

No. _____

In the Supreme Court of the United States

BAYER HEALTHCARE LLC,

Petitioner,

v.

DONIECE DRAKE and DEBORAH BOWLING,

Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when virtually all members of the proposed class lack evidence of an Article III injury.

PARTIES TO THE PROCEEDING

Petitioner Bayer HealthCare LLC was appellant in the Ninth Circuit and defendant in the district court.

Respondent Doniece Drake was appellee in the Ninth Circuit and plaintiff in the district court.

Respondent Deborah Bowling was appellee in the Ninth Circuit and plaintiff in the district court.

None of the parties to the proceeding has a stock ticker symbol.

CORPORATE DISCLOSURE STATEMENT

Bayer HealthCare LLC is a nongovernmental entity.

Bayer HealthCare LLC is a Delaware limited liability company whose members are Bayer Consumer Care Holdings LLC, Bayer West Coast Corporation, Bayer Essure Inc., NippoNex Inc., Bayer Medical Care Inc., Bayer HealthCare US Funding LLC, and Bayer Corporation.

Bayer Consumer Care Holdings LLC is a Delaware limited liability company whose sole preferred member is Bayer HealthCare US Funding LLC and whose sole common member is Bayer East Coast LLC, whose sole member is Bayer US Holding LLC.

Bayer West Coast Corporation, a Delaware corporation, is wholly-owned by Bayer Corporation.

Bayer Essure Inc., a Delaware corporation, is wholly-owned by Bayer Corporation.

NippoNex Inc., a Delaware corporation, is wholly-owned by Bayer HealthCare Pharmaceuticals Inc.

Bayer Medical Care Inc., a Delaware corporation, is wholly-owned by Schering Berlin Inc.

Bayer HealthCare US Funding LLC is a Delaware limited liability company whose sole member is Bayer US Holding LLC.

Bayer HealthCare Pharmaceuticals Inc., a Delaware corporation, is wholly-owned by Schering Berlin Inc.

Schering Berlin Inc., a Delaware corporation, is wholly-owned by Bayer Corporation.

Bayer Corporation, an Indiana corporation, is wholly-owned by Bayer US Holding LLC.

Bayer US Holding LLC is a Delaware limited liability company in which Bayer World Investments B.V. is the sole member.

Bayer World Investments B.V., a Netherlands private company with limited liability, is owned by Bayer Pharma AG and Bayer CropScience AG.

Bayer Pharma AG, a German stock company, is wholly-owned by Bayer AG.

Bayer CropScience AG, a German stock company, is wholly-owned by Bayer AG.

Bayer AG (stock ticker symbol: BAYRY), a publicly held German stock company, has no parent company and no publicly held company owns 10 percent or more of its stock.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Drake v. Bayer Healthcare LLC, No. 24-7158, United States Court of Appeals for the Ninth Circuit. Panel rehearing and rehearing en banc denied on June

17, 2026. Judgment of the district court affirmed on April 21, 2026.

Drake v. Bayer Healthcare LLC, No. 24-5956, United States Court of Appeals for the Ninth Circuit. Interlocutory appeal under Federal Rule of Civil Procedure 23(f) granted on November 21, 2024.

Drake v. Bayer Healthcare LLC, No. 3:22-cv-01085-MMA-JLB, United States District Court for the Southern District of California. Class certification granted on September 16, 2024.

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INTRODUCTION

This Court has twice tried to answer the question whether a class may be certified under Rule 23(b)(3) when its members cannot establish Article III injury, and it has twice been thwarted. This case presents the ideal opportunity to finally resolve that “important ... question.” *Lab. Corp. of Am. Holdings v. Davis* (“*Labcorp*”), 605 U.S. 327, 330 (2025) (Kavanaugh, J., dissenting).

In *Tyson Foods, Inc. v. Bouaphakeo*, this Court granted certiorari to decide “whether a class may be certified if it contains ‘members who were not injured and have no legal right to any damages.’” 577 U.S. 442, 460 (2016) (citation omitted). But for procedural reasons, it ultimately had no need to do so. *Id.* at 460-61. Again in *Labcorp*, this Court granted certiorari to decide “[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.” 145 S. Ct. 1133, 1134 (2025). But it dismissed the writ as improvidently granted for procedural reasons. *Labcorp*, 605 U.S. at 327.

The Court should grant certiorari to resolve that important question once and for all in this case. Plaintiffs seek to represent New York and California classes of consumers who purport to have been deceived by the label of Bayer’s “Natural Fruit Bites” multivitamins, allegedly in violation of state consumer protection laws. In support of class certification, Plaintiffs offered the report of a survey expert and a damages expert. But neither had a shred of evidence

that any absent class member was injured. The survey expert was clear that she had “no evidence that any consumers are confused by the word ‘[N]atural’ on the Bayer label.” 3-ER-285.¹ And the damages expert simply proposed a model he could later run to determine whether consumers paid a price premium. He never ran that model and readily testified that it is “possible that there could be no price premium” at all. 3-ER-357.

Despite Plaintiffs’ total lack of evidence of injury, the district court granted class certification and the Ninth Circuit affirmed. The Ninth Circuit never mentioned Article III and did not grapple with this Court’s Article III precedents. It acknowledged that potentially “all class members” are uninjured. App.4a. But it held that Plaintiffs had nonetheless established predominance through their damages “theory” and “not-yet-executed damages model.” App.4a-5a (citation omitted). According to the Ninth Circuit, proof-free speculation is sufficient for class certification.

Certiorari is just as warranted here as it was in *Tyson Foods* and *Labcorp*—if not more so. The question presented still has “great importance.” *Tyson Foods*, 577 U.S. at 461; *see Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting) (“[T]he consequences of overbroad and incorrectly certified damages class

¹ Citations to “ER” are to the excerpts of record in the Ninth Circuit. The volume number appears before “ER,” and the pincite appears after. Citations to “Dkt.” are to the docket in the Ninth Circuit.

actions can be widespread and significant.”). And the Ninth Circuit remains on the wrong side of an enduring circuit split.

In fact, the Ninth Circuit accentuated that split in this case. The Second and Eighth Circuits do not allow *any* uninjured absent class members. See *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Johannesson v. Polaris Indus., Inc.*, 9 F.4th 981, 987-88 (8th Cir. 2021). The First, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits allow *some* uninjured members but disagree about how many. See *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018) (more than a de minimis number is too many); *Mr. Dee’s Inc. v. Inmar, Inc.*, 127 F.4th 925, 933-34 (4th Cir. 2025) (32% is too many); *Arandell Corp. v. Xcel Energy Inc.*, 149 F.4th 883, 898 (7th Cir. 2025) (“a great many” is too many (citation omitted)); *Rider v. OXY USA, Inc.*, 175 F.4th 1214, 1226 (10th Cir. 2026) (“a significant portion” is too many (citation omitted)); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) (“a large portion” is too many); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019) (more than a de minimis number is too many). And the Ninth Circuit here went further, holding that a class may be certified even when evidence of injury is lacking for *all* absent class members.

Unlike *Tyson Foods* and *Labcorp*, this case presents a clean vehicle to finally resolve that split. Bayer has not “abandon[ed]” its arguments, *contra Tyson Foods*, 577 U.S. at 460, and the class definitions have not been modified, *contra Labcorp*, 605 U.S. at

330-31 (Kavanaugh, J., dissenting). This case presents a single question of federal law. It arises in the Rule 23(f) context, unburdened by any post-verdict issues. And it comes from the Ninth Circuit, whose outlier approach has only grown more extreme since this Court granted certiorari to review it in *Labcorp*. This case gives the Court an opportunity not only to assess that outlier approach but also to repudiate the Ninth Circuit’s proof-free workaround for evading Rule 23 and Article III altogether.

The Court should grant certiorari, finally resolve the circuit split, and provide courts with the guidance they have long been asking for.

OPINIONS BELOW

The Ninth Circuit’s opinion (App.1a-12a) is unreported but is available at 2026 WL 1079027. The district court’s opinion (App.13a-38a) is unreported but is available at 2024 WL 4204921.

JURISDICTION

The Ninth Circuit issued its opinion on April 21, 2026, and denied a petition for panel rehearing and rehearing en banc on June 17, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, §§ 1-2, of the United States Constitution is reproduced at App.41a-42a. Federal Rule of Civil Procedure 23 is reproduced at App.43a-54a.

STATEMENT

A. Factual Background

In March 2020, Bayer launched a new chewable multivitamin product: the Natural Fruit Bites. 3-ER-400. The product was designed for consumers seeking a chewable multivitamin without the artificial flavors, colors, and sweeteners found in many gummy multivitamins. 5-ER-867.

The Natural Fruit Bites were 98% natural, 6-ER-1077, and made primarily of real apples, 5-ER-877. They contained natural flavors, colors, and sweeteners. 5-ER-873. They had *no* artificial flavors, colors, or sweeteners, and no GMOs, gelatin, or high-fructose corn syrup, as disclosed on the product label:



6-ER-1084.²

Bayer did not represent that the product was “100% Natural” or “All Natural.” That is because—as with virtually all other multivitamin products on the market—the micronutrients in the product (the actual vitamins and minerals) were synthetic.

Consumers expect this. Tiny, bite-sized products do not naturally contain the bulk of one’s daily vitamin needs. And, “[b]efore this lawsuit was filed,” Bayer “had not heard of consumers generally car[ri]ng about synthetic vitamins within multivitamins.” 5-ER-873. The Food and Drug Administration prohibits companies from saying “[t]hat a natural vitamin in a food is superior to an added or synthetic vitamin.” 21 C.F.R. § 101.9(k)(4). It would also be nearly impossible to make a commercially viable multivitamin without using synthetic micronutrients. Such a product would have stability and consistency issues, product quality issues, an enormous serving size, and a hefty price. 5-ER-876.

Bayer offered the Natural Fruit Bites from March 2020 until they were discontinued in March 2022. 3-ER-400–01. As relevant to this case, the sales in New York and California were less than \$2 million. 6-ER-1204–09.

² The product came in four varieties: (1) Men’s, (2) Men’s 50+, (3) Women’s, and (4) Women’s 50+. App.14a. This petition refers to the four varieties collectively as the “product” or “products.” The label for each variety is materially identical. 3-ER-449–76.

B. Procedural Background

1. Plaintiffs Bring This Consumer Class Action.

Plaintiffs bring this class action on behalf of consumers who were purportedly deceived by the product label. According to Plaintiffs, the word “Natural” on the product label was misleading because the micronutrients in the product were synthetic. App.14a; 4-ER-685–91.

Plaintiffs seek to represent two Rule 23(b)(3) classes of consumers of the product.³ Doniece Drake seeks to represent a class of New York consumers with claims under New York’s consumer protection laws. *See* N.Y. Gen. Bus. Law §§ 349, 350. Deborah Bowling seeks to represent a class of California consumers with a claim under California’s consumer protection law. *See* Cal. Civ. Code §§ 1750-84.

Plaintiffs seek actual damages and, for the New York class, statutory damages. *See* N.Y. Gen. Bus. Law § 349(h) (allowing statutory damages of \$50); *id.* § 350-e(3) (allowing statutory damages of \$500).⁴ Plaintiffs allege actual damages in the form of a “price premium” paid by consumers for the “Natural”

³ Plaintiffs’ complaint originally indicated they would seek to certify Rule 23(b)(2) classes too. Because the product is no longer sold, Plaintiffs did not move to certify Rule 23(b)(2) classes.

⁴ These statutory damages are not available in class actions in New York state courts. *See* N.Y. C.P.L.R. § 901(b) (generally providing that “an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action”).

representation on the product label. 6-ER-1101. Plaintiffs claim statutory damages on behalf of the New York class in excess of \$36 million—roughly twenty times the alleged amount of sales to both classes. *See* 6-ER-1204–09.

2. Plaintiffs’ Survey Expert Has No Evidence of Injury.

In support of class certification, Plaintiffs submitted a report by Dr. Andrea Lynn Matthews. Dr. Matthews described her work as a “gold standard” consumer perception survey designed to assess whether removing the word “Natural” from the product label “changed consumer expectations regarding the type of ingredients found in the Products.” 4-ER-510, 524, 526. She found that it did not.

To do this, Dr. Matthews included a test group and a control group, which is typical for litigation surveys. The test group saw the actual product label, and the control group saw a modified label with the word “Natural” removed. The test and control versions of the product label are reproduced on the following page.

**Test Product
Label**



**Control Product
Label**



4-ER-545, 554.

To isolate the effect of the word “Natural,” Dr. Matthews “compar[ed] the percentage of individuals” in the two groups who believed the product was all natural. 4-ER-553. She found that those percentages were “statistically similar.” 4-ER-603. In Dr. Matthews’ words, “there is *no statistical impact* of removing a ‘Natural’ label from the product on consumer belief that the Product only contained natural ingredients.” 4-ER-512 (emphasis added).

Dr. Matthews stood by the results of her survey in her deposition. She testified 58 times that she had no

evidence that any consumer was deceived by the product label. *See, e.g.*, 3-ER-284 (“Q: And there’s no evidence the word ‘[N]atural’ deceived any consumers as to the types of ingredients in the product, right? A: Correct.”); 3-ER-285 (“Q: And so you have no evidence that any consumers are confused by the word ‘[N]atural’ on the Bayer label, right? A: Correct.”); 3-ER-287 (“Q: You have no evidence that the word ‘[N]atural’ confused a single soul anywhere in this world, right? A: Correct.”); 3-ER-298 (“Q. You have no evidence that [consumers] were deceived, correct? A. Correct.”).

Apparently dissatisfied with Dr. Matthews’ conclusion, Plaintiffs’ counsel had her run a second survey. For that survey, Dr. Matthews did not use the product label at all. Rather, she created an imaginary “generic multivitamin label” that stripped away all the context from the actual product label, including the text and imagery on the front of the label and the entirety of the back of the label. This imaginary label looks nothing like the product label—or the label of any multivitamin on the market. The test and control versions of the imaginary label are reproduced on the following page.



2-ER-154-55.

Even with this imaginary label, most consumers were *not* confused by the word “Natural.” Dr. Matthews concluded that “removing the word ‘[N]atural’ from the product label was associated with a decrease of 43.1 ... percentage points ... in consumer belief that the product contained only natural ingredients.” 2-ER-155.

Dr. Matthews explained that the results for the imaginary label did not change her first-survey conclusion that the product label did not deceive consumers. At her second deposition, she testified 21

more times that she had no evidence that any consumer was deceived by the actual Bayer product label at issue. *See, e.g.*, 2-ER-64 (“Q. And you would agree, looking at the Bayer label, that removing the word ‘[N]atural’ did not change consumer perceptions, correct? A. Correct.”); 2-ER-68 (“Q: ... For the Bayer label, the word ‘[N]atural’ did not impact consumers’ understanding of the type of ingredients, correct? A: Correct.”); 2-ER-71 (Q: “[O]n the Bayer label, removing the word ‘[N]atural’ had no impact on consumers’ understanding of the ingredients in the product, correct? ... A: On the Bayer label, that’s correct.”).

3. Plaintiffs’ Damages Expert Has No Evidence of Injury.

Plaintiffs also submitted a damages report by Dr. William Ingersoll in support of class certification. Dr. Ingersoll spent “two or three hours” preparing his seven-page report, large portions of which were “copied and pasted” from prior reports. 3-ER-354–55; 4-ER-666–72. The report proposes a damages model—specifically, a conjoint study—that he could one day run to determine “if there’s a ... price premium” consumers are willing to pay for a product with “only natural ingredients.” 3-ER-357; 4-ER-667.⁵

⁵ Dr. Ingersoll described “conjoint analysis” as “a standard practice in marketing research for identifying the unique impact of one product factor, such as size, price, color, or other attribute of a product, on willingness to purchase this item.” 4-ER-667. It reports the impact it measures “in the form of a dollar or percentage reduction in product value.” David Gal, *The Weak*

Critically, Dr. Ingersoll “ha[s] not performed the study yet.” 3-ER-352; *see also* 3-ER-357 (“[I]t hasn’t been run or designed yet.”). He has “no data because the study hasn’t been designed or conducted.” 3-ER-352. He has not “actually done any analysis.” 3-ER-356–57. And he has not reached any “professional opinion[s]” on whether any price premium exists. 3-ER-356. Dr. Ingersoll readily conceded that it is “possible that there could be *no* price premium.” 3-ER-357 (emphasis added).

4. The District Court Granted Class Certification Without Evidence of Injury, and the Ninth Circuit Affirmed.

The district court granted class certification. App.37a. The district court did not mention Article III or address this Court’s Article III precedents. It also failed to acknowledge Dr. Matthews’ perception survey or her repeated conclusion that there is no evidence any consumer was deceived. The district court certified two Rule 23(b)(3) classes:

California Class. All persons who purchased at least one of the [products] in the State of California from March 1, 2020, to May 30, 2023 ...

Foundations of Conjoint Analysis: Methodological Limitations for Assessing Consumer Preferences and Estimating Damages in Litigation Settings at 2, Westlaw Today (Mar. 29, 2022). In this way, conjoint analysis measures “what an average consumer wants.” *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015) (citation omitted).

New York Class. All persons who purchased at least one of the [products] in the State of New York from May 31, 2020, to May 30, 2023.

App.15a-16a.

The Ninth Circuit granted interlocutory review under Rule 23(f) and affirmed. App.2a. Like the district court (and despite briefing on the issue), the Ninth Circuit did not mention Article III or address this Court’s Article III precedents. It instead “conclude[d] that Plaintiffs satisfied the predominance inquiry for Rule 23(b)(3)” because “Plaintiffs’ expert’s proposed damages model was sufficient to establish that injury is common to all class members.” App.4a. It acknowledged that the proposed model was “not-yet-executed” and that it may ultimately show that “all class members” are uninjured. App.4a-5a (citation omitted). But it nonetheless determined that Rule 23(b)(3) was satisfied because “either all class members were injured or they were not.” App.4a.

Judge Forrest dissented as to the California class. App.10a. As she recognized, given Dr. Matthews’ “conclu[sion] that the challenged statement was not universally misleading,” the majority erred in holding “that the results of Dr. Ingersoll’s proposed conjoint analysis will necessarily answer whether the entire class suffered legal injury.” App.12a.

The Ninth Circuit denied Bayer’s timely petition for panel rehearing and rehearing en banc, with Judge Forrest noting that she would grant the petition. App.39a-40a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Accentuated an Undeniable Circuit Split That This Court Has Twice Granted Certiorari to Resolve.

This Court is well aware that the circuits are divided over whether a class containing uninjured members may be certified. This Court has twice granted certiorari to resolve that split without ultimately reaching the question. *See Labcorp*, 605 U.S. at 327; *Tyson Foods*, 577 U.S. at 460. The split has only grown more entrenched since.

Lower courts are seeking guidance. *See, e.g., Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 337 (6th Cir. 2025) (en banc) (Thapar, J., concurring) (“These questions have troubled courts and commentators for years.”); *Chavez v. Plan Benefit Servs., Inc.*, 108 F.4th 297, 307 (5th Cir. 2024) (recognizing the circuit split on “important questions about ... constitutional standing and the Rule 23 inquiry”); *cf.* 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:28 (22d ed. 2025) (canvassing split and noting “[c]ourts have wrestled extensively but inconclusively with the standing and Rule 23 ... questions”). The Court should take this opportunity to resolve the question presented and provide that guidance once and for all.

A. The Second and Eighth Circuits require all class members to have suffered an Article III injury.

As the Second Circuit has explained, “[t]he filing of [a] suit as a class action does not relax this jurisdictional requirement.” *Denney*, 443 F.3d at 263. It therefore requires that “no class may be certified

that contains members lacking Article III standing.” *Id.* at 264.⁶ The Eighth Circuit has adopted the same approach, explaining that a class cannot be certified unless it is “defined in such a way that anyone within it would have standing.” *Johannessoohn*, 9 F.4th at 987 (quoting *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010)). In these circuits, “a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.” *Avritt*, 615 F.3d at 1034.

B. The First, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits permit some uninjured class members but disagree over how many.

The First and D.C. Circuits allow only a *de minimis* number of uninjured class members. The First Circuit has suggested that “a very small absolute number of [uninjured] class members” may be permissible if those members “might be picked off in a manageable, individualized process at or before trial.” *Asacol*, 907 F.3d at 53. But when “any class member may be uninjured, and there are apparently thousands who in fact suffered no injury,” “[t]he need to identify those individuals will predominate.” *Id.* at 53-54. Relying on *Asacol*, the D.C. Circuit explained that “5% to 6% constitutes the outer limits of a *de minimis* number.” *Rail Freight*, 934 F.3d at 625

⁶ The Second Circuit discussed but did not overrule *Denney* in *Hyland v. Navient Corp.*, 48 F.4th 110, 118 n.1 (2d Cir. 2022). Regardless, any confusion that exists in the Second Circuit simply underscores the uncertainty that this Court should take the opportunity to finally resolve.

(citation omitted). Beyond that limit, the need for “individualized adjudications of causation and injury” defeats predominance. *Id.*

The Seventh, Tenth, and Eleventh Circuits permit more than a de minimis number of uninjured class members but prohibit certification when too many class members are uninjured. The Seventh Circuit precludes certification when a class “contains a great many persons who have suffered no injury at the hands of the defendant.” *Arandell*, 149 F.4th at 898 (quoting *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009)). The Tenth Circuit similarly prohibits certification when “a significant portion” of class members are uninjured. *Rider*, 175 F.4th at 1226, 1232 (quoting *Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1185 (10th Cir. 2023)).⁷ And the Eleventh Circuit holds that class certification is improper when “a large portion of the class does not have standing.” *Cordoba*, 942 F.3d at 1277. As that court explained, “unnamed class members’ standing [can] pose[] a powerful problem under Rule 23(b)(3)’s predominance factor.” *Id.* at 1273.

⁷ The Tenth Circuit’s treatment of uninjured class members has arisen in part alongside ascertainability questions. *See Rider*, 175 F.4th at 1226-27. In *Cline v. Sunoco, Inc. (R&M)*, 159 F.4th 1171 (10th Cir. 2025), the court likewise considered standing in the context of a dispute about ascertainability and concluded that unidentified class members had standing. *Id.* at 1194, 1197-99. These decisions further illustrate the uncertainty over what plaintiffs must establish concerning absent class member standing.

The Fourth Circuit has held that a class may contain some uninjured members but has not set the upper limit. In one case, it held that a class with 32% uninjured members was “much too high” and made the predominance question “not a close call.” *Mr. Dee’s*, 127 F.4th at 934. More recently, it suggested that class certification may be improper if “uninjured class members are more than mere outliers.” *Spurlock v. Wexford Health Sources, Inc.*, 175 F.4th 232, 252 (4th Cir. 2026). Regardless of where the line of permissibility is between “mere outliers” and 32%, the Fourth Circuit would not permit a class with virtually all uninjured members.⁸

C. The Ninth Circuit here deepened the existing split by taking its approach to a new extreme. Before this case, in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, the en banc Ninth Circuit expressly rejected a de minimis limit on uninjured class members and permitted class certification so long as there was not “a great number” of uninjured class members. 31 F.4th 651, 669 & n.14 (9th Cir. 2022) (en banc) (citation omitted). Judge Lee warned that the majority’s holding “needlessly creates a split with other circuits” and contradicts “Rule 23’s

⁸ These circuits all recognize a limit on uninjured class members. Some ground that limit in Article III, *see, e.g., Denney*, 443 F.3d at 263-66; others in Rule 23(b)(3)’s predominance requirement, *see, e.g., Rail Freight*, 934 F.3d at 624-26; and others in both, *see, e.g., Mr. Dee’s*, 127 F.4th at 933-34. Only this Court can resolve whether there is a limit on uninjured class members, and whether that limit is procedural, constitutional, or both.

language, common sense, and precedent from other circuits.” *Id.* at 691-92 (Lee, J., dissenting). Justice Kavanaugh in *Labcorp* agreed that the Ninth Circuit’s approach in *Olean* was “incorrect under Rule 23 and this Court’s precedents.” *Labcorp*, 605 U.S. at 332-33 (Kavanaugh, J., dissenting) (citing *Olean*, 31 F.4th at 669).

In this case, the Ninth Circuit took that approach even further. The Ninth Circuit affirmed class certification despite Plaintiffs’ lack of evidence that a single absent class member was injured. Plaintiffs’ survey expert testified 79 times across two depositions that she had no evidence that Bayer’s label deceived any consumer. 2-ER-79–83; 3-ER-248–56. Their damages expert never ran his proposed model, admitting that it might show “no price premium” at all. 3-ER-357. The Ninth Circuit candidly acknowledged that “all class members” may be uninjured. App.4a. Yet it held that Plaintiffs’ price premium “theory” and “not-yet-executed damages model” were sufficient for class certification. App.4a-5a (citation omitted).

Plaintiffs’ classes would not have been certified in any of the circuits discussed above. The classes are not limited to members who have suffered an injury, as required by the Second and Eighth Circuits. Nor have Plaintiffs offered any basis to find that the number of uninjured class members was within the ranges permitted by the First, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits. Only the Ninth Circuit would permit certification of these injury-free classes.

If the Ninth Circuit’s “great number” approach in *Olean* warranted this Court’s review in *Labcorp*, its approach here—the “anything goes” approach without evidence of injury—warrants review even more strongly.

II. This Case Is an Ideal Vehicle to Finally Resolve the Split.

Recognizing the need for guidance, this Court has twice granted certiorari to resolve the split. *See Labcorp*, 145 S. Ct. at 1134; *Tyson Foods*, 577 U.S. at 460. But each time, vehicle issues prevented the Court’s review. In *Labcorp*, the petitioner appealed an earlier version of a class certification order that was subsequently modified. 605 U.S. at 330-31 (Kavanaugh, J., dissenting). Without determining whether that subsequent modification mooted the case, the Court “dismissed” the writ “as improvidently granted.” *Id.* at 327 (majority op.). In *Tyson Foods*, the petitioner “abandon[ed] ... its argument from the petition” when it “reframe[d]” the issues in its merits briefing. 577 U.S. at 460. The Court had no “need [to], and d[id] not, address” the uninjured class member issue. *Id.*

This case presents no such obstacle. The class definitions have not been modified, and Bayer has not abandoned its argument. Bayer pressed its Rule 23 and Article III arguments repeatedly in the Ninth Circuit. *See* Dkt. 71 at 11-22 (arguing that the panel opinion is contrary to Article III and Rule 23); Dkt. 22 at 28-32 (arguing that the district court opinion is contrary to Article III and Rule 23). This case is an

ideal vehicle to finally resolve the circuit split over the question presented for three primary reasons.

First, this case cleanly presents a single, purely legal question that turns solely on the dictates of Article III and Rule 23. *Cf. TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021) (“[U]nder Article III, an injury in law is not an injury in fact.”).⁹ The key facts are undisputed. Plaintiffs’ *own survey expert* was crystal-clear that she had “no evidence that any consumers are confused by the word ‘[N]atural’ on the Bayer label.” 3-ER-285. And Plaintiffs’ *own damages expert* likewise testified that he had “no data” showing whether the label caused any consumers to pay a price premium “because the study hasn’t been designed or conducted.” 3-ER-352.

This case thus presents a particularly stark variant of the uninjured class member problem. This is not a case in which “*some* members of the proposed class lack any Article III injury.” *Labcorp*, 145 S. Ct. at 1134 (emphasis added). Rather, as the Ninth Circuit readily acknowledged, virtually *all* members of the proposed classes lack evidence of Article III injury. *See* App.6a (unable to say “whether the putative classes in fact paid a premium price for the product”).

That this case arises in the Rule 23(f) context makes it an even more attractive vehicle. There are no

⁹ Judge Forrest believed that the distinction between California and New York law was relevant, but she did not address Article III in her opinion. App.10a-12a. After Bayer re-raised the Article III issue again in its petition for rehearing, Judge Forrest voted for rehearing. App.39a.

post-verdict issues that could muddle this Court’s review of the question presented. The only issue is whether the Ninth Circuit properly affirmed certification of Plaintiffs’ proof-free classes.

This uncomplicated posture offers the Court a particularly clean opportunity to resolve the question presented. It is rare for a court to grant review under Rule 23(f), particularly in the Ninth Circuit. *See* Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. App. Prac. & Process 283, 326 (2022) (finding that the Ninth Circuit’s 18% rate of granting Rule 23(f) petitions is lower than the rates of other circuits). And if Rule 23(f) review is denied after class certification, it is “vanishingly rare,” Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009), for a case to survive the “*in terrorem* settlement pressures brought to bear by certification.” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 296 n.7 (2014) (Thomas, J., concurring in the judgment); *see infra* pp.26-28.

Second, this case arises out of the Ninth Circuit, which is a magnet for class action litigation. *See* Duane Morris Class Action Review—2026, at 12 (2026), <https://tinyurl.com/ycy4ujr8> (reporting 3,791 class actions filed in the Ninth Circuit in 2025, a 67% increase from 2022). The Ninth Circuit’s approach to class certification was already unduly permissive when this Court granted certiorari to evaluate it in *Labcorp*. *See supra* pp.18-20; *see also Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting) (“The Ninth Circuit’s decision is incorrect under Rule 23 and this

Court’s precedents, and it will generate serious real-world consequences.”). If that permissive approach warranted certiorari in *Labcorp*, the Ninth Circuit’s unbounded approach even more clearly warrants certiorari here.

The fact that the Ninth Circuit’s opinion is unpublished should “carr[y] no weight in [the Court’s] decision to review the case.” *Comm’r v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam). *Labcorp* was unpublished too. See *Davis v. Lab. Corp. of Am. Holdings*, 2024 WL 489288 (9th Cir. Feb. 8, 2024). The Ninth Circuit in both cases applied the same binding circuit precedent. See App.4a (citing *Olean*); see *Davis*, 2024 WL 489288, at *2 n.1 (citing *Olean*). This Court frequently grants certiorari in cases where unpublished opinions apply binding circuit precedent. See Rachel Brown et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1, 82, 139-45 (2021) (listing 75 such cases from 2001 through 2018).

If anything, the fact that a divided panel of the Ninth Circuit extended its outlier approach in an unpublished opinion “is yet another disturbing aspect of the ... decision, and yet another reason to grant review.” *Plumley v. Austin*, 574 U.S. 1127, 1131-32 (2015) (Thomas, J., dissenting from denial of certiorari). Since this Court dismissed *Labcorp*, the Ninth Circuit has continued to apply its outlier approach to uninjured class members in unpublished opinions. See, e.g., *Solano v. Kroger Co.*, 2026 WL 1396385, at *2 (9th Cir. May 19, 2026) (applying *Olean*

in unpublished opinion); *Falcone v. Nestlé USA, Inc.*, 2026 WL 74510, at *1 n.1 (9th Cir. Jan. 9, 2026) (same); *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co.*, 2025 WL 1683472, at *4 (9th Cir. June 16, 2025) (same). The Ninth Circuit should not be permitted to insulate its increasingly extreme approach to class certification from review by repeatedly using unpublished opinions to push the envelope.

There also can be no denying that the Ninth Circuit's opinion in this case has already had "a lingering effect." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting from denial of certiorari). A court in the Southern District of New York recently invoked the Ninth Circuit's opinion to permit another mislabeling class to seek more than \$100 million in statutory damages. *See Newman v. Bayer Corp.*, 2026 WL 1243391, at *3 (S.D.N.Y. May 6, 2026). In that case, the plaintiff's own expert determined that 72.9% of consumers were not deceived, and the plaintiff lacked even an *unexecuted* damages model. *See id.* at *1-2; *Newman v. Bayer Corp.*, 348 F.R.D. 567, 585 (S.D.N.Y. 2025). If the panel's opinion stands, more enterprising plaintiffs' counsel will likely follow that same playbook.

Third, this case presents a vehicle to address not only the Ninth Circuit's extreme approach to the issue of uninjured class members but also its proof-free method for avoiding that issue altogether. As noted, the Ninth Circuit regularly allows classes with uninjured members to proceed. It did so in this case,

and it did so in other cases that are or may soon be before this Court. *See Kroger Co. v. Solano*, No. 26-244; *Nestlé USA, Inc. v. Falcone*, No. 26A25.

But here the Ninth Circuit compounded that error by suggesting that classes do not need actual evidence of injury to begin with. The Ninth Circuit held that a proposed damages model suffices to establish predominance as to the issue of injury. App.4a. It does not matter that “all class members” may be uninjured. App.4a. It does not matter that the model is “not-yet-executed.” App.5a (citation omitted). And it does not matter that Plaintiffs’ own expert found no evidence that any consumer was deceived. *See supra* pp.8-12. Rule 23 is satisfied, the Ninth Circuit held, by a “theory” and a “not-yet-executed damages model” that may later prove that theory to be true (or not). App.4a-5a (citation omitted).

Even if this Court were to grant certiorari in another case from the Ninth Circuit (or any other circuit) to provide guidance on Rule 23’s and Article III’s limits on uninjured class members, the Court should still grant certiorari in this case to close the door on the Ninth Circuit’s proof-free approach for getting around those limits. If that door is left open, plaintiffs (and the Ninth Circuit) could easily circumvent Rule 23’s and Article III’s limits by doing exactly what Plaintiffs did here. It is therefore essential to hold *both* that absent class members must be injured under Rule 23 and Article III *and* that plaintiffs must have sufficient evidence of that injury at the class certification stage. Theories are not enough.

Only this Court can fix the problem that has divided the circuits and taken deep root in the Ninth Circuit. At the very least, if this Court were inclined to grant certiorari in *Sunoco, Inc. v. Cline*, No. 26-1; *Kroger*, No. 26-244; or any forthcoming case presenting the uninjured class member question, this petition should be held pending disposition of that case.

III. The Split Has, in This Court’s Words, “Great Importance.”

A decade ago, in a case where the evidence showed that many class members had been injured, this Court called the question whether a damages class may include uninjured members “one of great importance.” *Tyson Foods*, 577 U.S. at 461. The evidence in this case does not show that even a single absent class member was injured. *See supra* pp.8-13. If the question was “of great importance” in *Tyson Foods*, 577 U.S. at 461, it is of surpassing importance here for three primary reasons.

First, the Ninth Circuit’s approach to class certification will have “serious real-world consequences” for businesses and consumers alike. *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Although class certification may be procedural in form, it is often dispositive in practice. When a class is “overinflated with uninjured members,” the threat of “massive liability” can “coerce businesses into costly settlements” rather than “betting the company on the uncertainties of trial.” *Id.* (emphasis omitted); *see also Dunn v. Santa Fe Nat. Tobacco Co., Inc.*, 185 F.4th 999, 1049 (10th Cir. 2026)

(Tymkovich, J., dissenting) (“Businesses cannot afford to roll the dice if they face potential damages in the hundreds of millions—even if the merits of the underlying claims are doubtful or the rightful class is small.”).

Even apart from the risk of coerced settlements, class actions impose substantial defense costs. Businesses are projected to spend a record \$4.8 billion defending class actions in 2026—the eleventh consecutive record year. *See* 2026 Carlton Fields Class Action Survey at 7 (2026), <https://perma.cc/3KLR-5YKZ>. That is more than double the amount spent in 2011. *Id.* Those defense costs intensify the settlement pressure that class certification creates and add billions to the broader economic burden of class litigation.

The harm of overinflated class actions extends far beyond the businesses that must defend against them. Defense and settlement costs flow downstream “to consumers in the form of higher prices; to retirement account holders in the form of lower returns; and to workers in the form of lower salaries and lesser benefits.” *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Courts cannot cure that distortion by waiting until after certification to identify and exclude uninjured class members. As Judge Lee explained, “[p]unting this key question until later amounts to handing victory to plaintiffs because this case will likely settle without the court ever deciding that issue.” *Olean*, 31 F.4th at 686 (Lee, J., dissenting).

This case illustrates the massive exposure class certification can facilitate in stark terms. Plaintiffs

seek \$36.2 million in statutory damages for their New York class alone—roughly twenty times the total sales at issue—without evidence that any absent class member suffered an Article III injury. *See* 6-ER-1204–09. To make matters worse, those statutory damages would not be available to Plaintiffs through a class action in New York state court. *See* N.Y. C.P.L.R. § 901(b) (generally providing that “an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action”). They are available on a classwide basis here only because Plaintiffs are pursuing their claims in federal court with the aid of Rule 23. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010); *id.* at 415-16 (plurality opinion).

But Rule 23 “must be interpreted in keeping with Article III constraints.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (citation omitted). The Ninth Circuit permitted Plaintiffs to use a federal procedural rule to pursue statutory damages that would not be available to them in state court without showing that any absent class member suffered the sort of Article III injury federal jurisdiction requires. That approach does not just “keep[] the federal-court door open to class actions that cannot proceed in state court,” *Shady Grove*, 559 U.S. at 415 (plurality opinion); it blows that door off the hinges entirely.

Second, the Ninth Circuit’s opinion provides a roadmap for obtaining class certification based on mere speculation instead of “evidentiary proof.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *see supra* pp.24-26. The panel opinion “invite[s] plaintiffs

to concoct oversized classes stuffed with uninjured class members—with little fear of having their class certification bids being denied.” *Olean*, 31 F.4th at 692 (Lee, J., dissenting). And that invitation is paired with a straightforward guide for how to do so.

According to the Ninth Circuit, all a plaintiff needs to do to certify a consumer class is hire an expert (like Dr. Ingersoll) to spend two or three hours drafting a report (as Dr. Ingersoll did) that proposes a model that may or may not show a price premium (as Dr. Ingersoll admitted was true of his model). The expert need not establish that a price premium exists, nor even run his model to find out. No data or actual evidence is required. A sketch of a potential model that could possibly be run in the future, even if it might fail, is enough to certify consumer classes seeking tens of millions of dollars in damages.

As discussed above, the threat that Plaintiffs’ playbook here may be used again is not theoretical. *See supra* p.24. The Ninth Circuit’s opinion has already been used to justify certification of another class that is admittedly mostly uninjured, *see Newman*, 2026 WL 1243391, at *3, and other district courts have recently permitted classes to proceed without evidence of injury on the basis of unexecuted conjoint models, *see Washington v. Reynolds Consumer Prods. LLC*, 2026 WL 2210008, at *7 (S.D.N.Y. July 30, 2026) (granting class certification because unexecuted conjoint model “satisf[ied] predominance”); *Sharpe v. A&W Concentrate Co.*, 2021 WL 3721392, at *2-3, *6 (E.D.N.Y. July 23, 2021) (certifying class where unexecuted conjoint model, “if

viable,” would “provide common proof of the injury”); *Bechtel v. Fitness Equip. Servs., LLC*, 339 F.R.D. 462, 484-85 (S.D. Ohio 2021) (certifying classes based on overpayment theory and unexecuted damages model despite argument that the classes included “a great many persons who have suffered no injury” (citation omitted)). With the Ninth Circuit’s example in this case, other courts are likely to follow.

Third, the recurrence of the question presented in this Court underscores its importance. Seven petitions have presented variations on the same question since 2022. *See Kroger*, No. 26-244; *Sunoco*, No. 26-1; *City of Cleveland, Ohio v. Pickett*, No. 25-677; *Takeda Pharm. Co. v. Painters & Allied Trades Dist. Council 82 Health Care Fund*, No. 25-625; *Nissan N. Am., Inc. v. Johnson*, No. 24-1289; *Labcorp*, No. 24-304; *StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, No. 22-131. And over the past decade, the Court has twice granted certiorari to resolve it. *See Tyson Foods*, 577 U.S. 442; *Labcorp*, 605 U.S. 327. The question will keep returning until this Court answers it, and this case presents an excellent opportunity to do so. *See supra* pp.20-26.

IV. The Ninth Circuit Is at the Wrong End of the Split.

The Ninth Circuit’s proof-free approach to class certification is wrong. This Court should grant certiorari and make clear that Rule 23(b)(3), Article III, and this Court’s precedents prohibit the certification of Rule 23(b)(3) classes lacking evidence that any class member was injured.

A. Class actions are “an exception to the usual rule” of individual litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). Rule 23 “imposes stringent requirements for certification that in practice exclude most claims.” *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Plaintiffs bear the burden to “affirmatively ... prove” that each of those requirements is satisfied. *Wal-Mart*, 564 U.S. at 350; see *Halliburton*, 573 U.S. at 275 (plaintiffs must “actually prove ... that their proposed class satisfies each requirement of Rule 23”). Making this showing naturally requires “evidentiary proof.” *Comcast*, 569 U.S. at 33; see *Wal-Mart*, 564 U.S. at 355 (“[s]ignificant proof” (citation omitted)).

Plaintiffs here seek to certify damages classes under Rule 23(b)(3), which requires them to prove that common questions will “predominate over individual ones.” *Comcast*, 569 U.S. at 34. A question is common if “the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.” *Tyson Foods*, 577 U.S. at 453 (citation omitted).

Injury is an important question in a case like this one. It is both an element of the class claims, see N.Y. Gen. Bus. Law §§ 349(h), 350-e(3) (permitting recovery for “[a]ny person who has been injured by” the challenged statement); Cal. Civ. Code § 1780(a) (permitting recovery for “[a]ny consumer who suffers any damage as a result of” the challenged statement), and an element of Article III standing, see *TransUnion*, 594 U.S. at 417 (“No concrete harm, no standing.”). If there is no common evidence of injury,

then predominance is not satisfied. *See Rail Freight*, 934 F.3d at 624 (explaining that, at class certification, “we do expect the common evidence to show all class members suffered *some* injury” (citation omitted)).

Rule 23 also “must be interpreted in keeping with Article III constraints.” *Ortiz*, 527 U.S. at 831 (citation omitted). One of those constraints is standing. Standing requires a plaintiff to establish, among other things, an “injury in fact.” *TransUnion*, 594 U.S. at 423. That injury must be “concrete” and have “a close historical or common-law analogue.” *Id.* at 424 (citation omitted). Standing “is not dispensed in gross,” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (citation omitted), and must exist “at all stages of litigation,” *TransUnion*, 594 U.S. at 431.

“That a suit may be a class action ... adds nothing to the question of standing.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citation omitted); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) (advising that courts in “class actions” should “be more careful to insist on the formal rules of standing, not less so”). “Every class member must have Article III standing in order to recover individual damages.” *TransUnion*, 594 U.S. at 431. Courts have no “power to order relief to any uninjured plaintiff, class action or not.” *Id.* (citation omitted). If a court cannot *order relief* to an uninjured class member, it also cannot *adjudicate the claims* of that uninjured class member. *Cf. California v. Texas*, 593 U.S. 659, 673 (2021) (Article III prohibits “an advisory opinion without the possibility of any judicial relief.” (citation omitted)).

Standing must exist “at all stages” of a class action just as in any other case. *TransUnion*, 594 U.S. at 431. Rule 23 cannot alter that result. Allowing uninjured plaintiffs to pursue in a class action claims that they could not pursue individually would “violate[] the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.” *Tyson Foods*, 577 U.S. at 458.

Article III and Rule 23 therefore converge on the same conclusion: a court cannot certify a damages class without evidence that its members suffered injury.

B. Plaintiffs here provided no evidence of injury—common or otherwise. Across two depositions, Dr. Matthews was clear that she did not have any evidence of injury. She testified nearly 80 times that she had “no evidence that any consumers are confused by the word ‘[N]atural’ on the Bayer label.” 3-ER-285; *see, e.g.*, 3-ER-263 (“no evidence”); 3-ER-278 (“no evidence”); 3-ER-282 (“no evidence”); 3-ER-283 (“no evidence”); 3-ER-284 (“no evidence”); 3-ER-284 (“no statistical evidence”); 3-ER-285 (“no evidence”); 3-ER-286 (“no evidence”); 3-ER-287 (“no evidence”); 3-ER-289–90 (“no evidence whatsoever”); 3-ER-290 (“no evidence”); 3-ER-292 (“no evidence”); 3-ER-296 (“no evidence”); 3-ER-298 (“do not have evidence”); 3-ER-298 (“no evidence”); 3-ER-299 (“we have no evidence”); 3-ER-303 (“no evidence”); 3-ER-305 (“did not find any evidence”); 3-ER-306 (“no evidence”); 3-ER-307 (“not aware of any evidence”); 3-ER-308 (“no evidence”); 3-ER-309 (“no evidence”); 3-ER-311 (“not aware of any

evidence”); 3-ER-312 (“not aware of any evidence”); 2-ER-63 (“did not show any evidence”).

Dr. Ingersoll likewise had no evidence of injury. He merely *proposed* a model he could later run to determine “if there’s a ... price premium.” 3-ER-357. He did not run that model. He therefore had “no data” and never reached any “professional opinion[s]” on whether any price premium exists. 3-ER-352, 356. In fact, he conceded that it is “possible that there could be *no* price premium.” 3-ER-357 (emphasis added). Dr. Ingersoll’s proposed model in this case—much like his proposed models in other cases—is nothing more than “pure speculation.” *Reyes v. Upfield US Inc.*, 2025 WL 786656, at *7 (S.D.N.Y. Mar. 12, 2025); *see also Velez v. Lasko Prods., LLC*, 2025 WL 1865165, at *4 (S.D.N.Y. July 7, 2025) (similar); *Brockington v. Dollar Gen. Corp.*, 2025 WL 486173, at *5 (S.D.N.Y. Feb. 13, 2025).

In sum, Plaintiffs produced no evidence of consumer deception and no evidence of a price premium. They identified no common proof that absent class members were injured.

C. This dearth of evidentiary proof of injury should have prevented class certification under Rule 23(b)(3), Article III, and this Court’s precedents. The Ninth Circuit’s decision to nonetheless certify Plaintiffs’ proof-free classes rests on at least two fundamental errors.

First, the Ninth Circuit shirked its constitutional duties. Standing is a jurisdictional question that the Ninth Circuit was “bound to ask and answer for itself,

even when not otherwise suggested.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (citation omitted). Here, Bayer *did* suggest the Article III question. *See supra* p.20. And the district court and Ninth Circuit *still* failed to answer it—never mentioning Article III or this Court’s precedents interpreting it. “Going as they do to the existence of judicial authority, [standing] concerns are not to be ignored” in this way. *Mr. Dee’s*, 127 F.4th at 934.

The Ninth Circuit also fell short of its duty to conduct a “rigorous analysis” to ensure Rule 23 is “*in fact*” satisfied. *Wal-Mart*, 564 U.S. at 350-51 (citation omitted); *see also Tyson Foods*, 577 U.S. at 453 (“careful scrutiny”). Such analysis accounts for “the important due process concerns of both plaintiffs and defendants inherent in the certification decision.” *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). It requires a court to “consider[] *all* evidence relevant” to Rule 23’s requirements. *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 594 U.S. 113, 122 (2021). The district court’s failure to even acknowledge Dr. Matthews’ perception survey or her conclusion that there is no evidence any consumer was deceived is a far cry from a rigorous analysis.

Second, the Ninth Circuit held that Rule 23(b)(3)’s predominance requirement is satisfied because Plaintiffs’ unexecuted damages model, if it is ultimately run, might show that “either all class members were injured or they were not.” App.4a. But as explained above, Rule 23(b)(3) requires “evidentiary proof,” *Comcast*, 569 U.S. at 33, that there is common evidence of injury. *See supra* pp.31-

32. Mere theory or conjecture is not enough at class certification. *See Wal-Mart*, 564 U.S. at 350 (“Rule 23 does not set forth a mere pleading standard.”). And an unexecuted damages model that has never been run and may ultimately show no damages is not evidence at all, common or otherwise. Without evidence of injury, Plaintiffs’ classes should not have been certified.

The Ninth Circuit’s candid acknowledgment that “all class members” may be uninjured further misapprehends the predominance inquiry. App.4a. That inquiry is largely practical. *See* Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment (predominance asks whether “a class action would degenerate *in practice* into multiple lawsuits separately tried” (emphasis added)). It is concerned with the “evidence” that class members “will need to present” to prove their claims and how a trial would play out based on the nature of that evidence. *Tyson Foods*, 577 U.S. at 453 (citation omitted).

If Dr. Ingersoll’s proposed damages model ultimately shows that there was no price premium, as he admits it may, then Plaintiffs will not submit it to prove their claims. They will need to submit other evidence. Each class member will be left to rely on whatever individualized evidence they have to prove their injury, and the class action will necessarily devolve into a never-ending series of mini trials. *Cf. Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469 (9th Cir. 2023) (“class members were left relying on individual testimony to establish the existence of an injury” after their proposed expert was withdrawn).

Predominance requires proof that will not happen. Plaintiffs have offered none.

Even if Dr. Ingersoll's proposed *damages* model did ultimately show that there was a price premium, that still would not mean that all class members were *injured*. Damages are distinct from injury. *See, e.g., In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194-95 (3d Cir. 2020) ("Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)." (citation omitted)).

When it comes to injury, Plaintiffs' survey expert, Dr. Matthews, found no evidence that any consumers were deceived by the product label. *See supra* pp.8-12, 33-34. Consumers who were not deceived—who understood what they were purchasing and received exactly what they expected—were not injured. And they cannot claim to have paid any "price premium" based on a misrepresentation they did not believe.

Furthermore, Dr. Ingersoll's conjoint analysis would not show how "*all* class members" value all-natural vitamins. App.4a (emphasis added). It would show only how the *average* consumer values all-natural vitamins. That is because the conjoint analysis relies on averaging assumptions to show how consumers, *on average*, value a particular product attribute. *See supra* n.5; 4-ER-670–72. But an average value does not mean that all consumers in the market ascribe that same value to the attribute, let alone that all consumers were overcharged.

Even if Dr. Ingersoll's damages model showed a "price premium," it still would not establish that any particular class member was injured. Article III is concerned with particular class members, not some hypothetical average consumer. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("A federal court's jurisdiction therefore can be invoked only when *the plaintiff himself* has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" (citation omitted) (emphasis added)). Because "[e]very class member must have Article III standing in order to recover individual damages," *TransUnion*, 594 U.S. at 431, the district court would still need to conduct the highly individualized task of sorting those who in fact paid more as a result of the alleged deception from those who did not. That massive sorting exercise would "pose[] a powerful problem under Rule 23(b)(3)'s predominance factor." *Cordoba*, 942 F.3d at 1273.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2026

APPENDIX

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**APPENDIX A — MEMORANDUM OF THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED APRIL 21, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-7158
D.C. No. 3:22-cv-01085-MMA-JLB

DONIECE DRAKE; DEBORAH BOWLING,

Plaintiffs-Appellees,

v.

BAYER HEALTHCARE LLC,

Defendant-Appellant.

Filed April 21, 2026

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Argued and Submitted December 10, 2025
Pasadena, California

Before: M. SMITH, CHRISTEN, and FORREST, Circuit
Judges.

Partial Dissent by JUDGE FORREST.

*Appendix A***MEMORANDUM***

Bayer Healthcare LLC (Bayer) appeals the district court’s order certifying California and New York classes bringing product mislabeling claims under the California Consumers Legal Remedy Act (CLRA), Cal. Civ. Code §§ 1750-1784, and the New York General Business Law (GBL), N.Y. Gen. Bus. Law, §§ 349, 350. We have jurisdiction pursuant to 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). “We review the decision to certify a class . . . for an abuse of discretion.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (en banc). “We review the district court’s determination of underlying legal questions de novo, and its determination of underlying factual questions for clear error.” *Id.* (citation omitted). Because the parties are familiar with the facts of this case, we do not recount them here except as necessary to provide context for our ruling. We affirm.

1. The district court did not abuse its discretion in finding that common questions of law or fact “predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). The CLRA makes “unlawful a variety of ‘unfair methods of competition and unfair or deceptive acts or practices’ used in the sale or lease of goods or services to a consumer.” *Bower v. AT&T Mobility, LLC*, 196 Cal. App. 4th 1545, 1556 (Cal. Ct. App.

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

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2011) (quoting Cal. Civ. Code § 1770(a)). To state a CLRA claim, a plaintiff must show that the defendant engaged in deceptive conduct and that the deception caused the plaintiff harm. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011); accord *In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 94 (Cal. Ct. App. 2009). Under the CLRA, a class may establish causation on a classwide basis by evidence of materiality: “If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class.” *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 868 (9th Cir. 2025) (citation modified). The relevant sections of the GBL prohibit “[d]eceptive acts or practices in the conduct of any business, trade or commerce” or in the furnishing of any service and false advertising. *Montera v. Premier Nutrition Corp.*, 111 F.4th 1018, 1028 (9th Cir. 2024) (alteration in original) (quoting N.Y. Gen. Bus. Law §§ 349, 350) (citation modified). To succeed on a claim under the relevant sections of the GBL, “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.’” *Id.* (quoting *Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675, 675 (N.Y. 2012)).

Plaintiffs adduced sufficient evidence that their CLRA and GBL claims raise common issues that prevail over individualized ones. *See Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249, 1258 (9th Cir. 2024). Bayer’s arguments to the contrary do not persuade.

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First, Bayer and amici argue that the proposed classes include uninjured plaintiffs and that the district court accordingly abused its discretion by certifying both classes. We disagree. Plaintiffs' theory is premised on the notion that all class members were exposed to an alleged misrepresentation on the label of the product they purchased. Accordingly, the injury in this case is that the putative classes paid "an inflated premium price" for Bayer's Natural Fruit Bites products. Under Plaintiffs' theory of injury, the presence or absence of a price premium is an objective, reasonable consumer inquiry. Thus, either all class members were injured or they were not. Contrary to Bayer's assertions, that is entirely consistent with this court's reasoning in *Olean*. See 31 F.4th at 668-69, 669 n.14, 673.

Next, Plaintiffs' expert's proposed damages model was sufficient to establish that injury is common to all class members, as required at the class-certification stage. In a mislabeling case based on a deception claim, Plaintiffs can demonstrate injury-in-fact by showing that putative class members paid more for the product than they otherwise would have paid or that, absent the misrepresentation, they would not have purchased the product at all. See *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012). Dr. Ingersoll's proposed conjoint analysis demonstrated that he could "measure the value of an individual product attribute, such as a specific understanding of the label" in order to "determine the price premium attributable to the label claims." Under Plaintiffs' "theory of harm, the amount of overpayment attributable to the challenged term—the 'price premium'—is the standard measure

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of damages,” and Dr. Ingersoll’s analysis “proposed to measure that overpayment.” *Noohi*, 146 F.4th at 865.¹

As to Bayer’s objection that Dr. Ingersoll’s analysis was merely proposed and cannot constitute evidence of classwide injury, we have previously rejected that argument. In *Lytle v. Nutramax Labs., Inc.*, we held that “there is no general requirement that an expert actually apply to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage.” 114 F.4th 1011, 1019 (9th Cir. 2024) *cert. denied*, 145 S. Ct. 1308 (2025). “[C]lass action plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial.” *Id.*; *see also Noohi*, 146 F.4th at 860-61.²

1. The dissent contends that Dr. Ingersoll’s survey may show a factual injury but that it is insufficient to show a legally cognizable injury because the CLRA requires reliance, and only the class members who relied on the misrepresentation were legally injured. We disagree. We have previously explained that “[t]here is no talismanic means of measuring damages for deceptive marketing claims” pursuant to the CLRA, and “courts have approved damages models that use conjoint analysis” as Dr. Ingersoll proposes to do. *Noohi*, 146 F.4th at 867; *see also Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1033 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025) (collecting cases).

2. Bayer does not otherwise contend that Dr. Ingersoll’s proposed analysis was unreliable and did not file *Daubert* motions challenging Dr. Ingersoll’s reliability before the district court.

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Bayer demands more from Plaintiffs at this stage of the litigation than Rule 23 requires. “At the class certification stage, the key inquiry . . . is simply whether Plaintiffs have demonstrated the nexus between their legal theory . . . and their damages model.” *Noohi*, 146 F.4th at 867 (citation modified). Dr. Ingersoll’s “proposed damages model was designed to measure a price premium associated with the misleading label at the heart of [Plaintiffs’] claims.” *Id.* Plaintiffs have demonstrated that the proposed conjoint analysis, when applied, can establish whether the putative classes in fact paid a premium price for the product. The answer to that question would necessarily apply classwide. *See Lytle*, 114 F.4th at 1025. That is all that Rule 23(b)(3) requires of Plaintiffs at this stage, and the district court did not abuse its discretion in holding the same.

Plaintiffs also adduced sufficient common evidence of deception and causation under the CLRA and the GBL. As for the CLRA, we have previously explained that “[i]f the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises *as to the class*.” *Lytle*, 114 F.4th at 1034 (emphasis added). That inference is rebuttable if “materiality or reliance . . . would vary from consumer to consumer,” in which case “the issue is not subject to common proof,” and the class should not be certified. *Vioxx*, 103 Cal. Rptr. 3d at 95 (affirming that materiality was not subject to common proof where the inquiry turned on individual patient’s specific medical needs and history); *see also Knapp v. AT&T Wireless Servs., Inc.*, 124 Cal. Rptr. 3d 565, 574-75 (Cal. Ct. App. 2011) (affirming denial of class certification where class included members who never saw alleged

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misrepresentation). But California law does not require an individualized inquiry into each CLRA-class member's reliance on the allegedly misleading statements. Instead, "[m]ateriality, and therefore an inference of reliance, can be established by reference to an objective, reasonable consumer standard." *Noohi*, 146 F.4th at 861. Accordingly, "reliance under the CLRA is generally susceptible to common proof," *Lytle*, 114 F.4th at 1034, and CLRA claims tend to be "ideal for class certification," *Noohi*, 146 F.4th at 868.

Plaintiffs here are "entitled to the inference that reliance can be shown via common proof." *Id.* at 869. Plaintiffs offered evidence of materiality through named Plaintiffs' deposition testimony, Bayer's internal documents, and Dr. Matthews's survey. Bayer's disagreements with the substance of Plaintiffs' evidence do not defeat class certification because the core inquiry at this stage is whether the element of reliance, or materiality, is susceptible to common proof. *See Lytle*, 114 F.4th at 1034. Plaintiffs' claims concern "classwide exposure" to Bayer's label and the "natural" language. *See Noohi*, 146 F.4th at 869 (explaining that under California law, "[i]n determining whether a statement is materially misleading . . . the primary evidence is the advertising itself" (internal quotation marks omitted)). Under the objective, reasonable consumer standard, the district court did not abuse its discretion in concluding that "the ultimate question" of whether the alleged misrepresentation "was material was a common question of fact suitable for treatment in a class action." *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1294 (Cal. Ct. App. 2002); *see also Noohi*,

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146 F.4th at 869 (concluding that “undisputed evidence of classwide exposure” suffices to establish the “inference that reliance can be shown via common proof” under “the objective standard for materiality”).

The GBL likewise adopts an objective standard and asks whether a deceptive act is likely to deceive a reasonable consumer. *See Montera*, 111 F.4th at 1028. And, as in the CLRA context, we have explained that the objective, reasonable consumer standard applicable to GBL claims is particularly susceptible to resolution in a class action because it is “unnecessary to make any individualized inquiry into what each plaintiff knew and relied on in purchasing” the product. *Id.* at 1033 (citation omitted).

We thus conclude that Plaintiffs satisfied the predominance inquiry for Rule 23(b)(3).

2. Bayer additionally challenges the district court’s finding that Plaintiffs satisfied Rule 23(a)’s prerequisites for class certification. Specifically, Bayer appeals the district court’s findings with respect to the commonality, adequacy, and typicality requirements. Because we conclude that Plaintiffs have met their burden to demonstrate predominance under Rule 23(b)(3), we accordingly conclude that Plaintiffs have met their lower burden to demonstrate a question of law or fact common to the putative classes. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (observing that “even a single common question will do” for purposes of Rule 23(a) (citation modified)).

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Plaintiffs also met their burden with respect to typicality and adequacy. Both named Plaintiffs testified that they purchased Natural Fruit Bites products and did so because they believed them to be natural. At the class certification stage, the district court properly considered testimony consistent with Plaintiffs' theory of injury to determine that the interests of the named Plaintiffs aligned with the interests of each putative class.

We therefore conclude that the district court did not abuse its discretion in holding that Plaintiffs satisfied the requirements of Rule 23(a).

AFFIRMED.

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FORREST, Circuit Judge, dissenting in part:

I agree with the majority that the district court did not abuse its discretion in finding that common questions of law or fact predominate as to Plaintiffs' claim under the New York General Business law (GBL). But I disagree that common questions of law or fact predominate regarding Plaintiffs' California Consumers Legal Remedy Act (CLRA) claim. Because Plaintiffs advance a price-premium injury theory, to successfully bring a CLRA class claim they must demonstrate that all (or, perhaps, nearly all) members of the class relied on the alleged misrepresentation. Here, Defendant Bayer Healthcare LLC (Bayer) can point to undisputed evidence that a substantial proportion of class members was not misled, rebutting the inference of reliance. And because there is not classwide causation, neither is there classwide injury. Thus, the district court abused its discretion, and I would reverse certification of the California class.

The CLRA prohibits “unfair methods of competition and unfair or deceptive acts or practices.” Cal. Civ. Code § 1770(a). When bringing an action under this statute, “plaintiff[s] must show (1) the defendant engaged in deceptive conduct and (2) the deception caused plaintiff[s] harm.” *Lytle v. Nutramax Lab’y, Inc.*, 114 F.4th 1011, 1034 (9th Cir. 2024) (as amended). “[C]ausation, on a classwide basis, may be established by *materiality*. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class.” *Id.* (quoting *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011)).

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Materiality is determined “by reference to an objective, reasonable consumer standard,” which means that “reliance under the CLRA is generally susceptible to common proof.” *Id.* But “[t]here is an important caveat to this reasoning.” *Noohi v. Johnson & Johnson*, 146 F.4th 854, 868 (9th Cir. 2025). “If the misrepresentation or omission is not material as to all class members, the issue of reliance ‘would vary from consumer to consumer[,]’ and the class should not be certified.” *Id.* (quoting *Stearns*, 655 F.3d at 1022-23). Defendants can “rebut the inference of reliance” by pointing to evidence “that the understanding of the [challenged] phrase . . . varies across the class.” *Id.* at 869.

Here, Plaintiffs’ theory of injury is that class members were injured by paying a price premium after relying on Bayer’s alleged misrepresentation. To demonstrate injury, Plaintiffs point to their expert Dr. William Ingersoll, who proposed conducting a choice-based conjoint survey to demonstrate the premium associated with the product label’s inclusion of the word “natural.” Plaintiffs argue, and the court accepts, that on their price-premium injury theory, “either all class members were injured or they were not.” To be sure, Dr. Ingersoll’s survey may show that all class members suffered a factual injury in the sense that they were all charged a price premium and overpaid. But because the CLRA requires reliance, only those class members who relied on the misrepresentation have suffered a legally cognizable injury.

Bayer has pointed to undisputed evidence that reliance was not universal across the class. Specifically,

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it highlights that Dr. Matthews, Plaintiffs' expert on materiality, concluded that the challenged statement was not universally misleading. Likewise, neither the named plaintiffs' depositions nor Bayer's internal documents can demonstrate classwide reliance. Thus, I disagree with the majority that the results of Dr. Ingersoll's proposed conjoint analysis will necessarily answer whether the entire class suffered legal injury.

For these reasons, I respectfully dissent in part.

**APPENDIX B — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, FILED SEPTEMBER 16, 2024**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 22-cv-1085-MMA (JLB)

DONIECE DRAKE, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED, *et al.*,

Plaintiffs,

v.

BAYER HEALTHCARE LLC,

Defendant.

Signed September 16, 2024

ORDER:

- (1) **GRANTING MOTIONS TO FILE UNDER SEAL;**
[Doc. Nos. 87; 94; 102; 108]
- (2) **GRANTING MOTION FOR CLASS
CERTIFICATION; AND**
[Doc. No. 90]
- (3) **DENYING MOTIONS FOR SANCTIONS**
[Doc. Nos. 104; 107]

Appendix B

Pending before the Court is Plaintiffs Doniece Drake's and Deborah Bowling's ("Plaintiffs") motion for class certification. Doc. No. 90. Defendant Bayer Healthcare LLC ("Defendant") filed an opposition, Doc. No. 96, to which Plaintiffs replied, Doc. No. 110. In addition, the Court granted Defendant leave to file a sur-reply, to which the Court also allowed Plaintiffs to respond. Doc. Nos. 117-119. Also pending before the Court are the parties' respective Rule 11 motions for sanctions, which are fully briefed. Doc. Nos. 104; 107. The Court found the matters suitable for determination on the papers and without oral argument pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7.1.d.1. *See* Doc. Nos. 115; 117. For the reasons set forth below, the Court **GRANTS** Plaintiffs' motion for class certification and **DENIES** the parties' motions for sanctions.

I. Background

This case involves Defendant's popular "One A Day" ("OAD") line of multivitamins. Doc. No. 85 (Second Amended Complaint, the "SAC") ¶ 1. Specifically, Plaintiffs' SAC concerns Defendant's OAD Natural Fruit Bites Multivitamin products (the "Products"), including the following "four varieties: Men's, Women's, Men's 50+, and Women's 50+." *Id.* ¶ 1 n.1. Plaintiffs allege Defendant's "advertising and marketing campaign is false, deceptive, and misleading" because it holds its Products out as "natural" even though they "contain non-natural, synthetic ingredients." *Id.* ¶¶ 1-2.

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Named Plaintiffs Drake and Bowling are two adult women who purchased Defendant's Products. *See id.* ¶¶ 8, 11. Drake purchased the Products in 2020 in retail outlets in Queens, New York, where she is a resident. *Id.* ¶ 8; Doc. No. 110-4 at 2. Bowling is a resident of Riverside County, California, and she purchased the Products in retail outlets in Los Angeles County, California in or around 2020. *Id.* ¶ 11; Doc. No. 110-5 3. Both Named Plaintiffs have stated that they read the word "natural" on the Products' labels and relied on the word "natural" in purchasing the Products. *Id.* ¶¶ 9, 12; Doc. No. 110-6 at 3-4; Doc. No. 110-7 at 2-3.

Named Plaintiffs bring suit as individuals as well as on behalf of two statewide classes in California and New York. SAC ¶¶ 41-76. The classes that Plaintiffs seek to certify are defined as follows in the instant motion:

California Class. All persons who purchased at least one of the following Products in the State of California from March 1, 2020, to May 30, 2023:

- One-A-Day Natural Fruit Bites Women's
- One-A-Day Natural Fruit Bites Men's
- One-A-Day Natural Fruit Bites Women's 50+
- One-A-Day Natural Fruit Bites Men's 50+

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New York Class. All persons who purchased at least one of the following Products in the State of New York from May 31, 2020, to May 30, 2023:

- One-A-Day Natural Fruit Bites Women’s
- One-A-Day Natural Fruit Bites Men’s
- One-A-Day Natural Fruit Bites Women’s 50+
- One-A-Day Natural Fruit Bites Men’s 50+

Doc. No. 90-1 at 14.

Plaintiffs allege unlawful and deceptive business practices in violation of California’s Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 *et seq.*, on behalf of Bowling and the California class, deceptive acts and practices in violation of the New York General Business Law (“GBL”) § 349 on behalf of Drake and the New York class, and false advertising in violation of the New York GBL § 350 on behalf of Drake and the New York class. *See* SAC ¶¶ 41-76.

II. Legal Standard

Federal Rule of Civil Procedure 23 governs class actions. “Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of

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Rule 23.”¹ *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). The burden is on the party seeking certification to show, by a preponderance of the evidence, that the prerequisites have been met. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1175 (9th Cir. 2011).

Certification under Rule 23 is a two-step process. The party seeking certification must first satisfy the four threshold requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. Specifically, Rule 23(a) requires a showing that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The party seeking certification must then establish that one of the three grounds for certification applies. *See* Fed. R. Civ. P. 23(b). As stated in

1. Unless otherwise noted, all “Rule” references are to the Federal Rules of Civil Procedure.

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their motion, Plaintiffs invoke only Rule 23(b)(3) because they are no longer seeking injunctive relief.² *See* Doc. No. 90-1 at 14 n.2.

Rule 23(b)(3) provides that a class action may be maintained where “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.” Fed. R. Civ. P. 23(b)(2)(3). 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.

Id. In considering a motion for class certification, the substantive allegations of the complaint are accepted as

2. Plaintiffs note that the Products were last sold in May 2023. Doc. No. 90-1 at 14 n.2.

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true, but “the court need not accept conclusory or generic allegations regarding the suitability of the litigation for resolution through a class action.” *Hanni v. Am. Airlines, Inc.*, No. 08-cv-00732-CW, 2010 WL 289297, at *8 (N.D. Cal. Jan. 15, 2010); *see also Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 447 (N.D. Cal. 2012) (“[Courts] need not blindly rely on conclusory allegations which parrot Rule 23 requirements.”). Accordingly, “the court may consider supplemental evidentiary submissions of the parties.” *Hanni*, 2010 WL 289297, at *8; *see also Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

“A court’s class-certification analysis . . . may entail some overlap with the merits of the plaintiff’s underlying claim.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465-66 (2013) (internal quotation marks omitted). However, “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.” *Id.* at 466. “Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Id.*

III. Motions to File under Seal

The parties have moved to file under seal a number of documents in conjunction with the briefing on Plaintiffs’ motion for class certification. *See* Doc. Nos. 87, 94, 108. In addition, Defendant has moved to file under seal portions of the deposition transcript of Plaintiff Bowling in connection with its Rule 11 motion for sanctions. Doc. No. 102. “Historically, courts have recognized a ‘general

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right to inspect and copy public records and documents, including judicial records and documents.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). This is “because court records often provide important, sometimes the only, bases or explanations for a court’s decision.” *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014) (quotation omitted). Accordingly, when considering a sealing request, “a strong presumption in favor of access” is generally a court’s “starting point.” *United States v. Bus. of Custer Battlefield Museum & Store*, 658 F.3d 1188, 1194 (9th Cir. 2011) (quotation omitted). That presumption can be overcome only by a showing of a “compelling reason,” that “outweighs the general history of access and the public policies favoring disclosure.” *Id.* at 1194-95.

“Despite this strong preference for public access,” courts have “carved out an exception” for certain court filings. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016) (quotation omitted). Filings that are not “more than tangentially related to the merits of a case” need only satisfy “the less exacting ‘good cause’ standard” of Federal Rule of Civil Procedure 26(c). *Id.* The “good cause” standard requires a “particularized showing” that “specific prejudice or harm will result” if the information is disclosed. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002) (citation omitted); *see also* Fed. R. Civ. P. 26(c). “Unless the denial of a motion for class certification would constitute the death knell of a case, the vast majority of courts within this Circuit treat motions for class certification as

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non-dispositive motions to which the ‘good cause’ sealing standard applies.” *Ramirez v. GEO Grp.*, No. 18CV2136-LAB-MSB, 2019 WL 6782920, at *3 (S.D. Cal. Dec. 11, 2019) (quotation omitted).

However, some courts have recognized that the good cause standard may not be appropriate where a class certification motion is effectively dispositive because the stakes of the litigation are such that proceeding individually would not be viable from a practical perspective, and that in such circumstances a party must present compelling reasons for sealing. *See, e.g., In re High-Tech Emp. Antitrust Litig.*, 2013 WL 5486230, at *2 n.1 (citing *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000)); *see also In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2014 WL 10537440, at *3 (N.D. Cal. Aug. 6, 2014) (holding that the case at issue “present[ed] such a circumstance”). Although Plaintiffs have not indicated that the denial of their motion for class certification would constitute the death knell of the case, the Court finds that this is such a case because the Products sold for significantly less than the filing fee to bring an action in this Court, and therefore, individual litigation would not be practical and class certification would be effectively dispositive. Accordingly, the parties must show particularized compelling reasons to seal documents.

Here, the documents attached to and paragraphs referenced in the parties’ briefing on Plaintiff’s motion for class certification include personal information of Named Plaintiffs and information from third-party Circana Inc.

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and Defendant that is the type “of business information that might harm a litigant’s competitive standing” if they were made publicly available. *Nixon*, 435 U.S. at 598 (citation omitted). The Court finds that compelling reasons have been shown to seal the business information of Circana Inc. and Defendant, as well as Plaintiffs’ personal information. Therefore, the Court **GRANTS** the parties’ motions to seal.³ However, as seen below, the Court does rely on certain facts contained in the sealed documents that relate to numerosity and materiality. The public has a strong interest in the disclosure of these facts and compelling reasons for their confidentiality do not exist.

IV. Discussion

As explained below, the Court finds that Plaintiffs have satisfied the standards set forth in Rule 23(a) and Rule 23(b)(3).

A. Rule 23(a)

Rule 23(a) enumerates four prerequisites for class certification, referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy.

3. The Court’s ruling on the sealing of these documents and this information only applies at this stage in the proceedings and to the documents and briefing portions currently filed on the docket and has no bearing on the sealing of these documents or information at a later stage in the proceedings.

*Appendix B***1. Numerosity**

Rule 23(a)(1) requires that the “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). The party seeking certification “do[es] not need to state the exact number of potential class members, nor is a specific number of class members required for numerosity.” *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005). However, courts generally find that numerosity is satisfied if the class includes forty or more members. *See Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 605-06 (N.D. Cal. 2014); *In re Facebook, Inc., PPC Adver. Litig.*, 282 F.R.D. 446, 452 (N.D. Cal. 2012). Here, Plaintiffs contend that the proposed classes consist of “thousands” of members. Doc. No. 89 at 17. In addition, Defendant does not dispute that the proposed classes satisfy the numerosity requirement. Therefore, the Court finds that this element has been satisfied.

2. Commonality

Rule 23(a)(2) requires questions of law or fact common to the class. According to Plaintiffs, common issues include whether Defendant’s “natural” representation on its Products’ labels was deceptive and likely to deceive the public. Doc. No. 90-1 at 18; *see Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 664-65 (C.D. Cal. 2009) (“The proposed class members clearly share common legal issues regarding [Defendant’s] alleged deception and misrepresentations in its advertising and promotion of the Products.”).

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Defendant contends that commonality fails because individual issues predominate over common issues. Doc. No. 96 at 19. Because this argument overlaps with the Rule 23(b)(3) predominance analysis, the Court addresses it below, concluding that Plaintiffs have demonstrated both commonality and predominance.

3. Typicality and Adequacy

Typicality requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). Adequacy of representation requires that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). Adequacy is satisfied where (i) counsel for the class is qualified and competent to vigorously prosecute the action, and (ii) the interests of the proposed class representatives are not antagonistic to the interests of the class. *See Johns v. Bayer Corp.*, 280 F.R.D. 551, 557 (S.D. Cal. 2012).

Here, Plaintiffs claim typicality is met because they and the proposed class assert exactly the same claim, arising from the same course of conduct—the “natural” representation on the Products’ labels. Doc. No. 90-1 at 26. Likewise, Plaintiffs claim adequacy is met because their interests and class members’ interests are fully aligned in determining whether the Products’ labels were likely to deceive a reasonable consumer. *Id.* at 27. In addition, Plaintiffs note that they have been engaged in the litigation, responding to multiple discovery requests and attending depositions. *Id.* at 28.

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Defendant argues Plaintiffs are atypical and inadequate. Doc. No. 96 at 14-17. Defendants assert that it is “unlikely” that Plaintiffs purchased the Products, the word “natural” on the labels “was not material” to Plaintiffs’ purchasing decisions, and that Plaintiffs are “overwhelmingly ignoran[t] regarding the nature of this action.” *Id.* at 14-17. However, as Plaintiffs note, they testified multiple times that they purchased the Products and that they purchased the Products because of the “natural” representation on the labels. Doc. Nos. 110 at 3-4; 110-6; 110-7. This is enough to “assure that the interest of the named representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Typicality may be a bar to certification if other members would suffer because the named plaintiffs would be “preoccupied with defenses unique to” them. *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (quoting *Hanon*, 976 F.2d at 508). That is not the situation here. In addition, the Court does not find that this is a case where Named Plaintiffs “are startlingly unfamiliar with the case.” *Dufour v. Be LLC*, 291 F.R.D. 413, 419 (N.D. Cal. 2013) (internal quotations omitted). And in any event, objections to adequacy based on a named representative’s alleged ignorance are disfavored. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370-74 (1966).

Defendant also argues that Plaintiffs’ counsel are inadequate. Doc. No. 96 at 17-18. However, the Court finds that the complained-of behaviors, such as certain discovery violations, do not rise to a level that suggest Plaintiffs’ counsel are inadequate given that counsel has ample experience with consumer class actions and no

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conflicts with the proposed classes. Accordingly, the Court finds that typicality and adequacy have been met.

B. Rule 23(b)(3)

In addition to the prerequisites set forth in Rule 23(a), a class must be maintainable under Rule 23(b). Under Rule 23(b)(3), certification is appropriate if: (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

1. Predominance

“In order to satisfy the predominance requirement, a plaintiff must demonstrate that the claims are ‘capable of proof at trial through evidence that is common to the class rather than individual to its members.’” *Campion v. Old Republic Home Prot. Co.*, 272 F.R.D. 517, 528 (S.D. Cal. 2011) (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3rd Cir. 2008)). In analyzing predominance, “the Court must first examine the substantive issues raised by [p]laintiffs and second inquire into the proof relevant to each issue.” *Jimenez v. Domino’s Pizza, Inc.*, 238 F.R.D. 241, 251 (C.D. Cal. 2006). Additionally, in order to satisfy Rule 23(b)(3), “plaintiffs must show that ‘damages are capable of measurement on a classwide basis.’” *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, No. ML 13-2438 PSG (PLAx), 2017 WL

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2559615, at *9 (C.D. Cal. June 7, 2017) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)).

“For purposes of class certification, the . . . CLRA [is] materially indistinguishable. [The] statute allows Plaintiffs to establish the required elements of reliance, causation, and damages by proving that Defendant[] made what a reasonable person would consider a material misrepresentation.” *Forcellati v. Hyland’s, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *9 (C.D. Cal. Apr. 9, 2014); *see also Townsend v. Monster Bev. Corp.*, 303 F. Supp. 3d 1010, 1043 (C.D. Cal. 2018). The same is essentially true for Plaintiffs’ GBL causes of action. *See Sharpe v. A&W Concentrate Co.*, No. 19-CV-768 (BMC), 2021 WL 3721392, at *5 (E.D.N.Y. July 23, 2021) (noting that the element of materiality raises common questions, and “the centrality of those questions is strong evidence of predominance”).

Here, Defendant argues there is no predominance because (1) Plaintiffs cannot show that the disputed claims were material, (2) Plaintiffs cannot show classwide deception/reliance, and (3) Plaintiffs fail to present a proper damages model. Doc. No. 96 at 20-30. The Court addresses each argument in turn.

a. Materiality

Defendant argues that Plaintiffs cannot establish predominance because they cannot show that Defendant’s alleged misrepresentation—using the word “natural” on its gummy vitamin bottles that contain synthetic

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ingredients—was material to a reasonable consumer, a required element of each of Plaintiffs’ causes of actions. Doc. No. 96 at 23-26; *see also Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 224 (N.D. Cal. 2015).

“A representation is ‘material’ . . . if a reasonable consumer would attach importance to it or if the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action.” *Id.* (citing *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013), *as amended on denial of reh’g and reh’g en banc* (July 8, 2013)) (internal quotation marks omitted). “[P]laintiffs must offer some means of providing materiality and reliance by a reasonable consumer on a classwide basis in order to certify a class.” *Del Monte Foods*, 308 F.R.D. at 225.

Here, Plaintiffs offer several means of showing materiality, including Named Plaintiffs’ depositions, internal documents from Defendant, and a materiality survey from one of Plaintiffs’ experts, Dr. Andrea Lynn Matthews. Doc. No. 90-1 at 22. Although Defendant argues “Plaintiffs’ own testimony makes clear that the word ‘Natural’ is not material to them when they make purchasing decision,” the Court agrees with Plaintiffs that both Drake and Bowling testified in their depositions that they bought the Products because the label had the word “natural” on them. *See* Doc. Nos. 110-6 at 2-3; 110-7 at 2-3. As to Defendant’s internal documents, Plaintiffs include emails from Defendant’s marketing team and its “senior brand manager” indicating that Defendant had discussions

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on whether to include the word “natural” on its labels. For example, Defendant’s senior brand manager stated in an email that the “Regulatory [department] did not support” the use of the word “natural” on the labels “based on the presence of vitamins (which are synthetic) in the formula.” Doc. No. 88-3 at 2. In another email, Defendant’s vice president of marketing mentioned that she “would keep [the word “natural”] to test . . .” because “[c]onsumers loved those words . . .” Doc. No. 88-4 at 2. In opposition, Defendant argues that Plaintiffs “misrepresent the views” of its regulatory department. Doc. No. 96. Based on its review of Plaintiffs’ evidence, the Court finds that at this juncture, Defendant’s internal documents support that a reasonable consumer would attach importance to the claims at issue, and that Defendant knew that its consumers would regard these claims as important, which renders these claims material.

As to Plaintiffs’ expert, Defendant argues that Dr. Matthews’s survey is flawed and that its own expert report from Dr. Ran Kivetz “proves that the word ‘Natural’ on the [P]roducts’ label is not material to consumers.” Doc. No. 96 at 24. At this stage in the proceedings, the Court agrees with Plaintiffs that Defendant’s attacks on Plaintiffs’ expert presents common questions that cannot be resolved at this juncture and do not preclude certification. *In re JUUL Labs, Inc., Mktg. Sales Pracs. & Prod. Liab. Litig.*, 609 F. Supp. 3d 942, 958 (N.D. Cal. 2022). Indeed, the Court finds that Defendant’s arguments hinge on a classic “battle of the experts” that must be resolved by the trier of fact.

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Accordingly, the Court finds that Plaintiffs have presented sufficient evidence to establish materiality at this stage of the proceedings.

b. Reliance

Next, Defendant argues that Plaintiffs cannot show predominance because Plaintiffs cannot show that there is a common, classwide interpretation of each disputed claim, such that individualized inquiries into how each consumer interpreted the claims are not necessary. As noted above, this inquiry is intertwined with the question of materiality for CLRA and GBL claims. *See In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 576-77 (C.D. Cal. 2014) (“[I]f a misrepresentation is not material as to all class members, the issue of reliance ‘var[ies] from consumer to consumer,’ and no classwide inference arises.”); *Thurston v. Bear Naked, Inc.*, No. 3:11-CV-02890-H, 2013 WL 5664985, at *8 (S.D. Cal. July 30, 2013).

While Defendant argues that Plaintiffs have failed to present expert testimony or survey evidence showing uniform interpretation of each claim, Plaintiffs have established materiality, and in doing so, have offered evidence that the “natural” representation on the Products’ labels was intended to meet consumers’ desires. Because Plaintiffs have already established materiality of the claims as to all class members, this is sufficient to show that the issue of reliance does not vary from consumer to consumer. *See ConAgra Foods*, 302 F.R.D. at 576-77; *see also Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 902 (N.D. Cal. 2015) (“Reliance can be established on a

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classwide basis by materiality. In short, if the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class.”) (internal quotation marks omitted).

c. Damages Model

The predominance inquiry “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). As part of this inquiry, plaintiffs must demonstrate that “damages are capable of measurement on a classwide basis.” *Comcast*, 569 U.S. at 34. Plaintiffs must present a damages model consistent with their theory of liability—that is, a damages model “purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory.” *Id.* at 35. “Calculations need not be exact,” *id.*, nor is it necessary “to show that [the] method will work with certainty at this time,” *Khasin v. R. C. Bigelow, Inc.*, No. 12-CV-02204-WHO, 2016 WL 1213767, at *1 (N.D. Cal. Mar. 29, 2016).

In cases involving deceptive claims, plaintiffs can satisfy the injury-in-fact requirement by showing that they paid more for a product than they otherwise would have paid (e.g., a price premium), or that they would not have purchased a product at all absent the deceptive claims. *See Mazza*, 666 F.3d at 595.

As an initial matter, it should be noted that “class wide damages calculations under the CLRA are particularly

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forgiving[,]” because “California law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.” *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818 (9th Cir. 2019) (cleaned up). Here, Plaintiffs’ theory of liability in this case is that Defendant misrepresented that the Products are “natural” even though they contain synthetic ingredients, and that this alleged misrepresentation caused consumers to pay a higher price for the Products. Doc. No. 90-1 at 24; *see, e.g., McMorrow v. Mondelez Int’l, Inc.*, 2021 WL 859137, *6 (S.D. Cal. 2021) (“Plaintiffs’ action is a classic mislabeling case, and their allegation is that the defendant’s mislabeling of the Products caused Plaintiffs and the putative class members to pay more than they would have if the Products were properly labeled.”). As a method for measuring class-wide damages, Plaintiffs point to their expert Dr. William Ingersoll’s proposed “choice-based conjoint survey methodology,” which will “measure the value of an individual product attribute, such as a specific understanding of the label” and in turn will help “determine the price premium attributable” to the label claims. Doc. No. 90-1 at 24.

Conjoint surveys, like the one proposed by Plaintiffs’ expert, are a well-established method for measuring class-wide damages in mislabeling cases. *See, e.g., Bailey v. Rite Aid Corp.*, 338 F.R.D. 390, 409 (N.D. Cal. 2021) (“In mislabeling cases where the injury suffered by consumers was in the form of an overpayment resulting from the alleged misrepresentation at issue, . . . courts routinely hold that choice-based conjoint models that are

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designed to measure the amount of overpayment satisfy *Comcast's* requirements.”); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1110 (N.D. Cal. 2018) (noting that “[i]t is well-established that the ‘price premium attributable to’ an alleged misrepresentation on product labeling or packaging is a valid measure of damages in a mislabeling case under the [] CLRA,” and that “conjoint analysis is widely-accepted as a reliable economic tool for isolating price premia”) (quoting *Brazil v. Dole Packaged Foods, LLC*, 660 F. App’x 531, 534 (9th Cir. 2016)); *Briseno v. ConAgra Foods, Inc.*, 674 F. App’x 654, 657 (9th Cir. 2017) (recognizing that a “conjoint analysis to segregate the portion of th[e] premium attributable to” a contested label claim was a “well-established damages model []”); *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 575 (N.D. Cal. 2020) (“[C]onjoint surveys and analyses have been accepted against *Comcast* and *Daubert* challenges by numerous courts in consumer protection cases challenging false or misleading labels.”); *McMorrow*, 2021 WL 859137, at *14 (finding that the plaintiff’s proposed conjoint survey, which would “isolate and measure the price premium attached only to the term ‘nutritious,’” satisfied *Comcast*).

Relevant here, Defendant criticizes Dr. Ingersoll’s proposed model because his conjoint analysis has not been applied yet to the proposed classes and because his report refers to “natural ingredients” rather than “natural vitamins.” Doc. No. 96 at 28-29. First, the Court agrees with Plaintiffs’ that the proposed model is sufficient even though it does not inquire as to “natural vitamins.” Doc. No. 109 at 11. Indeed, Plaintiffs’ have “always argued that the ‘natural’ label is deceptive because the Product[s]

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contain[] synthetic ingredients.” *Id.*; *see, e.g.*, SAC ¶¶ 2, 9, 12. Second, the Ninth Circuit has held that “there is no general requirement that an expert actually apply to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage.” *Lytle v. Nutramax Lab’ys, Inc.*, No. 22-55744, 2024 WL 3915361, at *2 (9th Cir. Aug. 23, 2024). In addition, the *Lytle* Court held “that class action plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial.” *Id.*

Upon review of Plaintiffs’ proposed model, the Court is satisfied that Plaintiffs have sufficiently shown that their proposed damages model is reliable and consistent with their theory of liability under *Comcast*. *See, e.g., Bailey*, 338 F.R.D. at 409 (Plaintiffs’ proposed choice-based conjoint survey “seeks to measure the premium that consumers paid, on average, as a result of the allegedly misleading conduct at issue and is therefore directly tied to the theory of liability in the case.”).

For these reasons, the Court agrees with Plaintiffs that common questions of fact and law predominate over individualized inquiries, and will thus evaluate whether class litigation is a superior method to adjudicate this controversy.

*Appendix B***2. Superiority**

The Court also agrees with Plaintiffs that a class action is superior to other available methods of adjudicating these issues. Judicial economy weighs in favor of a class action where, as here, liability turns on whether products' labels were false or misleading. Likewise, it would be economically infeasible for class members to pursue their claims individually, since the expense of litigating the scientific adequacy of Defendant's claims would be exponentially larger than the small amount in controversy for each individual consumer (around \$11-\$13 per purchase). *See, e.g., Wiener*, 255 F.R.D. at 671. It is far more efficient to resolve the common questions regarding materiality and scientific substantiation in a single proceeding rather than to have individual courts separately hear these issues. The Court therefore concludes that Plaintiffs have met all the requirements of Rule 23(b)(3), as well as Rule 23(a).

V. Rule 11 Motions for Sanctions

Both parties have filed Rule 11 motions for sanctions. Doc. Nos. 104; 107. Federal Rule of Civil Procedure 11 provides in pertinent part that "[b]y presenting to the court a pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(3). Rule 11 authorizes a court to sanction a party and the party's counsel for filing a pleading, written

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motion, or other paper lacking evidentiary support. Fed. R. Civ. P. 11(c). The sanction may take many forms, including reasonable attorney's fees and expenses, but must "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4).

Rule 11 sanctions are an extraordinary measure. Defendant argues that Plaintiffs' "class certification motion and class action complaint are frivolous" requiring dismissal of this case with prejudice and attorneys' fees. Doc. No. 104-1 at 6-7. Given that the Court has denied two motions to dismiss in this case and has now granted class certification, the Court finds imposition of sanctions is not warranted, as this case is not frivolous. As discussed above, although Defendant contends that Plaintiffs' expert report from Dr. Matthews is flawed, the Court finds that those arguments are better suited for the trier of fact and that Plaintiffs presented other evidence sufficient to establish materiality at this stage of the proceedings. Indeed, "neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies." *Lytle*, 2024 WL 3915361, at *7. In addition, although the Court finds Plaintiffs' counsel's conduct disconcerting regarding the original named plaintiff, the Court declines to impose sanctions with the expectation that counsel will refrain from such conduct in the future.

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In response to Defendant’s Rule 11 motion, Plaintiffs filed their own Rule 11 motion against Defendant and its counsel for improperly threatening sanction for tactical purposes and for “knowingly misstating facts in signed filings with the Court.” Doc. No. 107-1 at 2. First, the Court does not find that Defendant brought its motion for sanctions for an improper purpose. Second, the Court agrees with Defendant that Plaintiffs’ arguments regarding “misstating facts” in a deposition is not applicable to a Rule 11 motion for sanctions. *See e.g., Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 (9th Cir. 2011) (explaining “Rule 11(d) specifically exempts discovery motions and objections from its procedural requirements.”); *see also Christian v. Mattel*, 286 F.3d 1118, 1131 (9th Cir. 2002) (reversing imposition of Rule 11 sanctions because the award was based, in part, on discovery abuse).

Therefore, the Court **DENIES** both parties’ motions for Rule 11 sanctions. Doc. Nos. 104; 107.

VI. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiffs’ motion for class certification, Doc. No. 90, and **DENIES** the parties’ motions for sanctions, Doc. Nos. 104, 107. In addition, the Court **GRANTS** the pending motions to seal, Doc. Nos. 87, 94, 102, and 108. Accordingly, it is hereby **ORDERED** that Document Numbers 88-89, 95, 103, and 109 shall remain under seal as proposed documents.

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As stated in U.S. Magistrate Judge Jill L. Burkhardt's November 1, 2023 Order, Doc. No. 81, the parties are **ORDERED** to contact Judge Burkhardt's chambers no later than **September 19, 2024** to request another Case Management Conference.

IT IS SO ORDERED.

Dated: September 16, 2024

/s/ Michael M. Anello
HON. MICHAEL M. ANELLO
United States District Judge

**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
FILED JUNE 17, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-7158
D.C. No. 3:22-cv-01085-MMA-JLB
Southern District of California, San Diego

DONIECE DRAKE AND DEBORAH BOWLING,

Plaintiffs-Appellees,

v.

BAYER HEALTHCARE LLC,

Defendant-Appellant.

Filed June 17, 2026

ORDER

Before: M. SMITH, CHRISTEN, and FORREST, Circuit
Judges.

Judges M. Smith and Christen voted to deny Appellant's petition for panel rehearing and rehearing en banc (Dkt. No. 71). Judge Forrest would grant the petition. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on

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whether to rehear the matter. Fed. R. App. 40. The petition for panel rehearing and rehearing en banc is **DENIED**. The motions for leave to file amicus briefs (Dkt. Nos. 72, 73) are **GRANTED**.

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

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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.

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Federal Rule of Civil Procedure 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

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(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

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(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

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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).

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(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;

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(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

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– 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;

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(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.

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(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

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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;

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(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:

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- (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).