

## **APPENDIX**

## TABLE OF CONTENTS

|                                                                           | Page |
|---------------------------------------------------------------------------|------|
| Appendix A — Court of appeals opinion<br>(Jan. 9, 2026) .....             | 1a   |
| Appendix B — District court order<br>(Sep. 26, 2024) .....                | 12a  |
| Appendix C — Court of appeals denial of rehearing<br>(Apr. 21, 2026)..... | 45a  |
| Appendix D — Constitutional and statutory<br>provisions involved .....    | 46a  |

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**APPENDIX A**

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**NOT FOR PUBLICATION**

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

MARIE FALCONE,  
individually and on behalf of all  
others similarly situated,

Plaintiff-Appellee,

v.

NESTLE USA, INC.,

Defendant-Appellant.

No. 24-7707

D.C. No.

3:19-cv-00723-

L-DEB

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California

M. James Lorenz, District Judge, Presiding

Argued and Submitted November 19, 2025

Pasadena, California

Before: CLIFTON, BYBEE, and DE ALBA, Circuit  
Judges. Dissent by Judge CLIFTON

Appellant Nestlé USA, Inc. (“Nestlé”) challenges  
the district court’s order certifying two state-based  
classes. Appellees allege that Nestlé used deceptive  
package labeling, claiming its chocolate products were  
“sustainably” or “responsibly” sourced, implying that

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

they were produced free of child labor and deforestation. Namely, Appellees assert false-advertising claims under California’s Unfair Competition Law (“UCL”) and Consumer Legal Remedies Act (“CLRA”). We review a district court’s order certifying a class for abuse of discretion. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (en banc). We have jurisdiction pursuant to 28 U.S.C. § 1292 and Federal Rule of Civil Procedure 23(f). We affirm.

1. The district court did not err in certifying Appellees’ injunctive relief class because Marie Falcone, the named plaintiff, has Article III standing. *See Summers v. East Island Inst.*, 555 U.S. 488, 493 (2009) (setting forth the standing elements). To establish standing for injunctive relief in a class action, at least one named plaintiff must satisfy the standing requirements. *DZ Rsrv. V. Meta Platforms, Inc.*, 96 F.4th 1223, 1239 (9th Cir. 2024). Here, Falcone repeatedly testified that she loves Nestlé products and that she would like to purchase these products in the future but that she stopped purchasing them when she learned about child labor and environmental damage. Although she described one of Nestlé’s current labels as having a “perfect placement,” she also testified that she does not trust Nestlé’s reporting in its Cocoa Plan. Reviewing Falcone’s deposition testimony in full, this is sufficient to confer Article III standing. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018) (noting that plaintiffs in consumer fraud cases “can satisfy the imminent injury requirement by showing they will be unable to rely on the product’s advertising or labeling in the future, and so will not purchase the product although [they] would like to.” (internal quotation marks omitted)); *see also Olean*, 31 F.4th at 663 (reviewing

findings of fact for clear error). Thus, the district court properly found that Falcone has Article III standing.

2. The district court did not abuse its discretion in finding that common questions of law and fact predominate over individual inquiries for the damages class. *See* Fed. R. Civ. P. 23(a)(1), (b)(3); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Nestlé argues that exposure was not met because whether a class member saw the misrepresentation is an individual question that predominates. Here, all the class members were exposed to the misrepresentation because it was on the products’ packaging and, by definition, class members must have bought the products at issue to be part of the class; in labeling fraud cases, this is all that is required. Thus, exposure is a common question that predominates over individual inquiries.<sup>1</sup>

Nestlé further argues that misrepresentation cannot be accomplished on a class-wide basis because the sustainability representations vary throughout the 59

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<sup>1</sup> Nestlé argues that the district court erred in treating exposure as a merits issue. Nestlé misreads the district court’s order. The district court was not simply rejecting exposure as being a merits question; instead, it was rejecting Nestlé’s argument that the sustainability representations were not *material* because they were mostly located on the back-label of the package. Thus, the district court found that *materiality*, not exposure, was a merits issue.

As to Nestlé’s argument that class members lack Article III standing, as Nestlé concedes, we have previously held that the possibility that some class members suffered no injury does not, by itself, defeat class certification. *See Olean*, 31 F.4th at 669, 680–81. In any event, Appellees’ argument that class members would not have spent money on Nestlé’s products had they known about the misrepresentations is a “quintessential injury-in-fact.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011).

different labels at issue. But the variations are slight, and we have found that “variations in messaging are not necessarily fatal to class certification.” *See DZ Rsrv.*, 96 F.4th at 1236 (“[D]ifferently worded sales pitches[] and disparate modes of exposure” do not defeat uniformity of representations to meet commonality.). As to Nestlé’s argument that the sustainability representations do not have an “objective definition,” this argument is unavailing. *See Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 870–71 (9th Cir. 2025) (noting that for CLRA and UCL claims, we “have consistently held that a plaintiff need not establish at the class certification stage that class members share a uniform understanding of the contested term.”).

Regarding materiality and reliance, the district court correctly found that these elements of Appellees’ consumer fraud claims raised common issues supporting class certification. Because Appellees can prove materiality and reliance with an objective, reasonable consumer standard, we have recognized that both elements of consumer protection laws are “generally susceptible to common proof.” *Lytle v. Nutramax Lab’ys, Inc.*, 114 F.4th 1011, 1034 (9th Cir. 2024). The district court found that materiality, and therefore reliance, can be proved or disproved on a class-wide basis from consumer research and surveys without having to scrutinize materiality as to every single class member. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 481 (2013). Falcone’s and Nestlé’s evidence on this point underscores this. Lastly, as the district court correctly found, Plaintiffs need not prove materiality at the class certification stage. For Rule 23(b)(3) purposes, the relevant question is not whether Falcone has successfully proven materiality, but rather whether the materiality inquiry is a common question susceptible to

common proof that helps to establish predominance. *See Lytle*, 114 F.4th at 1025, 1034–35.

Thus, the district court did not abuse its discretion in finding commonality and predominance to certify the damages class.

3. Finally, the district court did not abuse its discretion in finding that Falcone’s full refund theory of liability stems from her theory of deception, and the calculation of the refund is possible on a class-wide basis. Nestlé argues that this theory of liability contravenes *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) and California law. Nestlé’s argument is unpersuasive. We have not construed *Comcast* as requiring plaintiffs to provide a class-wide method for calculating damages at the class certification stage, but rather as requiring only that plaintiffs demonstrate a logical connection between their damages model and their theory of liability. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (collecting cases); *see also Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017), *rev’d on other grounds by Nutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019) (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.” (quoting *Pulaski*, 802 F.3d at 989)). Here, Falcone alleges that Nestlé misled consumers, in violation of the UCL and CLRA, by labeling the products at issue with sustainability representations that deceived them into buying the products, and this caused damage common to the class members. Her theory is that once class members learn about the misrepresentation, the value of the products they bought will be worthless or de minimis. *See Lambert*, 870 F.3d at 1183. Thus, as the district court correctly found, Falcone’s theory of restitution

stems from Nestlé’s liability-creating actions and whether the products are worthless is a merits issue not decided at class certification.<sup>2</sup> *See id.* at 1184 (“Whether [Falcone] could prove damages to a reasonable certainty on the basis of h[er] full refund model is a question of fact that should be decided at trial.”).

**AFFIRMED.**

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<sup>2</sup> The district court may want to consider Dr. William Robert Ingersoll’s proposal for a price premium (conjoint) damages model as a more appropriate way to measure Falcone’s damages. This alternative model can be considered under the rules at an appropriate time. *See* Fed. R. Civ. P. 23(c)(1)(C) (“An order that grants or denies class certification may be altered or amended before final judgment.”).

*Falcone v. Nestlé USA, Inc.*, 24-7707

CLIFTON, Circuit Judge, dissenting:

My colleagues conclude that “the district court did not abuse its discretion in finding that Plaintiff Marie Falcone’s full refund theory of liability stems from her theory of deception, and the calculation of the refund is possible on a class-wide basis.” Majority at 5. I disagree. The only damages model offered by Falcone is contrary to fact. Falcone tacitly admits as much. So do my colleagues in the majority. That is too shaky a foundation to support the class certification order entered by the district court in this case. At the class certification stage, Falcone must offer a damages model that is “consistent with [her] liability case” and demonstrates “that damages are susceptible of measurement across the entire class.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). She must also propose a “valid method” and a “workable method” for calculating damages. *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182, 1184 (9th Cir. 2017), *rev’d and remanded on other grounds*, 586 U.S. 188 (2019). She has not done so.

“The False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants asserting claims under those statutes.” *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006). “The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution.” *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009).

Falcone did not offer a “valid method” of calculating damages on a classwide basis. *Lambert*, 870 F.3d at 1182. Falcone merely contended that a full refund of the purchase price for each class member is appropriate because the products are worthless to consumers who

disagree with Nestlé’s alleged labor practices. She then proposed that damages be calculated by multiplying the average retail price by the number of units sold. This is not, however, a case where all class members would be entitled to a full refund of the purchase price. Restitution based on a full refund is only warranted if not a single class member derived any benefit from the chocolate products. *See In re Tobacco Cases II*, 240 Cal. App. 4th 779, 795–96 (2015) (“A full refund *may* be available in a UCL case when the plaintiffs prove the product had *no* value to them . . . since the price paid minus the value actually received equals the price paid.”); *see also Lambert*, 870 F.3d at 1183 (“The full refund model measures damages by presuming a full refund for each customer, on the basis that the product has no or only a de minimis value.”).

Falcone’s proposed damages model relies on two premises: (1) the discovery of the alleged misrepresentations regarding sustainability would render the purchased Nestlé chocolate products to become *entirely valueless* to (2) *every purchaser* of the chocolates. Both of these are highly implausible and not supported by any evidence offered by Falcone. Indeed, they were contradicted by Falcone’s personal acknowledgement that Nestlé products are superior in taste and by her own inability to resist purchasing a Butterfinger bar even after she became aware of the allegations against Nestlé. She bought and paid for the product despite knowing what she contends make the product “valueless” to every purchaser, putting the lie to that allegation. To the extent Falcone attempts to rely on Nestlé’s internal surveys indicating that sustainability representations influence consumer purchasing decisions, these documents fall far short of supporting the proposition

that every purchaser would find the products valueless upon learning of Nestlé's alleged practices.

During oral argument, Falcone's counsel suggested that she would present expert testimony at the merits stage concerning what percentage of consumers would find the products valueless. That promise adds a critical element that is not consistent with the proposed damages model used to obtain class certification, which was to be calculated simply by multiplying the average retail price by the number of units sold. That damages model rests on the premises that the discovery of the alleged misrepresentations would render the products *entirely valueless* to *every* purchaser of the chocolates. The promise to provide that new expert evidence admits that the model upon which the class certification order was granted needs adjustment. Class certification is to be based on evidence, not a promise that flaws will somehow be fixed later.

Falcone further admitted the shortcomings of the full refund model in offering an alternative "price premium" damages model. That model was offered to the district court for the first time in her reply memorandum in support of class certification. Because it was introduced on reply, the district court did not consider this model and did not rely upon it when it granted class certification. On appeal, Falcone renewed her proposal and requested permission to file another motion for class certification that relied upon a "price premium" model should this panel find that a full refund is improper. That is the path that we should take.

The majority recognizes the problem. It encourages the district court to consider Falcone's "proposal for a price premium (conjoint) damages model as a more appropriate way to measure Falcone's damages." Majority at 6 n.2.

The acknowledgement by both Falcone and the majority that an alternative damages model may be “more appropriate” is telling. The district court based class certification on the offered damages model and not on a hypothetical alternative that the district court declined to consider. That alternative is based on evidence that has not yet been developed, presented, or briefed. That evidence will presumably come in the form of what Falcone described as “a revised conjoint study proposed by Dr. Ingersoll.” It is not before us now, and it was not before the district court when it granted class certification. If Falcone wants to propose the alternative “price premium” model, with evidence to support it as a valid and workable measure of damages, that should be done in a renewed motion for class certification. The current class certification order should not stand.

Rather than deal with the recognized flaws in the damages model upon which the class certification order was based, the majority concludes “whether the products are worthless is a merits issue not decided at class certification.” Majority at 6 (citing *Lambert*, 870 F.3d at 1184). But *Lambert* does not authorize punting the issue down the road. It is true that in *Lambert* we held that whether Lambert “could prove damages to a reasonable certainty on the basis of his full refund model is a question of fact that should be decided at trial.” *Lambert*, 870 F.3d at 1184. But that was because “Lambert [had] presented evidence that the product at issue was valueless and therefore amenable to full refund treatment” at the class certification stage. *Id.* at 1183. As a result, we noted that “Lambert had shown that his damages model was supportable on evidence that could be introduced at trial.” *Id.* at 1184. That showing was not made here. At this stage, Falcone has not presented

evidence that the products were valueless to all purchasers and has not demonstrated that her full refund damages model was supportable with evidence that could be introduced at trial. To the contrary, Falcone proposes to develop and offer evidence that departs from her full refund damages model, because it is plain that the full damages model is based on unrealistic premises.

Under *Lambert*, it is not enough for Falcone to merely allege that her theory of restitution stems from Nestlé's liability-creating actions. She must proffer evidence to support "a workable model." *Id.* The full refund model is not workable or valid. The suggestions by Falcone and the majority that an alternative price premium model should be considered admit as much. We should vacate the existing class certification order and remand for further proceedings.

I respectfully dissent.

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**APPENDIX B**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

|                                 |                                                                                                                                               |
|---------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| MARIE FALCONE,<br>Plaintiff,    | CASE NO.<br>3:19-cv-723-L-DEB                                                                                                                 |
| v.                              | <b>CLASS ACTION</b>                                                                                                                           |
| NESTLE USA, INC.,<br>Defendant. | <b>ORDER GRANT-<br/>ING PLAINTIFF'S<br/>MOTION FOR<br/>CLASS CERTIFI-<br/>CATION AND<br/>DENYING DE-<br/>FENDANT'S MO-<br/>TION TO STRIKE</b> |
|                                 | <b>[ECF Nos. 125, 153]</b>                                                                                                                    |

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Pending before the Court in this action alleging deceptive product labeling is Plaintiff's motion for class certification. Defendant filed an opposition, and Plaintiff replied. In addition, Defendant filed a Motion to Strike or Exclude the Declarations of Roger Mendez, William Robert Ingersoll, and Andrea Lynn Matthews. Plaintiff filed an opposition and Defendant replied. The Court decides the motions on the briefs without oral argument. *See* Civ. L. R. 7.1(d)(1). For the reasons stated below, Plaintiff's motion is for class certification is granted, and Defendant's motion to strike is denied.

**I. BACKGROUND**

According to the operative complaint (ECF No. 78), Defendant is the world's largest food company and is

best known for its chocolate products. It purchases approximately 414,000 tons of cocoa annually.

Plaintiff regularly purchased Defendant's chocolate chip and cocoa mix products. The product labels displayed statements as "sustainably sourced," "responsibly sourced," "sustainably harvested cocoa beans," "improving the lives of cocoa farmers," and "better farming, better lives" as well as the "NESTLÉ Cocoa Plan" ("NCP"), "Rainforest Alliance," and "UTZ" logos (collectively "Sustainability Representations"). For purposes of class certification, the parties stipulated to a list of product labels relevant to this action. (ECF No. 125-2, Zeldes Decl., Ex. 2.)<sup>1</sup> The Sustainability Representations led Plaintiff and other consumers to believe that the products were produced in accordance with environmentally and socially responsible standards. Plaintiff alleges that she relied on these representations when she purchased Defendant's products.

Plaintiff claims the Sustainability Representations were deceptive because Defendant sourced its cocoa from West African plantations which rely on child labor, including child slave labor, and contribute to deforestation. Plaintiff also claims that, according to Defendant's own statements, the child labor conditions had worsened rather than improved after the inception of the NCP. Plaintiff alleges that she would not have purchased the products if she had known the truth.

In her operative complaint Plaintiff claims violations of the California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* ("CLRA"), and the Unfair

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<sup>1</sup> The labels were filed as Exhibits 3-5 to the Zeldes Declaration. (ECF No. 140.) The Sustainability Representations made on each label are summarized in Appendix A to Defendant's opposition. (ECF No. 132 ("Appendix").)

Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* (“UCL”), on her own behalf as well as on behalf of a putative class of California consumers. She seeks injunctive relief and a refund for the products purchased. The Court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d).

With her pending motion Plaintiff seeks to certify two classes. First, she seeks to certify, a class pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure<sup>2</sup> to recover monetary relief. The class is defined as follows:

All persons who purchased at least one of the following Nestlé Products during the following time periods:

- (i) Semisweet Morsels (12 or 72 oz) from 11/21/18 to present;
- (ii) Mini Semisweet Morsels (10 or 20 oz) from 10/17/17 to present;
- (iii) Dark Chocolate Morsels (10 or 20 oz) from 5/4/15 to present;
- (iv) Milk Chocolate Morsels (11.5 or 23 oz) from 4/19/15 to present;
- (v) Mini Marshmallows Hot Cocoa (6 Pack or 8 Pack) or Rich Milk Chocolate Hot Cocoa (6 Pack, 8 Pack, or 27.7 oz) from 12/14/17 to present;
- (vi) Nesquik Powder 16 oz from 7/6/15 to 4/27/20;

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<sup>2</sup> All further references to “Rule” and “Rules” are to the Federal Rules of Civil Procedure.

- (vii) Nesquik Powder (9.3 or 41.9 oz) from 5/3/15 to 12/12/17;
- (viii) Nesquik Powder 18.7 oz from 4/7/17 to present.

(ECF No. 141, Mot. at 18; hereinafter “Refund Class”.) Second, Plaintiff moves to certify a class pursuant to Rule 23(a) and (b)(2) for injunctive relief, defined as follows:

All persons who purchased at least one Nestlé Product<sup>[3]</sup> labeled with the words “sustainably sourced”, “responsibly sourced”, uses “sustainably harvested cocoa beans”, “improve[s] the lives of cocoa farmers”, or “better lives” and that has “Nestlé Cocoa Plan”, “Rainforest Alliance” and/or “Utz” logos, during the period from April 19, 2015, to the present.

(*Id.*; hereinafter “Injunctive Relief Class”.) Plaintiff seeks injunctive relief requiring Defendant to remove the Sustainability Representations from the product labels unless it can trace the cocoa beans to sources without child labor or environmental destruction. Defendant opposes certification arguing that Plaintiff lacks standing and fails to meet Rule 23 requirements.

## **II. DISCUSSION**

### **A. Plaintiff’s Standing**

Plaintiff is the sole class representative named in this action. Defendant challenges her standing under UCL and CLRA and argues she lacks Article III standing to seek injunctive relief. “Standing is the threshold

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<sup>3</sup> The reference to “Nestlé Products” is to the products listed in the definition of the Refund Class.

issue in any suit. If the individual plaintiff lacks standing, the court need never reach the class action issue.” *NEI Contracting and Eng’g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019).<sup>4</sup>

### 1. Statutory Standing

Based on deposition testimony, Defendant argues that Plaintiff lacks statutory standing to assert UCL and CLRA claims. For the reasons stated below, the argument is rejected.

Only “a person who has suffered injury in fact and has lost money or property as a result of the unfair competition” may bring an action under the UCL. Cal. Bus. & Prof. Code § 17204. This provision requires Plaintiff to “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the . . . false advertising that is the gravamen of the claim.” *Kwikset Corp. v. Super. Ct. (Benson)*, 51 Cal.4th 310, 322 (2011) (emph. in orig.) These requirements are satisfied if the plaintiff would not have purchased the product or would have not been willing to pay as much, but for the false representation. *Id.* at 330; *see also id.* at 323 (“surrender in a transaction more . . . than he or she otherwise would have”); *see also Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1104, 1107 (9th Cir. 2013) (*en banc*) (applying Cal. law).

To have standing under the CLRA, a plaintiff must show that he or she “suffer[ed] any damage as a result of” the misrepresentation. Cal. Civ. Code § 1780(a). The term “any damage” is broader than “actual damages and may encompass harms other than pecuniary

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<sup>4</sup> Unless otherwise noted, internal quotation marks, ellipses, brackets, citations, and footnotes are omitted from citations.

damages.” *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 156 (2010) (“*Steroid*”) (quoting *Meyer v. Sprint Spectrum L.P.*, 45 Cal.4th 634, 640 (2009)). Because this standard “includes even minor pecuniary damage,” any plaintiff who has standing under the UCL also has standing under the CLRA. *Hinojos*, 718 F.3d at 1108.

Defendant claims that Plaintiff lacks standing because she admitted she was not deceived by the Sustainability Representations, that the labels were not misleading as Defendant was not falling short of its representations, and that she never thought of child labor when she read the labels. Defendant misconstrues Plaintiff’s testimony.

Plaintiff purchased Defendant’s products because of the environmental and social responsibility representations on the product labels. (*See, e.g.*, Falcone Dep.<sup>5</sup> at 34, 41-42, 47, 51-52, 63, 73, 96-98, 118, 133, 143, 144-45, 146-48, 157, 190.) She stopped purchasing the products when she found out the representations were not true. (*See, e.g., id.* at 30, 40-41, 49, 52, 63, 104.) She associated the representations on the labels with the “wonderful things” Defendant was doing for the environment and cocoa farmers (*id.* at 52, 95) and was horrified when she discovered that Defendant’s cocoa production caused deforestation and included child slave labor (*id.* at 32-33, 35-36, 40, 52-53, 62-63, 77, 95, 104-05, 106-08). Plaintiff testified that the labels were deceptive because the environmental and social responsibility representations were not true. (*See, e.g., id.* at 76-77,

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<sup>5</sup> Excerpts from Plaintiff’s deposition can be found at Zeldes Decl. Ex. 6 and ECF No. 132-1, Loose Decl. Ex. 2. All Plaintiff’s exhibits are attached to the Zeldes declaration and all Defendant’s exhibits are attached to the Loose declaration.

90, 104, 112-13, 116-17, 197, 205-07, 209, 212-13, 220-23.) Because of the deception, Plaintiff has lost trust in Defendant's representations. (*See id.* at 120-21, 227, 252-53.)

Contrary to Defendant's contention, Plaintiff testified that had she known that the Sustainability Representations were false, she would not have purchased Defendant's products (Falcone Dep. at 73, 106.) She also testified that she lost money by purchasing the products. (*Id.* at 86.) Plaintiff was willing to, and did, pay a premium because of the Sustainability Representations on the labels. (*Id.* at 145). This testimony is sufficient to establish statutory standing under the UCL and CLRA.

## **2. Article III Standing to Seek Injunctive Relief**

Defendant further argues that Plaintiff cannot meet the injury element of Article III standing to seek injunctive relief. In this regard, a plaintiff must show ongoing injury or threat of future injury. "The plaintiff must demonstrate that [she] has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that [she] will again be wronged in a similar way." *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1240 (9th Cir. 2024). The primary purpose and effect of public injunctive relief under the UCL and CLRA is to prohibit unlawful acts that threaten future injury to the general public. *McGill v. Citibank, N.A.*, 2 Cal.5th 945, 955 (2017); *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018). Accordingly,

[c]onsumer fraud plaintiffs can satisfy the imminent injury requirement by showing they will be

unable to rely on the product’s advertising or labeling in the future, and so will not purchase the product although they would like to.

*DZ Reserve*, 96 F.4th at 1240.

Plaintiff testified she would like to purchase Defendant’s products again in the future. (*See, e.g.*, *Falcone Dep.* at 121.) She stopped purchasing them since learning about child labor and environmental damage and has not purchased again because she no longer can rely on Defendant’s labeling. (*See id.* at 227 (“I don’t know what to trust anymore.”); *see also, e.g., id.* at 98, 120-21, 227-29, 252-53.) This is sufficient to show imminent injury for purposes of Article III standing to seek injunctive relief.

### **B. Class Certification**

“The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (“*Dukes*”). First, the proposed class action must satisfy Rule 23(a) with its four prerequisites of numerosity, commonality, typicality, and adequacy. Fed. R. Civ. Proc. 23(a). Second, Plaintiff “must show that the class fits into one of the three categories” under Rule 23(b). *Olean Wholesale Grocery Corp. v. Bumble Bee Foods*, 41 F.4th 651, 663 (9th Cir. 2022) (*en banc*) (“*Olean*”).

Plaintiff seeks to certify one class each under Rule 23(b)(3) and (2). Rule 23(b)(3) “enables the potential recovery of damages and requires both that ‘questions of law or fact common to class members predominate over any questions affecting only individual members,’ and that a class action be ‘superior to other available methods for fairly and efficiently adjudicating the controversy.’” *DZ Reserve*, 96 F.4th at 1232 (quoting Fed. R.

Civ. P. 23(b)(3)). On the other hand, Rule 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole.” *Id.* (quoting Fed. R. Civ. P. 23(b)(2)).

Plaintiff “must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence.” *Olean*, 31 F.4th at 665.

Although . . . a court’s class-certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff’s underlying claim, Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. 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.

*Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013). If a court is not fully satisfied that the requirements of Rules 23(a) and (b) are met, certification should be denied. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

## 1. Rule 23(a) Prerequisites

### a. Numerosity

Rule 23(a)(1) requires the class to be “so numerous that joinder of all members is impracticable[.]” Fed. R. Civ. P. 23(a)(1). “For purposes of this requirement, ‘impracticability’ does not mean ‘impossibility,’ but only the difficulty or inconvenience of joining all members of the class.” *Johnson v. City of Grants Pass*, 72 F.4th 868, 886 (9th Cir, 2023), *rev’d on other grounds*, *City of*

*Grants Pass v. Johnson*, 144 S.Ct. 2202 (2024); *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). While “[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations[,]” *Gen. Tel. Co. of the NW v. EEOC*, 446 U.S. 318, 330 (1980), it has been held that fifteen class members would be too few and more than sixty may be sufficient, *Harik v. Cal. Teachers Ass’n*, 326 F.3d 1042, 1051-52 (9th Cir. 2003). The classes proposed here are comprised of California consumers who purchased at least one of the listed products over several years. The Court finds that the proposed classes are sufficiently numerous that joinder of all members would be impracticable. Defendant does not contend otherwise.

b. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class[.]” To meet this requirement, the class members’ claims must depend on a common contention, which must be of such nature that it is capable of classwide resolution. Decision on the contention must

resolve an issue that is central to the validity of each one of the claims in one stroke. [¶] What matters to class certification is not the raising of common “questions” . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

*Dukes*, 564 U.S. at 350 (emph. in orig.). Even a single such common question meets the commonality requirement. *Id.* at 359.

In determining whether the common question prerequisite is met, a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial.

*Olean*, 31 F.4th at 666-67 (emph. in orig.).

Plaintiff argues the commonality requirement is met because the question whether Defendant’s Sustainability Representations were likely to deceive consumers is common to all class members. Defendant counters that this issue cannot be resolved on a classwide basis because the Sustainability Representations were not uniform, and the consumers did not uniformly understand them.

The commonality analysis begins with the underlying causes of action. *DZ Reserve*, 96 F.4th at 1233.

Under California’s consumer protection laws, a consumer who pays extra for a falsely labeled or advertised product may recover the premium she paid for that product. California law also permits that consumer to seek a court order requiring the manufacturer of the product to halt its false advertising. California has decided that its consumers have a right, while shopping in a store selling consumer goods, to rely upon the statements made on a product’s packaging.

*Davidson*, 889 F.3d at 960-61.

The UCL is a broad California statute that prohibits its business practices that constitute “unfair competition,” which is defined, as relevant here, as any unlawful, unfair or fraudulent business act or practice[.]” Cal.

Bus. & Prof. Code § 17200.<sup>6</sup> “The substantive right extended to the public by the UCL is the right to protection from fraud, deceit and unlawful conduct, and the focus of the statute is on the defendant’s conduct.” *In re Tobacco II Cases*, 46 Cal.4th 298, 324 (2009) (“*Tobacco II*”). UCL’s “fundamental purpose” is to protect consumers from unfair businesses practices. *Id.* “If a defendant is found to have engaged in any of the three varieties of unfair competition,” *Steroid*, 182 Cal. App.4th at 154, the UCL provides for injunctive relief and restitution, *Kasky*, 27 Cal.4th at 950. *See* Cal. Bus. & Prof. Code § 17302.

To obtain relief on a UCL claim based on false advertising or promotional practices as alleged here, Plaintiff need “only to show that members of the public are likely to be deceived.” *Tobacco II*, 46 Cal.4th at 312. This standard “prohibit[s] not only advertising, which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.” *Kasky v. Nike*, 27 Cal.4th 939, 951 (2002).

Plaintiff also seeks relief under the CLRA. The CLRA was enacted “to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.” Cal. Civ. Code, § 1760. “[T]o promote’ these purposes, the Legislature directed that the CLRA ‘be liberally construed and applied.’” *McGill*, 2 Cal.5th at

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<sup>6</sup> Although Plaintiff alleged a UCL claim under each of its three prongs (ECF No. 78, Third Am. Class Action Compl. ¶¶ 117-33) and moves for class certification under all of them, Plaintiff’s motion is focused on the fraudulent prong with the remaining two prongs addressed in a footnote (Mot. at 25 n.18). Accordingly, this Order addresses only the fraudulent UCL prong.

954 (quoting Cal. Civ. Code, § 1760). Plaintiff’s complaint focuses on section 1770(a)(5), which provides in pertinent part as follows,

The unfair methods of competition and unfair or deceptive acts or practices listed in this subdivision undertaken by any person in a transaction intended to result or that results in the sale . . . of goods . . . to any consumer are unlawful: [¶]

(5) Representing that goods . . . have . . . characteristics . . . that they do not have[.]

“A consumer who suffers damage as a result of a prohibited act or practice can sue for damages, restitution, and an injunction.” *Chapman v. Skype, Inc.*, 220 Cal. App. 4th 217, 230 (2013).

The standard for determining whether a defendant violated section 1770(a)(5) “is the same as that for determining whether there was false advertising under the UCL[, i.e.,] whether the representation was likely to deceive consumers”. *Chapman*, 220 Cal. App. 4th at 230 (citing *Kasky*, 27 Cal.4th at 951); *see also Williams v. Gerber*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Kasky*, 27 Cal.4th at 951).

Plaintiff argues she can prove on a classwide basis that the Sustainability Representations were likely to deceive consumers because the analysis is based on the “reasonable consumer standard.” *Skinner v. Ken’s Foods, Inc.*, 53 Cal. App. 5th 938, 948 (2020); *Chapman*, 220 Cal. App. 4th at 226; *Williams*, 552 F.3d at 938. A reasonable consumer “is neither the most vigilant and suspicious of advertising claims nor the most unwary and unsophisticated, but instead is the ordinary consumer within the target population.” *Chapman*, 220 Cal. App. 4th at 226. Accordingly, the standard does not

call for individualized proof. Instead, the focus is on Defendant's conduct toward the purchasers of the relevant products. *See Tobacco II*, 46 Cal.4th at 324.

Defendant counters that classwide proof is not possible because this action is based on 59 different product labels with different Sustainability Representations. For example, not all labels featured the UTZ or Rainforest Alliance logos, and not all of them included every permutation of the sustainability claim. However, every label referenced the NCP, and all included at least one of the representations that the cocoa was "sustainably" or "responsibly" sourced, or that Defendant was improving the lives of cocoa farmers. (*See* Def.'s Appendix.)

Variations in messaging are not necessarily fatal to class certification. *See DZ Reserve*, 96 F.4th at 1234.

Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions.

*Id.* at 1236. In this regard, "similarly misleading sales presentations" can represent a cohesive class, even though their exact wording varies. *Id.* ("[D]ifferently worded sales pitches, and disparate modes of exposure" do not defeat uniformity of representations.).

To argue that the differences in the Sustainability Representations do not detract from the uniformity of Defendant's marketing messaging, Plaintiff points to Defendant's records to show that Defendant viewed the

“sustainably sourced” and “responsibly sourced” statements to be interchangeable and include both consumers’ environmental and social concerns. (*See, e.g.*, Pl. Ex. 42 at slides 2, 9, 10; Pl. Ex. 41 at 269; *see also* Pl. Ex. 33 at slide 6; Pl. Ex. 22; Pl. Ex. 28 at slide 28.) Defendant formulated this messaging based on consumer research. (*See* Pl.’s Ex. 20 at 18 (“type of information consumers want to know” and grouping environmental and social concerns under Sustainable Sourcing Strategies for cocoa products); Pl. Ex. 42 slide 2.)

“[T]he class action mechanism would be impotent if a defendant could escape much of his potential liability for fraud by simply altering the wording or format of his misrepresentation across the class of victims.” *DZ Reserve*, 96 F.4th at 1236. Given that all class members encountered interchangeable Sustainability Representations, the variation in their wording does not detract from the uniformity of the message conveyed.

To the extent Defendant argues that different consumers had different understanding of the Sustainability Representations, the argument is rejected. The UCL and CLRA preclude individual inquiry into class members’ understanding because the analysis is based on the “reasonable consumer” standard. *See Chapman*, 220 Cal. App. 4th at 226. The remainder of the analysis, whether the Sustainability Representations were false or likely to deceive a reasonable consumer, turns on Defendant’s conduct, *i.e.*, whether Defendant’s cocoa was sustainably produced. This issue is the same for all class members.

Whether or not Plaintiff can prove at trial that the Sustainability Representations were likely to deceive a reasonable consumer, this issue can be resolved in one stroke for all class members and addresses a central element of both the UCL and CLRA claims. Plaintiff has

therefore sufficiently established commonality under Rule 23(a)(2).

c. Typicality

Rule 23(a)(3) requires that “the claims . . . of the representative parties are typical of the claims . . . of the class[.]” “[T]he commonality and typicality requirements of Rule 23(a) tend to merge” because

[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

*Dukes*, 564 U.S. at 249 n.5. “[R]epresentative claims are typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.

*Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010).

Defendant argues that Plaintiff is not typical because she admitted she was not deceived. As discussed in Section A.1. above, Plaintiff testified she was deceived by Defendant’s labeling and, contrary to Defendant’s contention, had a problem with the Sustainability Representations on the labels because they were false,

and she could no longer trust Defendant's product claims. (See Falcone Dep. at 87-90, 179, 220-22, 245 ("[i]f it's true"), 252-53.)

Defendant further argues that the Sustainability Representations were not the only reason why Plaintiff purchased Nestle Products, pointing to the fact that Plaintiff prefers the taste of Nestle chocolate to others and had been a Nestle fan since childhood. For purposes of the UCL and CLRA, the Sustainability Representations need not be "the sole or even the predominant or decisive factor influencing [the purchasing decision.] It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing [her] decision." *Tobacco II*, 46 Cal.4th at 326-27. Accordingly, the fact that Plaintiff had multiple reasons for purchasing the products does not preclude typicality for purposes of a class claiming UCL and CLRA violations. Plaintiff testified that the Sustainability Representations substantially influenced her purchasing decision and the discovery that they were false caused her to stop purchasing the products. (See discussion of Plaintiff's testimony in Section A.1 *supra*.)

Finally, Defendant argues Plaintiff is not typical because she did not purchase one of the products included in the class definition. As discussed above in Section *b.*, the Sustainability Representations were sufficiently uniform to meet the commonality requirement. Accordingly, the fact Plaintiff did not purchase one of the products does not preclude a finding of typicality.

d. Adequacy

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is grounded in constitutional due process

concerns: “absent class members must be afforded adequate representation before entry of judgment which binds them.” *Hanlon*, 150 F.3d at 1020. In reviewing this issue, courts must resolve two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Id.* In other words, the named plaintiffs and their counsel must have sufficient “zeal and competence” to protect the interests of the rest of the class. *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975). Furthermore,

[i]n appointing class counsel, the court [¶] 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.

Fed. R. Civ. Proc. 23(g)(1)(A).

Defendant does not dispute that the adequacy requirement is met. No conflict of interest is apparent from the record between Plaintiff and her counsel on one hand and the putative classes on the other. Further, both appear to be willing and able to vigorously prosecute the action on behalf of the class members. (See ECF No. 125-4, Falcone Decl. ¶¶ 15-20; ECF No. 125-3, Granade Decl. & Ex. A.) Based on Plaintiff’s

declaration, her participation in this action so far, including participation in discovery, the statements made in her deposition and declaration, and counsel's declaration regarding qualifications and resources to prosecute this action, the Court finds that Plaintiff and her counsel meet Rule 23(a)(4) adequacy requirements, and that Plaintiff's counsel meets the criteria of Rule 23(g)(1)(A).

## **2. Rule 23(b)(3) Refund Class**

Plaintiff moves to certify a class pursuant to Rule 23(b)(3), which seeks a refund for the products purchased by the class members. A class action under Rule 23(b)(3) may be maintained if Rule 23(a) prerequisites are met and if 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." *Olean*, 31 F.4th at 663-64.

### **a. Predominance**

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The requirements of Rule 23(b)(3) overlap with the commonality prerequisite of Rule 23(a). Under Rule 23(a), the plaintiff must show at least one question of law or fact common to class members. *Olean*, 31 F.4th at 664. Under Rule 23(b)(3), the plaintiff must further show that common questions predominate over individualized ones. *Id.*; see also *DZ Reserve*, 96 F.4th at 1233 (The standard to determine which elements are common, i.e., capable of being established through a common body of evidence, is identical to the commonality analysis under Rule 23(a)(2).).

This calls upon courts to scrutinize “the relation between common and individual questions in a case.” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

*Id.*

As with commonality, the predominance inquiry begins with the elements of the underlying causes of action. *Olean*, 31 F.4th at 665. “Rule 23(b)(3), however, does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof.” *Amgen*, 568 U.S. at 469.

As discussed in Section 1.b. above, Plaintiff’s UCL and CLRA claims require proof that members of the public are likely to be deceived by Defendant’s representations. See *Tobacco II*, 46 Cal.4th at 312 (UCL); *Chapman*, 220 Cal. App. 4th at 230 (CLRA). The Court

has found that this element can be proven on a classwide basis.

No further proof is required under the UCL because “restitution may be ordered without individualized proof of deception, reliance and injury if necessary to prevent the use or employment of an unfair practice.” *Tobacco II*, 46 Cal.4th at 320 n.14; *see also discussion* at 320. Accordingly, “absent class members on whose behalf a private UCL action is prosecuted [need not] show on an individualized basis that they have lost money or property as a result of the unfair competition.” *Id.* at 320; *see also Steroid*, 181 Cal. App. 4th at 154.

However, additional proof is required to show liability for restitution or damages under the CLRA. The CLRA “requires a showing of actual injury as to each class member.” *Steroid*, 181 Cal. App. 4th at 155; *see also* Cal. Civ. Code §§ 1780(a), 1781(a). This may be presumed, however, if the misrepresentation is material. *Skinner*, 53 Cal.App.5th at 949.

“Materiality is an objective inquiry.” *Skinner*, 53 Cal.App.5th at 949.

A misrepresentation is judged to be material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question[. ¶]

In the alternative, it may also be material 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, although a reasonable man would not so regard it.

*Kwikset*, 51 Cal.4th at 332-33. If a misrepresentation is material, the inference of reliance, causation, and injury arises as to the entire class, even if a defendant may be able to prove that some class members did not rely on the misrepresentation. *Steroid*, 181 Cal. App. 4th at 156-57. “Because materiality is judged according to an objective standard, [it] is a question common to all members of the class[.]” *Amgen, Inc.*, 568 U.S. at 459; *see also Skinner*, 53 Cal. App. 5th at 949 (“materiality is an objective inquiry and is thus well suited to class treatment.”).

Plaintiff cites evidence to show that materiality can be proved with a common body of evidence. She notes that in formulating its sustainability marketing campaign, Defendant performed its own materiality analysis, as demonstrated by Defendant’s US16 Sustainable Sourcing Strategic Framework which outlined the “Baking Division Sustainable Sourcing Strategies” as follows, “These sustainable sourcing strategies are based on materiality analysis of what ingredients to focus on, and what type of information consumers want to know about our products. The key ingredient categories to focus on are dairy, cocoa, and pumpkin.” (Pl. Ex. 20 at 18.) With regard to cocoa, the issues Defendant considered material to the consumers were “[Rainforest Alliance] Sourcing to demonstrate Responsibly Sourced cocoa, [¶] Deforestation, [ and ¶] Child Labor[.]” (*Id.*)

Defendant studied consumer preferences and impact of sustainability messaging on product labels (*see Green Dep.*<sup>7</sup> at 132-33; *see also id.* at 257-58) and found

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<sup>7</sup> Excerpts from the deposition of Heather Green, former Marketing Manager, Nestle Toll House, and Defendant’s Rule 30(b)(6) witness regarding labelling statements, were filed as Plaintiff’s Exhibit 7.

that claims in the area of sustainable and responsible sourcing were important to consumers (*id.* at 258). In at least one internal presentation regarding sustainable sourcing, Defendant cited Harvard Business Review Research findings that from 2013-2018 sales of products with on-pack sustainability claims grew 5.6 faster than those without, and sales of chocolate with sustainability claims grew faster than the overall category (16% versus 5%) in 2017-18. (Pl. Ex. 15 at slide 5.) Another internal presentation cited research stating that “the sustainable chocolate category is growing faster than any other [baking product] segment[.]” (Pl. Ex. 23 at slide 5.) A further sustainability presentation regarding Defendant’s Toll House brand cited statistics showing that “[c]hocolate product with environmental claims sold 5x FASTER than overall category[.]” (Pl. Ex. 16 at 554 (emph. in orig.)). An internal email between Defendant’s marketing personnel regarding Toll House morsels discussing consumer data states that “certification like ‘Rainforest Alliance Certified’ can have a powerful impact on purchase intent with 74% of L6M Baking & Cooking Staple purchasers indicating the claim would make them ‘much more/somewhat more likely to purchase.’” (Pl. Ex. 43 at 744.) Plaintiff’s evidence is relevant to the materiality element as to all class members.

Defendant offers its consumer research (Def.’s Exs. 4-7) and the opinion of Dr. Ran Kivetz, defense expert, to argue that the Sustainability Representations do not matter to the consumers as much as other product claims on the labels, such as quality or 100% real chocolate, and are therefore not material to the purchasing decision. This is a merits argument aiming to show that Plaintiff cannot prevail on the issue of materiality.

Plaintiff need not prove materiality at the class certification stage. *DZ Reserve*, 96 F.4th at 1235.

Instead, the pivotal inquiry is whether proof of materiality is needed to ensure that the *questions* of law or fact common to the class will predominate over any questions affecting only individual members as the litigation progresses.

*Amgen*, 568 U.S. at 467 (emph. in orig.). Furthermore, because the question of materiality is an objective one, materiality can be proved through evidence common to the class. *Id.* Consequently, materiality is a common question for purposes of Rule 23(b)(3). *Id.* Here, rather than negating that materiality is a common question, Defendant’s evidence, which consists of consumer studies, underscores that materiality can be proved (or disproved) on a classwide basis from consumer research and surveys.<sup>8</sup>

Next, Defendant argues that the Sustainability Representations were not material because they were mostly placed on the back of the package and, according to Defendant’s eye tracking study and a study by Dr. Kivetz of one of Defendant’s labels, most consumers were therefore not “exposed” to the Sustainability Representations. This argument is rejected initially as going to the merits rather than class certification require-

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<sup>8</sup> Because materiality is a common question, a district court could “reserve consideration of [the defendant’s] rebuttal evidence for summary judgment or trial” and is “not required to consider the evidence in determining whether common questions predominate[ ] under Rule 23(b)(3).” *Amgen*, 568 U.S. at 482. If the Court were to consider Defendant’s evidence on the merits at this stage, it shows that consumers had multiple reasons for their purchasing decisions. It is not required that the Sustainability Representations be “the sole or even the decisive” reason for the purchase, as long as they “played a substantial part.” *Tobacco II*, 46 Cal.4th at 326-27, *Chapman*, 220 Cal. App. 4th at 229.

ments. Further, Defendant again offers classwide survey evidence which underscores the fact that materiality is a common question. Moreover, as to consumer “exposure,” the relevant issue is whether Defendant communicated the Sustainability Representations to the class members. *See DZ Reserve*, 96 F.4th at 1237. When, as here, all class members by definition received the representations, they have been “exposed” to them. *Walker v. Life Ins. Co. of the SW*, 955 F.3d 624, 631 (9th Cir. 2020). Defendant has cited no California law, and the Court is aware of none, requiring that the misrepresentation be prominently displayed to be deemed material.<sup>9</sup>

Accordingly, Plaintiff has shown that she can prove materiality on a classwide basis either by showing through consumer research, including Defendant’s research regarding the products at issue, that the Sustainability Representations were important to a reasonable consumer, or alternatively, through Defendant’s internal records and employee testimony, that Defendant had reason to know that its target consumers would consider the Sustainability Representations important

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<sup>9</sup> If the Court were to consider Defendant’s argument on the merits, *see Amgen*, 568 U.S. at 482, Plaintiff’s evidence shows that Defendant itself considered back-of-the-label sustainability advertising important. (*See* Pl.’s Ex. 11 at 878.) Defendant’s personnel thought about the location of the Sustainability Representations on the package to make sure that the representations were communicated to the consumers. (Green Dep. at 200-01.) Defendant found it “compelling” for the Toll House brand to place the Sustainability Representations on the back—the same side as the cookie recipe. (*See id.* at 198-200.) Based on this evidence, Defendant had reason to believe, and intended, that consumers would see the Sustainability Representation on the back of the package.

to making a purchasing decision for the products at issue. *See Kwikset*, 51 Cal.4th at 332-33.

Based on the foregoing, Plaintiff has shown that liability for monetary relief under UCL and CLRA can be proved by common evidence. The only remaining question for the Refund Class is the amount of the refund. Defendant argues, however, that Plaintiff cannot show predominance because she offers no proof of damages.

At the class certification stage, the plaintiff must offer a damages model that is both “consistent with [her] liability case” and demonstrates “that damages are susceptible of measurement across the entire class.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). Accordingly, Plaintiff must be able to show that damages stemmed from Defendant’s actions that created legal liability. *See Lambert v. Neutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017) (applying Cal. law), *rev’d on other grounds*, *Neutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019) (discussing *Comcast*).

Plaintiff seeks a refund of the purchase price for herself and the class. The UCL provides for restitution and CLRA provides for damages or restitution. *See Kasky*, 27 Cal.4th at 950 (UCL); *Chapman*, 220 Cal. App. 4th at 230 (CLRA). An order for restitution compels the defendant to return money obtained through an unfair business practice to the persons from whom it was taken. *Kasky*, 27 Cal.4th at 950. Plaintiff’s restitution theory is based on the contention that the Sustainability Representations deceived consumers into purchasing Defendant’s products and that this caused damage common to the class members.

For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately.

*Kwikset*, 51 Cal.4th at 329. Plaintiff's theory of restitution therefore stems from Defendant's liability-creating actions.

It is possible to recover a full refund on this theory, as Plaintiff seeks, if "a product is shown to be worthless," or has "only *de minimis* value." *Lambert*, 870 F.3d at 1174, 1183. Defendant disputes that a full refund recovery is appropriate in a case such as this, where the consumer was able to use the product. This argument is unavailing because "the economic harm—the loss of real dollars from a consumer's pocket—is" not erased even if "a court might objectively view the products as functionally equivalent." *Kwikset*, 51 Cal.4th at 329. For example, "[n]onkosher meat might taste and in every respect be nutritionally identical to kosher meat, but to an observant Jew who keeps kosher, the former would be worthless." *Id.* at 330. Consumers care how their products are produced:

Whether a diamond is conflict free may matter to the fiancée who wishes not to think of supporting bloodshed and human rights violations each time she looks at the ring on her finger. And whether food was harvested or a product manufactured by union workers may matter to still others.

*Kwikset*, 51 Cal.4th at 328-29. Labor practices, and child labor in particular, is one of the "key issues" for

concern in Defendant's industry (Pl.'s Ex. 29 at 731) because of strong consumer feelings about it—a fact of which Defendant was acutely aware (*see* Pl. Ex. 13). Accordingly, Plaintiff can assert a full refund theory of recovery.

Next, Plaintiff needs to show that the trier of fact could calculate or sufficiently approximate the damage amount and that her damages model is supportable on evidence that could be introduced at trial. The measure of restitution is the difference between what the plaintiff paid and the value of what the plaintiff received. *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009). Full refund “may be calculated by multiplying the average retail price by the number of units sold” during the relevant time, *Lambert*, 870 F.3d at 1174-75, as well as by other formulas that approximate damages for the class as a whole, *see id.* at 1183 & n.9. That the resulting class damages are an approximation does not present a problem under the UCL and CLRA, which are “particularly 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 is an approximation.” *Id.* at 1183. Therefore, “[u]nder California law, . . . uncertain damages should not prevent class certification.” *Id.*

Plaintiff claims the products are worthless or at best have *de minimis* value because they were produced through abhorrent practices of child slave labor and deforestation. Defendant disputes that the products are in fact worthless and offers Dr. Kivetz' consumer survey. Whether the products are worthless or have *de minimis* value is a merits issue not decided at class certification. *See Lambert*, 870 F.3d at 1184 (“Whether [Plaintiff] could prove damages to a reasonable certainty on the basis of [her] full refund model is

a question of fact that should be decided at trial.”). The calculation of class members’ individual damages alone cannot defeat class certification. *Leyva*, 716 F.3d at 513.

The Court finds that the questions whether a reasonable consumer was likely to be deceived by the Sustainability Representations and whether the representations were material are susceptible to common proof on behalf of all class members. Plaintiff’s full refund restitution theory stems from Plaintiff’s theory of deception. If Plaintiff prevails on the merits, calculation of the refund is possible on a classwide basis. Accordingly, the common issues predominate over individual ones.

b. Superiority

To meet her burden under Rule 23(b)(3), Plaintiff must show that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. Proc. 23(b)(3). Relevant to the inquiry are matters such as “the class members’ interests in individually controlling the prosecution or defense of separate actions; [¶] the extent and nature of any litigation concerning the controversy already begun by or against class members; [¶] the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and [¶] the likely difficulties in managing a class action.” *Id.*

“Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation. A class action is the superior method for managing litigation if no realistic alternative exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

In consumer fraud cases such as this, where the individual monetary recovery of putative class members is small, “class certification may be the only feasible means for them to adjudicate their claims.” *Leyva*, 716 F.3d at 515. Given the small amount of each class member’s economic interest, concentrating claims in one action is desirable and it is unlikely that the class members would have an interest in individually controlling the prosecution of their individual claims. Neither party has noted any related litigation already pending or any likely difficulties in managing if a class action is certified here. Based on the discussion of commonality and predominance above, the Court has no reason to foresee difficulties. Accordingly, the Court finds that a class action is superior to other available methods of adjudicating this controversy. Defendant does not contend to the contrary.

### **3. Rule 23(b)(2) Injunctive Relief Class**

In addition to the Refund Class, Plaintiff moves to certify the Injunctive Relief Class under Rule 23(b)(2). Rule 23(b)(2) requires the plaintiff to show that “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[.]” This requirement is met only when the plaintiff seeks a single injunction or declaratory judgment that would provide relief to each member of the class. *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014). Rule 23(b)(2) inquiry “does not require an examination of the viability or bases of the class members’ claims for relief, does not require that the issues common to the class satisfy a Rule 23(b)(3)-like predominance test, and does not require a finding that all members of the class have suffered identical injuries.” *Id.*

As discussed above, all class members were subject to the Sustainability Representations. The requested injunction, to remove the Sustainability Representations from product labels unless Defendant can trace the cocoa to assure compliance, would provide relief to each class member equally.

Defendant argues that the Injunctive Relief Class should not be certified because Plaintiff as class representative lacks Article III standing to request injunctive relief and cannot meet Rule 23(a) commonality and typicality prerequisites. These contentions have been rejected in Sections A.2., B.1.b., and B.2.a. above. Accordingly, Plaintiff has met the burden to certify the Injunctive Relief Class.

### **C. Motion to Strike**

Defendant filed a motion to strike expert declarations Plaintiff filed with her reply in support of class certification. Defendant argues that the declarations should be stricken because the expert opinions they contain were not timely disclosed and, alternatively, are unreliable and irrelevant under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Plaintiff introduced these expert opinions in support of her class certification motion and has not offered them for any other purpose. Because they were offered for the first time in reply, they were not considered in the decision on Plaintiff's class certification motion. Accordingly, Defendant's motion to strike is denied as moot.

### **III. CONCLUSION**

For the foregoing reasons it is ordered as follows:

1. Plaintiff's motion for class certification is granted.

2. The Court certifies a class of California consumers pursuant to Rule 23(a) and (b)(3) to recover monetary relief. The class is defined as follows:

All persons who purchased at least one of the following Nestlé Products during the following time periods:

- (i) Semisweet Morsels (12 or 72 oz) from 11/21/18 to present;
- (ii) Mini Semisweet Morsels (10 or 20 oz) from 10/17/17 to present;
- (iii) Dark Chocolate Morsels (10 or 20 oz) from 5/4/15 to present;
- (iv) Milk Chocolate Morsels (11.5 or 23 oz) from 4/19/15 to present;
- (v) Mini Marshmallows Hot Cocoa (6 Pack or 8 Pack) or Rich Milk Chocolate Hot Cocoa (6 Pack, 8 Pack, or 27.7 oz) from 12/14/17 to present;
- (vi) Nesquik Powder 16 oz from 7/6/15 to 4/27/20;
- (vii) Nesquik Powder (9.3 or 41.9 oz) from 5/3/15 to 12/12/17;
- (viii) Nesquik Powder 18.7 oz from 4/7/17 to present.

The Court also certifies a class of California consumers pursuant to Rule 23(a) and (b)(2) for injunctive relief, defined as follows:

All persons who purchased at least one Nestlé Product<sup>[10]</sup> labeled with the words “sustainably sourced,” “responsibly sourced,” or uses “sustainably harvested cocoa beans,” “improve[s] the lives of cocoa farmers,” or “better lives” and that has “Nestlé Cocoa Plan,” “Rainforest Alliance” and/or “Utz” logos, during the period from April 19, 2015, to the present.

3. Plaintiff Marie Falcone is appointed class representative for the certified classes.

4. Plaintiff’s counsel George V. Granade, Helen I. Zeldes, Joshua A. Fields, and Aya Dardari are appointed class counsel to represent the certified classes in this action.

5. Defendant’s motion to strike is denied.

**IT IS SO ORDERED.**

Dated: September 25, 2024

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Hon. M. James Lorenz  
United States District Judge

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<sup>10</sup> The reference to “Nestlé Products” is to the products listed in the definition of the monetary relief class.

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**APPENDIX C**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

|                                                                                                                                                                             |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| MARIE FALCONE,<br>individually and on behalf of all<br>others similarly situated,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>NESTLE USA, INC.,<br><br>Defendant-Appellant. |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

No. 24-7707  
D.C. No.  
3:19-cv-00723-  
L-DEB  
Southern District of  
California,  
San Diego  
ORDER

Before: CLIFTON, BYBEE, and DE ALBA, Circuit  
Judges.

Judges Bybee and de Alba voted to deny Appellant's petition for panel rehearing. Judge Clifton voted to grant the petition for panel rehearing. Judge de Alba voted to deny the petition for rehearing en banc and Judges Clifton and Bybee recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions will be entertained.

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## **APPENDIX D**

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### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

#### **U.S. Const. art. III.**

##### **Section 1**

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

##### **Section 2**

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

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as

to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

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

....

**28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe**

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

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

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

**Fed. R. Civ. P. 23. Class Actions**

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

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

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

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

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

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

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

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

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

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

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

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

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

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

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

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

(1) *Certification Order.*

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

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

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

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the

court may direct appropriate notice to the class.

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

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

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

51a

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

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

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

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

(d) CONDUCTING THE ACTION.

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

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

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

(i) any step in the action;

(ii) the proposed extent of the judgment; or

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

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

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

(E) deal with similar procedural matters.

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

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

(1) *Notice to the Class.*

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

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

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

53a

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

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

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

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

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

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

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

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

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

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

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to be Excluded.* If the class action was previously certified under Rule

23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

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

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

(i) forgoing or withdrawing an objection, or

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

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

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the

order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

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

(A) must consider:

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

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

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

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

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

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

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

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

(2) *Standard for Appointing Class Counsel.*

When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

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

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

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

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

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

57a

(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).