)(2) has been construed permissively.”); *see also Or. Laborers-Emps. Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 188 F.R.D. 365, 373 (D. Or. 1998) (“When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise

to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.” (simplified)). Thus, commonality under Rule 23(a)(2) is satisfied.

c. Predominance

To certify a class under Rule 23(b)(3), plaintiffs must show that questions of law or fact common to the class predominate over questions affecting only individual members. FED. R. CIV. P. 23(b)(3). “Rule 23(b)(3)’s predominance criterion is even more demanding” than commonality. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); *Hanlon*, 150 F.3d at 1022 (“[T]he presence of commonality alone is not sufficient to fulfill Rule 23(b)(3).”). The predominance inquiry “asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *Lytle*, 99 F.4th at 569 (quoting *Tyson Foods*, 577 U.S. at 453). In other words, is the proposed class “sufficiently cohesive to warrant adjudication by representation”? *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Where “common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,” proceeding as a class – rather than individually – is warranted. *Hanlon*, 150 F.3d at 1022.

“When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over

common questions.” *Olean*, 31 F.4th at 668. A district court may not, however, decline “to certify a class that will require determination of some individualized questions at trial, so long as such questions do not predominate over the common questions.” *Id.* “When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.” *Id.* (quoting *Tyson Foods*, 577 U.S. at 453). “And the possibility that an ascertainable portion of the class may be unable to recover [damages]. . . does not in itself demonstrate class certification was improper.” *Lytle*, 99 F.4th at 572 (citing *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (“To gain class certification, Plaintiffs need to be able to allege that their damages arise from a course of conduct that impacted the class. But they need not show that each members’ damages from that conduct are identical.”))).

Plaintiffs assert that common issues predominate as to its UTPA and unjust enrichment claims: whether Fred Meyer’s 10-cent charges added to FNOJ 564 and 567 purchases was false or misleading, whether that conduct was knowing or reckless, and if that conduct violated ORS §§ 646.608(1)(e) and (s). Because their diminished value theory of ascertainable loss does not turn on reliance, plaintiffs argue that no individualized issues predominate over common issues. Plaintiffs also contend that their unjust enrichment claim rests on common proof of Fred Meyer’s conduct and raises the same legal arguments

for all class members. (Pls.' Mot. Class Cert. at 52- 53.) Finally, plaintiffs argue that their pursuit of UTPA statutory damages can readily be calculated on a class-wide basis.

Fred Meyer advances three primary arguments against predominance: (1) because 1,275 customers sought or obtained refunds of their FNOJ 564 and 567 bottle deposits, establishing injury will require individualized adjudications; (2) plaintiffs' diminished value theory of ascertainable loss cannot be shown through common proof because price and objective market value require individualized determinations; and (3) establishing that Fred Meyer acted knowingly or recklessly will require individualized assessments of its conduct across the entire 11-month class period. The court disagrees.

1. refunds

Under Fred Meyer's theory, because it has no way to determine which putative class members obtained refunds, the court will need to undertake 1,275 adjudications to determine who received a refund, relying on the Ninth Circuit's decision in *Van*, 61 F.4th 1053, and the district court's order after remand in *Van v. LLR, Inc.*, Case No. 3:18-cv-00197-JMK, 2023 WL 8434456 (D. Alaska Dec. 5, 2023). In Fred Meyer's view, its refunds have deprived at least 1,275 class members of standing, and those member-by-member

assessments will overwhelm common issues.⁹

Fred Meyer's reliance on *Van* is misplaced. In that case, plaintiff Katie Van brought a putative class action seeking to recover interest on improperly assessed sales tax charged by LLR, a multi-level marketing company that sold clothing to purchasers through independent retailers. *Van*, 2023 WL 8434456, at *1. Retailers purchased LLR products wholesale, then later sold those products to customers. Retailers were responsible for most aspects of their businesses, "including ordering, inventory, advertising, marketing, pricing, invoicing, shipping, and returns." *Id.* From April 2015 to May 2017, LLR used software that charged sales tax based on the location of the retailer making the sale, not the customer, resulting in thousands of customers paying sales tax that they did not owe. *Id.* Retailers were informed of the sales tax issue and sometimes provided offsetting discounts on the price of the merchandise, free shipping, free products, or credits and vouchers to be used on future purchases. *Id.* From March to May 2017, LLR refunded the customers' erroneously charged sales taxes. *Id.* at *2. Van sued on behalf of 10,606 Alaskans who made 72,373 purchases from LLR retailers that improperly charged them sales tax, alleging claims under Alaska's Unfair Trade Practices Act and Consumer Protection Act (UTPCPA) and conversion. *Id.* Because LLR refunded the sales tax before the case

⁹ Fred Meyer submitted a Notice of Supplemental Authority, to which it appended the district court's Order (ECF No. 149). Plaintiffs filed a response to that notice (ECF No. 150).

was filed, Van’s injury was the “lost time value of money,” or in other words, interest on the refunded amounts on behalf of the class. *Van*, 61 F.4th at 1063.

The Ninth Circuit vacated the district court’s class certification decision, holding it erred in assessing whether the “individualized issues generated by the retailer discounts – some of which were provided to offset the improper sales tax – defeat predominance of class issues,” and remanded for the district court to reconsider that issue. *Id.* at 1058.

Based on LLR’s “strengthened” factual showing about the individual discounts provided to customers, the district judge on remand determined that individualized inquiries about whether class members suffered an ascertainable loss or had Article III standing predominated over common issues and denied class certification. *Van*, 2023 WL 8434456, at *9. Class representative Van suffered a concrete injury because she paid over \$500 in sales tax over a long period. Yet it was unclear that other class members suffered the alleged injury – “the loss of the use of their money until the tax was later refunded.” The court found that class members who received discounts in at least the amount of the improper sales tax were not injured because they paid no more at the time of purchase than they otherwise would have and therefore, were not deprived of the use of their money between purchase and refund. For class members who did not receive discounts, but received other offsets at the time of purchase, such as free shipping, they may not have been injured because they “did not suffer a temporary loss of their money.” At the same time,

those class members who were charged sales taxes and received non-monetary benefits or benefits such as a voucher or promotional code to be used on *future* purchases had standing because they temporarily lost the use of their money. *Id.* at *10. Because the “discounts were not consistently reflected on invoices or provided in the same ways to all customers,” common proof could not be used to establish how the offsetting discount was applied. “The evidence required to conduct this individualized analysis would dwarf that required to adjudicate common questions in this case.” *Id.* at *11.

Fred Meyer argues that, as in *Van*, the 1,275 refunds it provided to absent class members raises the spectre of member-by-member adjudications. *Van* is unhelpful for several reasons.

To begin with, under plaintiffs’ theory of diminished value, they suffered an ascertainable loss when they bought a carton of FNOJ that was not redeemable under Oregon law. As discussed above, the fact that *Fred Meyer* offered refunds does not establish that FNOJ containers were redeemable under Oregon law because consumers may redeem their empty beverage containers in several ways, such as running them through a reverse vending machine or returning them to a Bottle Drop Center. Under Oregon’s Bottle Bill, customers need not return their empty containers to retail stores from which they are purchased. Thus, under plaintiffs’ theory, their concrete harm is not assuaged by *Fred Meyer’s* refund.

Next, as plaintiffs argue, under their diminished

value theory of ascertainable loss, all class members suffered the same injury at the same time – at the point-of-sale. Thus, if plaintiffs can prevail, they would establish liability for all class members at the same time, distinguishing *Van*. Under plaintiffs’ theory, Fred Meyer’s contention that some class members may have obtained bottle deposit refunds conflates the concepts of *liability* with *damages*. In the Ninth Circuit, the fact that individualized damages assessments may need to be determined does not preclude class certification. *See, e.g., Olean*, 31 F.4th at 681-82 (“there is no per se rule that a district court is precluded from certifying a class if plaintiffs may have to prove individualized damages at trial”); *Torres*, 835 F.3d at 1135, 1137 (holding predominance is not defeated where individual issues go to “the issue of damages rather than liability” that can be winnowed at a damages phase).

Lastly, the *Van* class members’ injuries depended on what kind of benefit, if any, they received to offset the improperly-charged sales tax. The *Van* court determined that those class members who received post-transaction benefits (vouchers or promotional codes for *future* purchases) had standing. *Id.* at *10. Because Fred Meyer provided only post-transaction refunds, as argued by plaintiffs, those refunds do not undercut any class members’ concrete harm, and no individualized, member-by-member determinations on standing or ascertainable loss is required.

2. ascertainable loss/price/value

Fred Meyer argues that for plaintiffs to establish

an ascertainable loss under their diminished value theory, they must show the “purchase price was greater than its objective market value.” (Def.’s Opp’n at 29-35.) Because there is no efficient market for orange juice, in Fred Meyer’s view, plaintiffs will be unable to show a common price or market value, and thus individual questions will overwhelm common questions and preclude class treatment, relying on *Bohr v. Tillamook Cnty. Creamery Ass’n*, 321 Or. App. 213 (2022), *rev. allowed*, 371 Or. 333 (2023). According to Fred Meyer, the price plaintiffs paid for their FNOJ varied from store to store and purchase to purchase – like the Tillamook dairy products in *Bohr* – and they similarly will be unable to show that the price they paid was more than the objective market value on a class-wide basis. Not so.

As plaintiffs contend, their diminished value theory of ascertainable loss is distinguishable from the price-inflation theory of ascertainable loss advanced in *Bohr*. In *Bohr*, the plaintiffs sought to bring a class action alleging UPTA violations based on Tillamook’s deceptive marketing that allowed it charge a premium for its products across the entire market. The *Bohr* plaintiffs sought to recover the purchase price of their items because they paid more than they otherwise would have for their dairy products. *Id.* at 220. The *Bohr* court determined that the plaintiffs’ price-inflation theory of causation was untenable because the price of any Tillamook dairy product could vary substantially. *Id.* at 244. And to recover the purchase price under an inducement-based theory or prohibited transaction claim, the plaintiffs also needed to establish reliance – but “people choose different dairy

products for myriad reasons,” undermining an obvious causal link. *Id.* at 244-46.

Unlike *Bohr*, plaintiffs here do not rely on a price-inflation theory of ascertainable loss and they are not seeking a refund of their purchase price. Instead, plaintiffs allege a straightforward diminished value theory of ascertainable loss. Plaintiffs contend that the price they ultimately paid for their FNOJ consistently was 10 cents more than the objective market value, which was caused by the unlawful practice – the addition of the bottle deposit. *Solano*, 2020 WL 7028473, at *3 (stating this is a “typical UTPA scenario featuring a diminished value theory of ascertainable loss . . . ten cents per beverage”). As Judge Mosman observed, some theories of ascertainable loss might require establishing reliance, but under the diminished value theory advanced by plaintiffs here, it is not necessary. *Id.* at *4. Unlike *Bohr*, plaintiffs seek to recover the difference between the purchase price as represented and the product as received. *Pearson v. Philip Morris, Inc.*, 358 Or. 88, 143-44 (2015) (“When a plaintiff can establish that she purchased an item and that, as a result of a misrepresentation of the item’s characteristics, the purchase price of that item was greater than its objective market value, the necessary connection between the unlawful trade practice and the ascertainable loss exists.” (Walters, J., concurring)). Because plaintiffs seek to recover their ascertainable loss at the time of purchase (10 cents more), and not refunds of their entire purchase price, price variations for the FNOJ are inconsequential. *See also Sharfstein v. BP W. Coast Prods.*, 292 Or. App. 69, 87-90 (holding

plaintiffs demonstrated ascertainable loss when BP charged 35-cent unlawful debit card fee, and that causation occurred when it was paid; reliance was not required, “what matters is whether the fee is disclosed in the particular way that the law requires”), *rev. denied*, 363 Or. 815 (2018).

3. reckless or knowing

Fred Meyer argues that individualized inquiries about whether its alleged conduct was undertaken with the appropriate scienter will overwhelm common issues, precluding class certification for three reasons: (1) analyzing whether any of the alleged 11,000 violations were reckless or knowing will require individualized inquiries about what guidance OLCC was providing at the time; (2) plaintiffs’ evidence of Fred Meyer’s alleged scienter is unsubstantiated and unreliable; and (3) to establish scienter to recover statutory penalties will require individualized proof of its deceit at the clear and convincing level. (Def.’s Opp’n at 37.)

The court is not persuaded that individualized assessments of the thousands of alleged UTPA violations threaten to overwhelm this litigation. Like other consumer fraud-type actions, plaintiffs will rely on Fred Meyer’s corporate decision-making to establish liability, such as failing to consult legal counsel and failing to develop an effective plan to implement the

bottle deposit changes.¹⁰ See *Jabbari v. Farmer*, 965 F.3d 1001, 1007-08 (9th Cir. 2020) (stating that plaintiffs could prove Fair Credit Reporting Act violations with common proof of corporate policies); *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 559 (9th Cir. 2019) (providing that consumer fraud cases readily met predominance inquiry because class was exposed to uniform fuel-economy misrepresentations and suffered identical injuries with small range of damages). If Fred Meyer's knowledge about the bottle deposit charges changed during 2018, that fact would be proved through common evidence and does not preclude certification.

As plaintiffs argue, the bulk of Fred Meyer's arguments about the strength or weakness of plaintiffs' evidence on scienter go to the merits of its claims, not whether class certification is appropriate here. And contrary to the Fred Meyer's assertion, plaintiffs may recover statutory damages for a reckless or knowing violation of the UTPA by a preponderance of the evidence; clear and convincing evidence is not necessary to establish a UTPA violation. *Stewart v. Albertson's, Inc.*, 308 Or. App. 464, 491 (2021) (stating

¹⁰ Fred Meyer's contentions that individualized determinations as to each class member will predominate to establish plaintiffs' unjust enrichment claim likewise fails. Plaintiffs will rely on the same common questions of law and fact, and common evidence relating to Fred Meyer's knowledge and corporate decision-making, to establish their unjust enrichment claim. As discussed above, whether any class member obtained a refund goes to damages, not liability, and does not thwart class treatment here.

that for willful violations under the UTPA, class members are entitled to the greater of actual damages or \$200, and that willful means “negligence”), *rev. denied*, 368 Or. 138 (2021); *State ex rel. Redden v. Discount Fabrics, Inc.*, 289 Or. 375, 386 (1980) (holding preponderance of evidence standard applies for willful violations of UTPA).

In summary, common class issues predominate over individualized class issues. Resolving whether Fred Meyer’s course of conduct constituted a UTPA violation and caused plaintiffs’ ascertainable loss will predominate over other individualized issues, such as damages.

4. unjust enrichment claim

Fred Meyer argues that plaintiffs’ unjust enrichment claim is not susceptible to classwide resolution because: (1) it remitted all the erroneous bottle deposits to the state, and (2) establishing whether any enrichment is unjust will require individualized inquiries or evidence. The court is not persuaded.

Plaintiffs contend that under Oregon’s Bottle Bill, bottle deposits are not remitted to the state. (Hillenbrand Decl. Ex. B, ECF No. 114-2 (Bottle Bill FAQ: “The State does not receive any proceeds from container returns and there is no reporting required.”).) Whether Fred Meyer retained or remitted bottle deposits goes to the merits of plaintiffs’ unjust enrichment claim and need not be resolved here. Contrary to Fred Meyer’s suggestion, the case-by-case

analysis required under *Larisa's Home Care, LLC v. Nichols-Shields*, 362 Or. 115 (2017), requires courts to examine “the established legal categories of unjust enrichment as reflected in Oregon case law and other authorities to determine whether any particular enrichment is unjust.” *Id.* at 132. As Magistrate Judge John V. Acosta recognized, “Oregon courts have ‘long held’ the right to a refund of overpayment is implied by law.” *Miller v. WinCo Foods, LLC*, Case No. 3:19-cv-02094, 2020 WL 6693149, at *8 (D. Or. Sept. 3) (denying motion to dismiss unjust enrichment claim where putative class alleged Winco improperly added a 10-cent surcharge on non-grocery items), *adopted* 2020 WL 6685697 (Nov. 12, 2020). Fred Meyer points to no reasoned basis to deny class certification of an unjust enrichment claim where the alleged overpayment results from a uniform course of conduct. Plaintiffs have shown that they will rely on common evidence to establish that Fred Meyer’s collection and retention of thousands of overpayments of 10 cents for FNOJ 564 and 567, and that common issues of liability on the unjust enrichment claim will predominate over any individualized concerns like damages.

d. Superiority of Class Adjudication

Under Rule 23(b)(3), the court must determine that a class action would be superior to individual actions in fairly and efficiently resolving the claims. When determining superiority under Rule 23(b)(3), courts generally consider the following non-exclusive factors: (i) the class members’ interests in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation over

the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the likely difficulties in managing a class action. FED. R. CIV. P. 23(b)(3)(A-D). Central to this inquiry, and class actions generally, is the goal of overcoming “the problem that small recoveries do not provide the incentive for individuals to bring a solo action.” *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

As discussed above, a class action is superior to individual proceedings here. This action was filed more than three years ago, and to date, no competing lawsuits have been filed by absent class members. A class action is manageable and beneficial because the aggregation of class members’ claims will achieve economies of time, effort, and expense. Fred Meyer does not contest this factor. Because all the Rule 23(b)(3)(A-D) factors favor finding that a class action is superior to other methods of resolution, the court finds that plaintiffs have satisfied the Rule 23(b)(3) requirements. Plaintiffs’ motion to certify the class should be granted.

CONCLUSION

For the above reasons, plaintiffs’ Motion for Class Certification (ECF No. 117) should be GRANTED, plaintiffs Solano, Conroy, and Zach should be appointed as Class Representatives, and plaintiffs’ attorneys should be appointed as Class Counsel. Fred Meyer’s Motion to Deny Class Certification (ECF No.

113) should be DENIED.

SCHEDULING ORDER

The Findings and Recommendation will be referred to District Judge Michael W. Mosman. Objections, if any, are due within 14 days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within 14 days. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED: July 16, 2024.

/s/

JEFF ARMISTEAD

United States Magistrate Judge

APPENDIX E

United States Constitution Article III

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

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

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original

Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX F

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

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

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

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

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

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

(b) **TYPES OF CLASS ACTIONS.** A class action may be maintained if Rule 23(a) is satisfied and if:

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

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible

standards of conduct for the party opposing the class; or

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

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

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

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

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

(C) the desirability or undesirability of

concentrating the litigation of the claims in the particular forum; and

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

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

(1) *Certification Order.*

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

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

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

(2) *Notice.*

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

the class.

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

(i) the nature of the action;

(ii) the definition of the class certified;

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

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

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

(vi) the time and manner for

requesting exclusion; and

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

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

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

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

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

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

(d) CONDUCTING THE ACTION.

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

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

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

(i) any step in the action;

(ii) the proposed extent of the judgment; or

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

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

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

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An

order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

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

(1) *Notice to the Class.*

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

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

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

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

(2) *Approval of the Proposal.* If the proposal

would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

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

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

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

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

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

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

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

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

(3) *Identifying Agreements.* The parties

seeking approval must file a statement identifying any agreement made in connection with the proposal.

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

(5) *Class-Member Objections.*

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

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

(i) forgoing or withdrawing an objection, or

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

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

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

(g) CLASS COUNSEL.

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

(A) must consider:

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

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

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

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

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

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

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

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

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

appoint the applicant best able to represent the interests of the class.

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

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

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

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

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

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

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