Case No. 25-6818

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RANDALL HEAGNEY, RICA GUERRERO, KERRIE GONNELLA, JOHN ROHLOFF, AND JEWEL RULE, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

JOHN PAUL MITCHELL SYSTEMS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of California
No. 3:23-cv-00687-VC; Hon. Vince Chhabria

BRIEF FOR THE APPELLANT

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INTRODUCTION

This is not the typical class action alleging misrepresentations on consumer packaging. In other cases, the challenged representation appears on the front of the product label, which nearly every consumer sees before buying the product. Here, Plaintiffs challenge claims appearing only in small print on the side or back of John Paul Mitchell Systems hair-care products: "John Paul Mitchell Systems does not conduct or endorse animal testing" and "No Animal Testing."

To see those tiny statements, a consumer would have to pick up the bottle, turn it around, and closely review the back label. But this Court has recognized that California law rejects "'the assumption that reasonable consumers [of consumer products] are back-label scrutinizers.'" *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771, 778 (9th Cir. 2024) (quoting *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1174 (2018)). And online buyers would not see the statements at all unless (1) the retailer's website included a picture of the part of the bottle showing the statement, and (2) buyers clicked on it.

Under these circumstances, a court cannot presume classwide exposure to marketing statements; Plaintiffs must prove it. The

certification order here is particularly flawed because the district court acknowledged that "there isn't adequate proof of classwide exposure to the marketing statements." 1-ER-3. It nonetheless certified a class because, in the court's subjective view, the label claims were "visible enough." *Id.* Without "adequate proof of classwide exposure," however, individualized questions as to whether each class member saw the statements predominate, precluding class certification.

Equally warranting reversal, the certification order improperly inferred classwide reliance on the statements at issue. First, the district court erred by crediting Plaintiffs' support for materiality—an internal JPMS marketing document that, at best for plaintiffs, showed 40% of consumers would not care about the statements even if they saw them. Second, the court ignored unchallenged survey evidence of actual consumer behavior by an experienced survey expert showing only a very small percentage of consumers would find the label claims material. That effectively rendered the inference of classwide reliance unrebuttable.

Finally, Plaintiffs' sole proffered means of proving classwide injury and damages were expert studies that had not yet been designed. Their

expert merely invoked two generic types of studies and cited generic variables and attributes he *might* examine. He did not say what he would do or how. That is not enough and independently requires reversal.

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. § 1332(d)(2) because at least one class member is of diverse citizenship from JPMS and the amount in controversy exceeds $5,000,000. This Court has jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). On October 27, 2025, the Court granted a petition for permission to appeal under Rule 23(f). That petition was timely filed on July 11, 2025, which was within 14 days after the class certification order was entered on June 27, 2025.

ISSUES PRESENTED

1. Whether a false advertising class may be certified without any proof of classwide exposure to minuscule marketing statements that appear only on side or back labels.

2. Whether a false advertising class may be certified when the undisputed record shows that between 40% and 98% of absent class members did not rely on the challenged representations.

3. Whether proposed studies that have not yet been designed can serve as common proof of damages.

STATEMENT OF THE CASE

A. Factual Background

John Paul Mitchell Systems ("JPMS") was founded in 1980 and has been a privately-held, family-owned company for its entire history. Dkt. 119-1. JPMS seeks to provide luxury hair-care products at affordable prices, offering shampoos, conditioners, serums, hairsprays, sculpting foams, treatment oils, and more. 9-ER-2009–47; 10-ER-2403–22. These products are sold and marketed under several distinct brands. Relevant here are Paul Mitchell®, Clean Beauty, Tea Tree, MITCH®, Awapuhi Wild Ginger®, Neuro®, and MVRCK™. 1-ER-2.[1]

In 1980, JPMS became the first professional beauty company to publicly take a stance against animal testing. 5-ER-1085. Between 2015 and 2020, JPMS products displayed one of two fine-print statements on the back or side of product labels (together, the "Label Claims"): (1) a line of text perpendicular to the back label on a bottle that stands vertically, stating "John Paul Mitchell Systems does not conduct or

[1] As will be relevant to the discussion regarding the 2018 internal consumer survey (in which only women participated), the MITCH® and MVRCK™ products are marketed to men. *See, e.g.*, 9-ER-2038–41.

endorse animal testing," which was used on products until approximately 2016 (11-ER-2459, 9-ER-1994):[2]

or (2) a logo consisting of a semicircular "no animal testing" statement surrounding a rabbit, which was gradually introduced starting in 2014 and used until January 2020. *See* 11-ER-2485; 10-ER-2416; 9-ER-1994.

[2] The record does not include a clearer photograph of a product labeled with the first statement.

Beginning in 2020, the packaging of some products carried a similar small logo stating "a pioneer in cruelty-free hair care." 11-ER-2455; 9-ER-1995. That statement was not certified for class treatment (1-ER-3) and is not at issue here.

The Label Claims appeared on numerous JPMS products sold across multiple sales channels, 3-ER-480, and were used concurrently in the marketplace. 3-ER-480–81; *see also* 3-ER-462–63. The vast majority of JPMS's sales were wholesale sales to third parties, such as salons, distributors, and retailers. 3-ER-481.

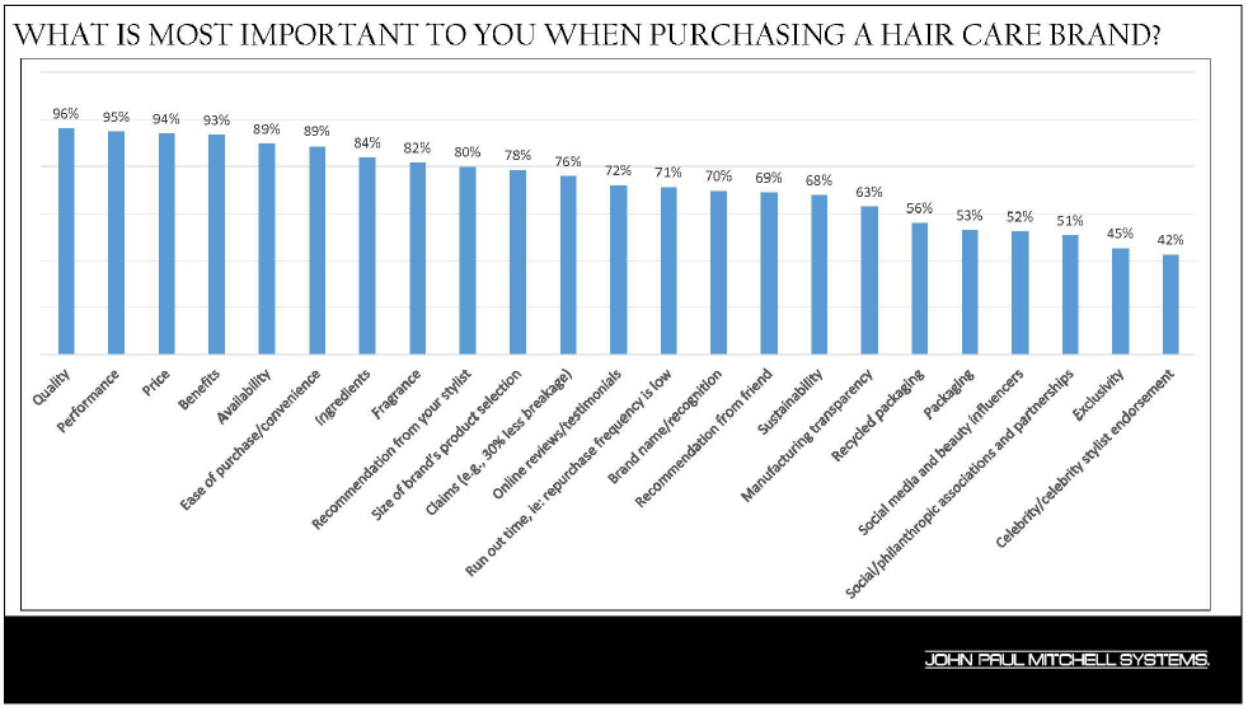
B. Proceedings Below

Plaintiffs sued JPMS in the Northern District of California, contending that the Label Claims were false because JPMS products were sold in China at a time when China allegedly required animal testing for all foreign non-special-use cosmetics. 11-ER-2448–49; 11-ER-2466. Plaintiffs asserted claims under California's (1) Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*, (2) Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, (3) False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.*, and (4) express warranty law. 11-ER-2491–97. There is no allegation JPMS conducted any type of animal testing in the United States or elsewhere.

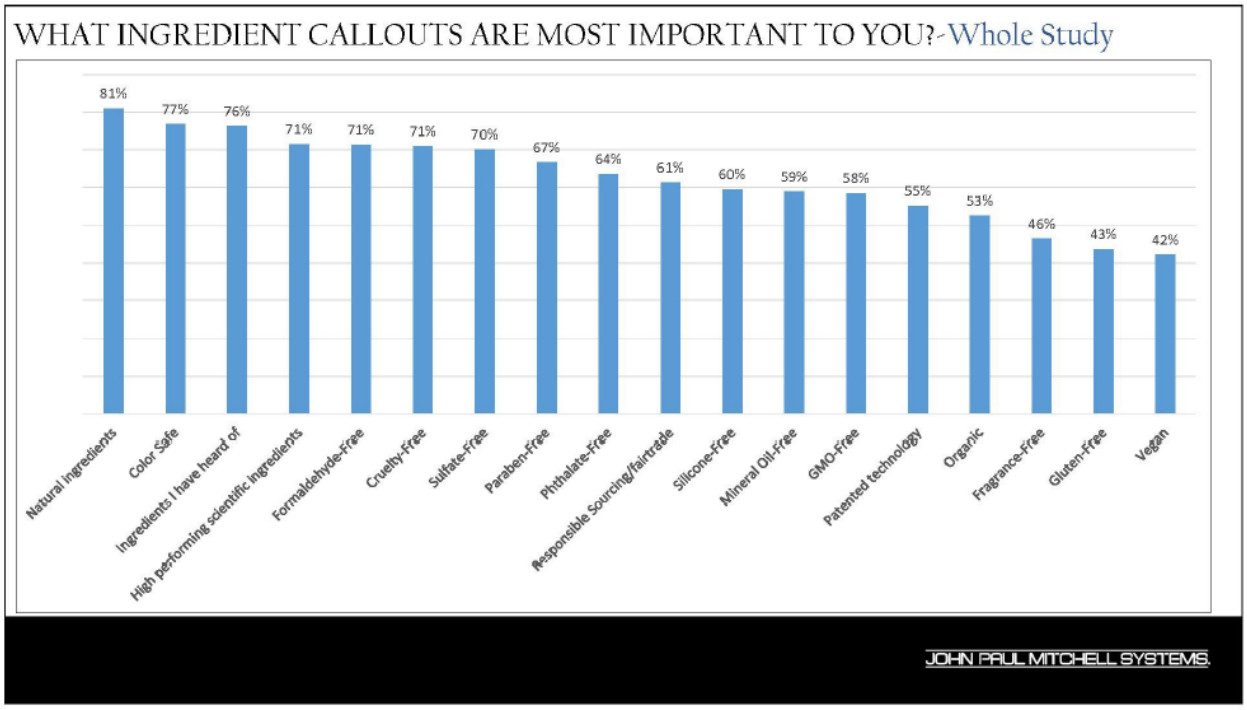
Plaintiffs' class certification motion offered no evidence addressing how (or whether) class members saw the Label Claims on the sides or backs of JPMS products before buying them in-store or online. In

contrast, JPMS presented evidence that the Label Claims were not prominently displayed on JPMS product bottles. *See, e.g.*, 3-ER-467; 9-ER-1994–95; 10-ER-2403–22.

Having skipped over exposure, Plaintiffs sought to prove reliance by pointing to a 2018 internal consumer survey JPMS conducted (the "2018 Consumer Survey"). That survey, which included only women (13-ER-2989), found that, of the 84% of respondents who considered ingredients "most important" when purchasing a hair-care brand, 71% viewed "cruelty-free" as a "most important" "ingredient callout" (13-ER-3006; 13-ER-3008).



13-ER-3006.



13-ER-3008.

Put differently, 60% of the total respondents—71% of 84%—viewed "cruelty-free" as a "most important" "ingredient callout." "Cruelty-free" ranked sixth among a total of 18 "most important" ingredient callouts (such as "color safe," "natural," and "paraben-free"), with 15 different callouts named as "most important" by more than half the respondents who found ingredients "most important." 13-ER-3008. Despite relying extensively on the 2018 Consumer Survey, Plaintiffs provided no evidence regarding its methodology, including how the survey was designed, who created it, or whether the survey sample was representative of JPMS's consumers.

Plaintiffs also pointed to a JPMS social media metrics report covering a single month of the class period, 8-ER-1779, in which the vast majority of social media posts had nothing to do with cruelty-free messaging. For example, on one page containing a "no animal testing"-related post, a separate post regarding founder John Paul DeJoria's business philosophy had over twice as much reach and twice as many comments. 8-ER-1787. Plaintiffs also isolated text from documents outlining JPMS's annual marketing strategies. 14-ER-3110–11 (citing 14-ER-3055, 14-ER-3058–59, 8-ER-1812–13, 14-ER-3075–76). Plaintiffs presented no evidence, however, that these materials influenced or reflected consumers' purchasing decisions.

In contrast, JPMS's expert, Dr. Dominique Hanssens, conducted a survey of buyers and potential buyers of JPMS products, which Plaintiffs did not challenge or rebut. Hanssens' survey found only 16% of respondents considered "information on bottle/label/package" in their most recent decision to purchase hair-care products. 12-ER-2552–53. Several other sources of information were as or more common: stylist recommendations, friends, websites, social media, and Google. *Id.*

Moreover, only 2% of respondents to Hanssens' survey identified "cruelty-free/doesn't test on animals" as a factor driving their purchasing decisions for hair-care products—failing to rank among the top 30 factors. 12-ER-2548–49. Hanssens also tested the effect of clarifying the "No Animal Testing" logo in accord with Plaintiffs' theory of liability to say: "No animal testing except in countries where it is required by law. No animal testing in the U.S." 12-ER-2562–64. There was no statistically significant difference in respondents' likelihood to purchase products when that language was added. *Id.*

Finally, to show that damages could be proved classwide, Plaintiffs relied on contemplated damages models that had not yet been designed. In an expert report JPMS moved to exclude (9-ER-1969), Plaintiffs' expert Dr. Gareth Macartney pointed to two methods to calculate a price premium.

First, he identified "[o]ne *possible* hedonic pricing regression model specification" (14-ER-3145 (emphasis added)) but did not say whether he would actually use this model. In the seven paragraphs broadly describing hedonic regressions, Macartney did not identify what factors he would control for, which he would measure, or how he would calculate

any premium. 14-ER-3143–46. Rather, he simply identified "[p]otentially relevant characteristics" in three categories. 14-ER-3145. These would include "indicator variables for the time period" to control for factors that change over longer times. *Id.* He also would look at "brand-level indicator variables, which control for characteristics *such as* product quality and marketing polic[i]es that determine brand equity for individual brands." *Id.* (emphasis added). And he also would address "indicator variables for the store or chain where the product is sold," to "control for pricing tendencies and product availability across retail stores and chains." *Id.* He did not explain what the variables would be, let alone why or how they would accomplish his stated goals.

Second, Macartney—who had never designed (or conducted) a conjoint survey of this type before, 3-ER-391–93—described the nature of a potential conjoint survey in broad terms but did not propose a particular design or identify key design elements. 14-ER-3147–49. He did not select which attributes to measure or how many levels each attribute would have. *See* 3-ER-403–05; 3-ER-407–08. He also could not say how he would account for the differing attributes of different types of hair-care products (*e.g.*, "stickiness" for a gel but not a shampoo), vastly

complicating any conjoint analysis. *See* 3-ER-431; *see also* 13-ER-2795. Nor could he explain how he would account for differences between JPMS's different brands (*e.g.*, Paul Mitchell versus Tea Tree) and their target audiences. *See* 3-ER-428–29; *see also* 13-ER-2792–93. Although Macartney averred that "product quality and brand effects can be controlled for by asking consumers to consider two products with the same ingredients and brand name"—"identical apart from the labeling" (14-ER-3149)—he proposed no means of addressing the fact that the challenged labeling is on the side or back of packages.

Macartney's report also included a literature review of studies that mostly were not performed in the United States and/or did not concern animal testing or cruelty-free products. 14-ER-3131–40. For example, several studies related to the ethical sourcing of coffee. *See* 14-ER-3139–40.

C. The Class Certification Order

The district court certified "[a] class of all California residents who between May 1, 2015, and January 1, 2020, purchased, directly from JPMS or through an authorized third-party retailer or salon, a JPMS hair-care product branded as Paul Mitchell, Clean Beauty, Tea Tree,

MITCH, Awapuhi Wild Ginger, Neuro, or MVRCK[.]" 1-ER-2. The class could address only the Label Claims identified above: "no animal testing" and "John Paul Mitchell Systems does not conduct or endorse animal testing." 1-ER-3. The third statement Plaintiffs sought to challenge—"pioneer in cruelty-free hair care"—was "too different from 'no animal testing' to be considered substantially the same representation." *Id.*

With respect to the issue of harm, which turns on both exposure and reliance, the district court recognized that "there isn't adequate proof of classwide exposure to the marketing statements[.]" *Id.* The district court excused that lack of proof, however, because in its view "the targeted representations were visible enough" and consistently appeared on product labels. *Id.* This conclusion accorded with the court's suggestion at the hearing that Plaintiffs need not demonstrate that consumers "picked [the product] up and looked for [the logo,]" but only that the label was a "representation that a reasonable consumer would rely on" whether or not she actually saw it. 2-ER-16.

The court further concluded "reliance [could] be inferred on a classwide basis because there [was] sufficient evidence of the label statements' materiality[,]" citing the unscientific 2018 Consumer Survey

and other, unspecified "internal JPMS documents." 1-ER-4. The court did not acknowledge the unchallenged and unrebutted Hanssens survey, which showed only 2% of respondents considered the lack of animal testing an important factor in their purchase. *See id.*

Finally, the district court held Macartney had done enough to show that damages could be proved classwide. 1-ER-5. In the court's view, Macartney had "identified certain variables that *might* be necessary to control for—including other label statements, brand and product characteristics, and marketing channels—and explained how he *would determine* which variables must be controlled for and how he *would* control for them[,] . . . how he *would* get the data necessary and how he *would* determine the appropriate sampling population for a conjoint survey." *Id.* (emphasis added).

STANDARD OF REVIEW

An order certifying a class is reviewed for abuse of discretion. *E.g.*, *Lytle v. Nutramax Lab'ys, Inc.*, 114 F.4th 1011, 1023 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025). "A district court applying the correct legal standard abuses its discretion" where "it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in

weighing the correct mix of factors." *Id.* (quoting *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018)). Underlying factual findings are reviewed for clear error and will be reversed if "(1) illogical, (2) implausible, or (3) without 'support in inferences that may be drawn from the record.'" *Sali* , 909 F.3d at 1002 (citation omitted).

SUMMARY OF THE ARGUMENT

In certifying the class here, the district court failed to engage in the "rigorous analysis" required by Rule 23 on three distinct issues. *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350–51 (2011).

First, the district court improperly excused Plaintiffs from their burden of providing evidence that class members actually saw the small, back-label statements, instead presuming exposure because, in the court's opinion, the Label Claims were "visible enough." 1-ER-3. Not only was there, as the court acknowledged, no "adequate proof of classwide exposure to the marketing statements," *id.*, there was no such proof at all. In fact, the size and placement of the Label Claims made it likely that many—if not most—class members never saw the claims. Because there was no evidence of classwide exposure, the district court abused its discretion in certifying a class that "almost certainly includes

members who were not exposed to, and therefore could not have relied on, [JPMS's] allegedly misleading advertising material." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012), *overruled in part on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc). Determining which class members actually saw the representations would require individualized inquiries for every single class member, defeating predominance.

Second, the district court erroneously deemed the Label Claims material, leading to an inference of classwide reliance. Plaintiffs' principal evidence of materiality was an unscientific consumer survey that showed at least 40% of respondents did *not* find "cruelty-free" important—deficient support for a classwide inference. *See* 13-ER-3006; 13-ER-3008. The animal-testing representations have no other indicia of materiality; they do not, for example, pertain to the primary purpose of the hair-care products. This lack of evidence should have precluded any finding of materiality and any inference of classwide reliance.

Even if an inference of reliance were warranted, however, JPMS's unchallenged, scientifically conducted survey, crafted and executed by an

experienced survey expert, rebutted any inference. Those surveys showed consumers relied on a wide variety of information sources when purchasing JPMS products, with only 16% of consumers relying on product packaging and only 2% claiming "cruelty-free/doesn't test on animals" was important to their most recent purchasing decisions. 12-ER-2553; 12-ER-2549. By ignoring this evidence, the district court effectively—and improperly—rendered the inference of reliance irrebuttable. Ultimately, and irrespective of whether one concludes that an inference of reliance never arose or was subsequently rebutted, reliance in this case would have to be determined consumer by consumer, defeating predominance.

Third, the district court misapplied this Court's precedent by deeming Plaintiffs' undesigned, hypothetical damages models sufficient to measure classwide damages. Although this Court has permitted a designed but not yet executed damages model to serve as common proof at the certification stage, *Lytle*, 114 F.4th at 1024, the Court did not suggest that a damages model yet to be *designed* could sufficiently demonstrate a classwide means of proving damages. To the contrary, the Court warned that an unexecuted damages model would have to pass

muster under Federal Rule of Evidence 702, *id.* at 1029–31, noting that a model's "underdeveloped" status "may weigh against a finding that it will provide a reliable form of proof." *Id.* at 1032. Plaintiffs' expert Macartney advanced only underdeveloped models. He (1) presented only vague summaries of hedonic regression and conjoint analysis methodologies and (2) confirmed in deposition he had not determined the specific attributes he would test nor taken steps to secure the necessary data. He also offered no opinion as to how he would account for differences in the JPMS product types and respective target audiences. Macartney's report is far more cursory than the report approved in *Lytle* or those this Court approved in other cases, and does not satisfy *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) or *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

ARGUMENT

"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*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). As a consequence, class certification is "not to be granted lightly," *Black Lives Matter L.A. v. City of Los Angeles,* 113 F.4th 1249,

1258 (9th Cir. 2024), and may be ordered only after a "rigorous analysis" of Rule 23's requirements. *Wal-Mart,* 564 U.S. at 350–51. Plaintiffs bear the burden of "satisfy[ing] through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33. In addition, a Rule 23(b)(3) class may be certified only if "common questions predominate over individual ones"—a "difficult" showing that "regularly presents the greatest obstacle to class certification." *Black Lives Matter*, 113 F.4th at 1258 (citations omitted). A question is common only if common evidence will resolve the "truth or falsity" of the issue "in one stroke." *Wal-Mart*, 564 U.S. at 350. To establish predominance, "a party seeking class certification must make a positive showing that common issues will rule the day." *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925, 934 (4th Cir. 2025).

Moreover, class members must be harmed by the allegedly unlawful conduct, *see Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011), *abrogated in part on other grounds by Comcast,* 569 U.S. 27, because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (citation omitted). So the harm from

the allegedly unlawful conduct must be susceptible to common proof or the class is necessarily overbroad.

Individualized issues predominate here. Plaintiffs seek classwide relief for violations of California's (1) Consumer Legal Remedies Act ("CLRA"), (2) Unfair Competition Law ("UCL"), (3) False Advertising Law ("FAL"), and (4) express warranty law. 11-ER-2489–97. Each cause of action requires, in some form, a material misrepresentation, consumer reliance on it (for express warranty, in the absence of privity), and harm caused by that reliance. *Lytle*, 114 F.4th at 1034 (CLRA); *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (UCL); *Bowen v. Energizer Holdings, Inc.*, 118 F.4th 1134, 1145 (9th Cir. 2024) (FAL); *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 696 (1954) (express warranty).

Yet Plaintiffs presented no adequate classwide means of proving absent class members (1) were exposed to the alleged misstatements, (2) relied on the alleged misstatements, or (3) were injured. Because those individualized issues overwhelm any common ones, the class certification order should be reversed.

I. Individualized Issues of Purchasers' Exposure to the Back- and Side-Label Representations Predominate Over Common Issues.

The district court erred as a matter of law by excusing Plaintiffs from presenting "adequate proof of classwide exposure to the marketing statements." 1-ER-3. In fact, there was no proof of classwide exposure at all: Plaintiffs offered no evidence putative class members ever saw the Label Claims in the first place. The district court improperly skipped over that threshold issue and instead leaped to assess the Claims' materiality.

But alleged misrepresentations "do not justify a presumption of reliance" where "it is likely that many class members were never exposed to the allegedly misleading advertisements," *Mazza*, 666 F.3d at 595, for an obvious reason: no consumer can be misled by statements she didn't see. *Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531, 534 (9th Cir. 2016) ("allegedly offending statements" cannot "influence[] [the] purchase" of a buyer who did not see them before buying). California law equally recognizes that persons not "exposed" to an alleged misstatement "could not have been deceived by it." *Downey v. Pub. Storage, Inc.*, 44 Cal. App. 5th 1103, 1115 (2020); *see also*, *e.g.*, *Sevidal v. Target Corp.*,

189 Cal. App. 4th 905, 926–28 (2010); *Pfizer Inc. v. Superior Ct.*, 182 Cal. App. 4th 622, 631–33 (2010).

That is why "everyone in the class [must] have viewed the allegedly misleading advertising." *Mazza*, 666 F.3d at 596. A class that consists of many people who never saw—and thus "could not have been harmed" by—the alleged misrepresentations "does not satisfy Rule 23(b)(3)." *Castillo v. Bank of Am., NA*, 980 F.3d 723, 730 (9th Cir. 2020) (citing and quoting *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136, 1138 (9th Cir. 2016)). Such a class would be "overbroad because those persons were, by definition, not injured and cannot recover." *Moorer v. StemGenex Med. Grp., Inc.,* 830 F. App'x 218, 220 (9th Cir. 2020). Thus, "[c]ommon issues do not predominate (and class certification is properly denied) when the evidence demonstrates variations in how—and, critically, *whether*—class members were exposed to an allegedly deceptive advertisement." *Downey*, 44 Cal. App. 5th at 1117.

Because a "class must be defined . . . to include only members who were exposed to advertising that is alleged to be materially misleading[,]" *Mazza*, 666 F.3d at 596, any class here would have to be limited to buyers who were exposed to the no-animal-testing claims in tiny print on the

side or back of JPMS product labels. The absence of common proof here on the threshold issue of exposure necessarily creates individualized issues that predominate over any others.[3]

A. Unlike Prominent Front-Label Claims, Uniform Classwide Exposure to Side- or Back-Label Claims Cannot be Inferred.

On JPMS products, like most others, the most important information—brand and the product type and features—appears on the front:

[3] This issue was raised at 3-ER-462–63, 3-ER-467.

11-ER-2475–76. The Label Claims, by contrast, appeared either (1) in a small font as a line of text perpendicular to the text of the back label (pictured below at left on the vertically standing bottle) or (2) in a small font as a logo adjoining the back label (right).

11-ER-2459; 11-ER-2485.

In some instances, plaintiffs are entitled to a presumption of classwide exposure because the challenged statement is "prominently displayed on the front of the packaging." *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 869 (9th Cir. 2025). That makes sense and is consistent with California law. Products' front labels convey the

critical factors in the purchasing decision: the brand, product type, and features. Here, however, the district court assumed classwide exposure to the tiny side- and back-label claims because, in its view, they "were visible enough" and consistently appeared on product labels whether or not they were actually seen in their inconspicuous locations. 1-ER-3.

That conclusion runs counter to California law. Both this Court and California state courts have made clear that statements appearing only on the side- or back-labels of packaging do ***not*** support an inference of uniform exposure. California courts have "rejected 'the assumption that reasonable consumers of vitamins are back-label scrutinizers.'" *Whiteside,* 108 F.4th at 778 (quoting *Brady*, 26 Cal. App. 5th at 1174). Similarly, this Court has rejected arguments that back-label disclosures necessarily cure misleading statements on front labels. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008). As this Court has indicated, consumers cannot be expected to routinely examine "small print on the side of the box," *id.*; there is no indication buyers commonly refer to products' back labels without a specific reason to do so. Unlike front labels, to which consumers are exposed before deciding to buy, exposure to side or back labels is not "a practical inevitability" because

buyers can and often do make purchasing decisions without looking there. *Downey*, 44 Cal. App. 5th at 1117; *see also In re Clorox Consumer Litig.*, 301 F.R.D. 436, 444 (N.D. Cal. 2014) ("only 11 percent of consumers read the back panel of the [at-issue] packaging").

These precedents accord with common sense. Just as courts do not assume prospective purchasers necessarily peruse products' back labels and see statements curing the harm of misleading statements on the front labels, courts cannot assume reasonable consumers consult the sides and backs of packaging as a matter of course and uniformly discover allegedly false statements there. At most, this Court has suggested ambiguous front-label statements may prompt interested consumers to consult back labels for clarification, in which case clarifying statements may cure potentially misleading aspects of the front-label statements. *See McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1098–99 (9th Cir. 2023). But front-label ambiguity is not at issue here, and nothing on the front labels alludes to animal testing at all, let alone in a way that would prompt a reasonable purchaser to consult the back label for further information. Exposure to the side or back labels thus was not "a practical inevitability." *Downey*, 44 Cal. App. 5th at 1117.

Neither Plaintiffs nor the district court identified a single controlling decision inferring uniform exposure to a side- or back-label statement. The district court's sole cited support for the proposition that it is unnecessary to prove classwide exposure to side- and back-label claims was *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552 (N.D. Cal. 2020). But that isolated trial-court decision is inapposite because *Krommenhock* hinged on the lack of evidence that a statement "moved from the front to the side of the box." *Id.* at 564 n.9. But the Label Claims here were always on the side or back of the products. More fundamentally, *Krommenhock* rests on the mistaken premise that "California law does not ask whether class members actually saw" the alleged misrepresentations. *Id.* at 565. Not so. As this Court recognized long ago, California law asks exactly that. *See Mazza*, 666 F.3d at 596.

Downey is only the most recent California decision to recognize that, "[u]nless the class members were *exposed* to the advertisement, they could not have been deceived by it[.]" 44 Cal. App. 5th at 1115. *Downey* collects monolithic California authority confirming that "one who was not exposed to the alleged misrepresentations" cannot have been

deceived or damaged by them. *Id.* (quoting *Pfizer*, 182 Cal. App. 4th at 631).[4]

Sevidal is a prime example. There, the court affirmed the denial of class certification because too many "absent class members never saw the Web page containing the alleged misrepresentation and thus were never exposed to the alleged wrongful conduct." 189 Cal. App. 4th at 910. The *Sevidal* plaintiffs claimed certain representations on Target's website falsely represented the products were made in the United States. *Id.* But the challenged representations were contained only in a page accessed through an "additional info" link. *Id.* at 913. Buyers could complete their purchases without clicking that link, however, and many undoubtedly did. *Id.* at 913, 915. Because the *Sevidal* plaintiffs had no means of using common evidence to determine which buyers clicked the link—let alone

[4] Among the California decisions *Downey* collects are *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009) (no relief if the "consumer . . . was never exposed in any way to an allegedly wrongful business practice"); *Tucker v. Pac. Bell Mobile Servs.*, 208 Cal. App. 4th 201, 229 (2012) (exposure required); *Davis–Miller v. Auto. Club of S. Cal.*, 201 Cal. App. 4th 106, 124–25 (2011) (same); *Knapp v. AT&T Wireless Servs., Inc.*, 195 Cal. App. 4th 932, 945–46 (2011) (same); *Am. Honda Motor Co., Inc. v. Superior Ct.*, 199 Cal. App. 4th 1367, 1379 (2011) (same); *Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544, 562 (2011) (same); *Sevidal*, 189 Cal. App. 4th at 926 (same).

which would find the representations material if they saw them—the court found the litigation would be overwhelmed by the individualized threshold inquiry into who saw what. *See id.* at 914–15, 928.

This case parallels *Sevidal*. Like the customers in that case, a JPMS customer could easily buy a hair-care product without ever seeing the side or back labels, which would require extra effort to see (and motivation to look in the first place). Much like the *Sevidal* customers who could not see the challenged claims unless they clicked an "additional info" link, online buyers of JPMS products at a minimum would have had to click on an additional product image to see JPMS products' side or back labels, if those images were accessible at all. And customers buying JPMS hair products in person could see the Label Claims only if they took the additional step of turning the bottle around and reading miniscule print on the back or side labels.

In sum, under controlling precedent from this Court and the California courts, the district court could not assume classwide exposure here.

B. Plaintiffs Failed to Offer Common Evidence Showing Class Members Were Exposed to the Minuscule Label Claims.

Where it is far from certain every class member would have necessarily seen the challenged advertising, this Court requires evidence that "everyone in the class [must] have viewed the allegedly misleading advertising." *Mazza*, 666 F.3d at 596. Because the district court could not presume classwide exposure to Label Claims appearing only on the side or back labels, Plaintiffs bore the burden to present common evidence that all class members would have seen these fine-print no-animal-testing statements on the backs or sides of JPMS product labels.

But Plaintiffs offered nothing, presenting no evidence absent class members saw, let alone relied upon, the Label Claims. There was no evidence addressing whether buyers in stores and salons turned the product bottles around so that they might see the challenged statements, let alone whether they noticed the statements or logos running alongside the ingredients list. And no evidence addressed whether the side or back labels were even accessible to online buyers, let alone whether buyers clicked through to see those labels.

That failure of proof extends to the sole class representative for the certified class, Randall Heagney. *See* 1-ER-3. Heagney did testify that

when he first purchased a JPMS product in the 1980s, a hairstylist pointed out a "symbol of the rabbit" indicating the product was "cruelty free." 6-ER-1221–23. But the "cruelty free" statement was not certified for class treatment, 1-ER-3, and JPMS did not introduce a rabbit symbol until 2014 or use the term "cruelty free" on labels until 2020. *Compare* 6-ER-1221–23 (describing "rabbit" symbol that "said it was cruelty-free") *with* 9-ER-1994–95 (explaining "rabbit" symbol not introduced until 2014 and "cruelty-free" language not introduced until 2020).

The absence of classwide—or even individual—evidence that class members saw the Label Claims is dispositive because, as explained above, overwhelming authority in this Court and California courts recognizes no one can be misled by statements they do not see. *Mazza*, 666 F.3d at 596 (class members "who were not exposed" to the product claims "could not have relied on" them); *Downey*, 44 Cal. App. 5th at 1115 ("Unless the class members were *exposed* to the advertisement, they could not have been deceived by it[.]"); *Burch v. CertainTeed Corp.*, 34 Cal. App. 5th 341, 353 (2019) (plaintiff "cannot have relied on what he never saw") (citing *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993)); *Brazil*, 660 F. App'x at 534 (holding statements plaintiff did not see

cannot "be said to have influenced his purchase"). Thus, there is "absolutely no likelihood" that class members who "were 'never exposed' to the alleged misrepresentation" were "deceived by the alleged false or misleading advertising." *Sevidal*, 189 Cal. App. 4th at 926 (quoting *Pfizer*, 182 Cal. App. 4th at 632) (emphasis omitted).

The district court nevertheless excused that failure of proof here because, having looked at hair-care bottles handed to him during the hearing by Defendant's counsel to view the challenged claims, it deemed the representations "visible enough." 1-ER-3. But a court cannot substitute its own judgment for evidence. No conceptual shortcut can "excuse a plaintiff from having to prove that he or she was actually exposed to at least one deceptive advertisement." *Downey*, 44 Cal. App. 5th at 1115 (emphasis omitted); *see also*, *e.g.*, *Sevidal*, 189 Cal.App.4th at 926–27. The district court's subjective belief is thus insufficient to support certification of the class given proof of classwide exposure to the alleged misstatements was both necessary and lacking.

C. Including Class Members Who Never Saw the Representations In A Damages Class Would Also Violate Article III And The Rules Enabling Act.

Persons who did not see, and cannot have been harmed by, the Label Claims cannot be class members here for additional, fundamental reasons. Because consumers who never saw allegedly misleading statements cannot have been injured by them, their inclusion in a damages class would impermissibly allow the court "to order relief to an[] uninjured plaintiff." *TransUnion*, 594 U.S. at 431. Article III forbids that result, "class action or not." *Id.* Rule 23 has the same limit: "federal courts may not certify a damages class pursuant to Rule 23 when the class includes both injured and uninjured class members." *Labcorp v. Davis,* 605 U.S. 327, 333–34 (2025) (Kavanaugh, J., dissenting).

This Court, unlike other circuits, nonetheless allows a class to include "more than a de minimis number of uninjured class members"—but only if separating them out will not defeat predominance. *Olean*, 31 F.4th at 669; *see id.* at 691–92 (Lee, J., dissenting) (identifying circuit split). Here, however, only intensely individualized inquiries could establish which buyers saw the Label Claims before buying. And those inquiries would predominate over every other aspect of the litigation.

The district court's contrary approach requires reversal for another reason: It would impermissibly use Rule 23 to "confer a remedy upon those class members who have not been wronged," thus "'creat[ing] substantive rights' that do not otherwise exist." *Downey*, 44 Cal. App. 5th at 1123 (citation omitted). The Rules Enabling Act's prohibition on "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. §2072(b)), forecloses using the class action device to confer rights plaintiffs would not have if they sued as individuals. This Court applied the same principle when it rejected certification of a class that included persons who could not have been harmed by challenged practice in *Wit v. United Behavioral Health*, 79 F.4th 1068, 1084–85 (9th Cir. 2023). As the Court recognized, because the certified "classes were not limited to" those injured by "challenged provisions," "Rule 23 was applied in a way that enlarged or modified Plaintiffs' substantive rights in violation of the Rules Enabling Act." *Id.* at 1086.

Of course, federal and state enforcement agencies can address and penalize misleading product statements that only a limited number of purchasers may see. But unharmed private plaintiffs cannot recover

damages—whether or not in class actions. *See TransUnion*, 594 U.S. at 431. As the Eighth Circuit recently observed, class certification is improper where "the conclusion seems ineluctable that a significant proportion of the proposed class did not read those representations or, if they did, did not care about them one way or the other." *In re Folgers Coffee Mktg.*, 159 F.4th 1151, 1156 (8th Cir. 2025). That is the case here. *See also* pp. 48–50, *infra* (addressing evidence many JPMS buyers "did not care . . . one way or the other").

Without evidence of classwide exposure, "numerous and substantial" individualized inquiries as to what each class member saw would predominate, precluding certification. *Downey*, 44 Cal. App. 5th at 1113 (citation omitted). The Order certifying the class therefore should be reversed.

II. Individual Issues Further Predominate Because Plaintiffs Lack Classwide Evidence Of Reliance And Causation.

To certify a class here, Plaintiffs had to advance a common means of proving reliance and causation, *i.e.*, that a challenged representation was a substantial factor in class members' purchasing decision. *E.g.*, *Lytle*, 114 F.4th at 1036. But Plaintiffs failed to present any common proof of reliance and causation. Instead, Plaintiffs asked for the inference

of reliance that arises when a statement would be materially misleading to a reasonable consumer. *Id.* at 1034. And the district court gave it to them.

The inference of reliance is rebuttable, however. *Id.* at 1035; *Vasquez v. Superior Ct.*, 4 Cal. 3d 800, 814 (1971); *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 134–35 (2009). And "[a] showing that for *some portion* of a class that statement *was not in fact material* upsets that inference." *Noohi*, 146 F.4th at 870 (emphasis added).

Here, JPMS's unchallenged expert rebuttal evidence—as well as the non-expert evidence on which Plaintiffs and the district court relied—showed that the no-animal-testing statements were "not in fact material" to the purchasing decisions of at least 40% of the class members and, very likely, substantially more. *See* 13-ER-3006; 13-ER-3008. As a result, the fact-intensive issues of reliance and causation would have to be proved through individualized inquiries that would predominate over all other issues in the case.[5]

[5] This issue was raised at 3-ER-467–70.

Rather than undertaking the "rigorous analysis" Rule 23 requires, *Wal-Mart*, 564 U.S. at 350–51, however, the district court ignored this rebuttal evidence. Certification was therefore improper.

A. Because There Was No Evidence "No Animal Testing" Was Material, the Court Erred in Presuming Classwide Reliance.

Although materiality is judged under a reasonable person standard, that finding must rest on more than speculation. The district court relied on *Lytle* to find materiality here (1-ER-4), but that reliance was misplaced many times over. In *Lytle*, this Court affirmed class certification because the plaintiffs "presented ample evidence to show that the challenged statements would be materially misleading to a reasonable consumer." 114 F.4th at 1035. That "ample evidence" of materiality included testimony from the plaintiffs' advertising expert and survey results from the defendant's expert, which together "outweighed" the defendant's contrary evidence. *Id.* There was no such affirmative evidence here.

1. *The internal JPMS survey touching on "cruelty-free" ingredient callouts does not provide evidence of materiality.*

In contrast to *Lytle*, no weighing of evidence is necessary here because Plaintiffs adduced no evidence of materiality, offering no survey

or other empirical evidence of their own. Plaintiffs—and the district court—instead relied on a handful of JPMS's internal documents, including the 2018 Consumer Survey (14-ER-3110–11), without providing any information about who conducted the survey or their qualifications, how participants were selected, how and whether the 100%-female sample properly represents the male and female putative class, what methodology was used, or how the results were analyzed and applied by JPMS (if they were applied at all).[6] Plaintiffs' unsubstantiated evidence of materiality pales in comparison to the extensive showing in *Lytle*.

Even when accepted at face value, the 2018 Consumer Survey cannot serve as evidence of materiality. The district court concluded that "reliance can be inferred on a classwide basis because there is sufficient evidence of the label statements' materiality: 71% of respondents to a JPMS survey said that a statement that a product was made with

[6] The reliability of this online multiple-choice survey is dubious for another reason. Forty percent of the all-female participants said that they have or currently use Mitch products, a brand targeted exclusively at men—almost twice as many as used Paul Mitchell products, and five times as many as used Awapuhi Wild Ginger, two brands targeted to women. *See* 13-ER-2991 (lower right corner); 9-ER-2105–26; 9-ER-2035–41.

'cruelty-free ingredients' was a 'most important callout.'" 1-ER-4. That was erroneous for several reasons.

To begin with, as the district court recognized (1-ER-3), the term "cruelty-free" is different from (and broader than) "no animal testing"—the Label Claim at issue here. *See* 3-ER-477 (demonstrating differing interpretations of "cruelty-free" versus "no animal testing"). Moreover, the 2018 Consumer Survey results show a substantial percentage of the class did *not* find the Label Claims material—a full 29% by the district court's count, or nearly one in three. *See* 1-ER-4. But even that figure—which should have precluded a classwide inference of materiality—was too low once the framework of the survey is understood.

First, respondents to the 2018 Consumer Survey had to choose among factors "most important to you when purchasing a hair care brand." 13-ER-3006. Eighty-four percent (84%) of respondents identified "ingredients"—which placed that factor seventh of 23 factors such as "quality," "performance, and "price." *Id.* Indeed, all 23 factors were identified by more than 40% of respondents, and 14 factors by 70% of respondents or more. *Id.*

Second, the 84% in the subgroup identifying "ingredients" was then asked to rank the "ingredient callouts" that were "most important" to them. *See* 13-ER-3006; 13-ER-3008. Seventy-one percent (71%) *of that subgroup* identified "cruelty-free" as among the "most important"—ranking it sixth among the 15 factors (such as "color safe," "natural," and "paraben-free") deemed "most important" by more than half the respondents. 13-ER-3008.

Thus, the district court's 71% figure was an overstatement. In fact, only 60% of total respondents—71% of the 84% who considered ingredients most important—found "cruelty-free" to be a most important ingredient call-out. That is, the 2018 Consumer Survey—Plaintiffs' central evidence—showed at least 40% did not find "cruelty-free" to be a "most important" attribute of a product's ingredients. Moreover, as noted above, survey respondents rated many other factors more important, and many more factors nearly as important—making it practically impossible to sort out which factors substantially affected the purchasing decisions of which consumers. And the same survey showed "cruelty-free" was only the 13th highest brand association for Paul Mitchell, named by only 51% of respondents. 13-ER-3037. Thus, the best evidence Plaintiffs could

marshal showed nearly half of purchasers did not find "cruelty-free" characteristics significant—and proved nothing at all about the no-animal-testing Label Claims the court certified. That is particularly true where, as here, the Plaintiff presented no evidence JPMS ever took any action with respect to the survey results.

Those unscientific results provide no basis to deem the Label Claims material (and thus to infer classwide reliance). Although this Court permits a class to include "more than a *de minimis* number of uninjured class members," *Olean*, 31 F.4th at 669, 40%—or even 29%—is hardly "de minimis," particularly in the absence of any common method to sift the injured from the uninjured. *See Downey*, 44 Cal. App. 5th at 1118–19 (issues not common when 13% or 31% not affected by allegedly deceptive conduct); *Mr. Dee's*, 127 F.4th at 933–34 (class with one-third of members uninjured "raises Article III standing concerns"). Indeed, shortly after the district court's class certification order, this Court clarified in *Noohi* that an inference of reliance is upset by "[a] showing that for *some* portion of the class [the] statement was not in fact material." 146 F.4th at 870 (emphasis added). The survey the district court relied on makes clear that, not only are animal testing practices

not material to the hair-care product purchasing decisions of just "some portion," they are not material to a significant portion of class members.

As this Court recognized in *Lytle*, classwide materiality is not established where "a sizable portion of the class either were not misled by the statements or would not have found the misrepresentations to be material had they known the truth." 114 F.4th at 1038. Here, that is precisely what the evidence indicated: at least 40% of class members—a truly "sizable portion of the class"—"would not have found the misrepresentations to be material had they known the truth." *Id.* It should be "self-evident" that an inference of reliance "will not arise where the record will not permit it." *Massachusetts Mut. Life Ins. Co. v. Superior Ct.*, 97 Cal. App. 4th 1282, 1294 (2002). In light of the evidence before it, the district court erred in deeming the no-animal-testing statements material.

2. *The other internal JPMS marketing documents likewise do not demonstrate materiality.*

The district court also rested its finding of materiality on "internal JPMS documents" purportedly showing that "emphasizing the cruelty-free nature of JPMS's products was a key marketing strategy for the

firm."[7] 1-ER-4. But JPMS's internal marketing goals and strategies (some of which focused on the future) are not evidence identifying a "'substantial factor in' a 'large percentage of *consumers'* purchasing decisions.'" 1-ER-4 (citing *Lytle*, 114 F.4th at 1034–36) (emphasis added); *cf. Bustamante v. KIND, LLC*, 100 F.4th 419, 433 (2d Cir. 2024) (company's "own conception" of statements does not reveal "consumer's understanding"). In any event, Hanssens' systematic review of JPMS advertising and social media materials revealed that very little of JPMS's actual marketing focused on animal testing: only 2–6% of public-facing social media posts contained any "cruelty-free" messaging. 12-ER-2557–59.

3. *The Label Claims do not relate to the product's purpose, further weighing against an inference of classwide materiality.*

Lytle is inapposite for an additional reason. The challenged statements in *Lytle*—claiming the products improved joint mobility in dogs—were directly related to the product's purpose, providing evidence

[7] While Plaintiffs had pointed to a JPMS social media metrics report, it covered only a single month of the class period, and the vast majority of social media posts had nothing to do with cruelty-free messaging. *See* 8-ER-1779–808.

of materiality. 114 F.4th at 1035. The finding of materiality in *Lytle* rested on expert evidence showing a "near-universal understanding" that the product's "purpose" was to "improve/help/maintain mobility, flexibility, joint health/support" in dogs. *Id.* Indeed, as the Court observed, "it is difficult to see why else consumers would purchase this 'joint health supplement' other than to improve their dog's joint health." *Id.* at 1038; *see also Noohi*, 146 F.4th at 869 (statement material because "[i]t is hard to imagine that consumers would purchase a product labeled 'Oil-Free Moisture' without regard to whether the product was free from oil").

Here, in contrast, there was no similar evidence of a "universal understanding," for the obvious reason that the lack of animal testing had nothing to do with the purpose of the JPMS hair-care products purchased by class members. For that reason as well, *Lytle* provides no support for the court's finding of materiality here.

B. Hanssens' Surveys Rebut any Possible Inference of Classwide Reliance on the "No Animal Testing" Statements.

Even if an initial inference of classwide reliance had been permissible, Hanssens' unchallenged survey evidence rebutted any such inference. An inference of reliance is rebuttable, not conclusive.

"[E]xcusing the plaintiffs from presenting direct proof of individual reliance would not foreclose the defendant from presenting evidence of a lack of causation or reliance, which too would raise individualized questions." *Folgers*, 159 F.4th at 1156. But the district court brushed aside the rebuttal evidence—which was the evidence most on point.

A court presented with evidence regarding the purchasing decisions of actual consumers does "not need to look to the hypothetical reasonable consumer" or to "infer reliance." *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 453 (S.D. Cal. 2014). Here, the unchallenged evidence showed consumers relied on a variety of information sources in making their purchasing decisions, and many did not consider the lack of animal testing to be an important purchasing factor.

Hanssens' survey showed only 16% of buyers pointed to the package as a source of information in their most recent decision to purchase hair-care products—third among ten sources listed by 10% or more. 12-ER-2552–53. Other information sources included the product attribute mentions, hair salon/stylist, other websites, social media, and Google.com. *Id.* That showing of consumer reliance on a variety of information sources rebuts any inference of classwide reliance on the

Label Claims. *See Vioxx*, 180 Cal. App. 4th at 134 (finding individualized issues where there was "substantial evidence that all physicians are different and obtain their information about prescriptions from myriad sources").

Hanssens' survey also asked respondents about what factors were important to them in purchasing hair-care products, and only 2% of respondents listed "doesn't test on animals" and/or "cruelty-free," which was not even among the top 30 factors. 12-ER-2548–49. Amazon reviewers further confirmed the individualized nature of materiality and reliance: only 28 out of 9,724 Amazon.com reviews of JPMS products—0.29%—mentioned the words "animal" or "cruelty." 12-ER-2554.

In fact, one of Hanssens' surveys zeroed in on the precise alleged misrepresentation at issue here and showed most consumers did not rely on it. Plaintiffs' core allegation is that "the Class relied on the misrepresentations of JPMS regarding its stance on animal testing and that its products were never tested on animals. JPMS's representations turned out not to be true because it tested on animals to sell its products in China." 11-ER-2493. Thus, what is at issue in this case is not animal testing generally (or in the United States), but animal testing in China

as required by law to sell products there. To test whether consumers found material the specific, alleged misrepresentation at issue here, Hanssens compared the actual "No Animal Testing" logo with a modified version stating: "No Animal Testing. No animal testing except in countries where it is required by law. No animal testing in the U.S." 12-ER-2562–64. He found there was no statistically significant difference in respondents' intent to purchase, which remained at 75% among all respondents. *Id.*

Notably, no evidence of any kind indicated or even suggested that U.S. consumers would universally care about testing in China on products sold there.[8] The district court simply decided consumers would (a) care about animal testing in general and (b) care about animal testing

[8] A statute enacted by the California Legislature—a reasonable proxy for California consumers—reflects preferences like those expressed in Hanssens' survey. That law—enacted in 2018, but which became operative starting January 1, 2020—prohibits the sale of cosmetics "developed or manufactured using an animal test that was conducted or contracted by the manufacturer, or any supplier of the manufacturer" but excepts "[a]n animal test that was conducted to comply with a requirement of a foreign regulatory authority, if no evidence derived from the test was relied upon to substantiate the safety of the cosmetic sold in California by the manufacturer." Cal. Civ. Code § 1834.9.5.

in China in particular, apparently based on its own subjective beliefs. 2-ER-18 ("[I]t doesn't really sound like the typical person who would care about animal testing . . . would only care about animal testing in California as opposed to other parts of the country or China.").

On the contrary, evidence that an alleged misrepresentation would not influence consumers' purchasing decisions precludes a finding of materiality. For example, the *Vioxx* court held classwide materiality was lacking in the face of evidence that some consumers would still take the drug at issue in the case if it were on the market and they were aware of the risks allegedly concealed. 180 Cal. App. 4th at 125, 134. Likewise, the court in *Fairbanks* held "it is impossible to determine, as a matter of common proof," whether alleged misrepresentations were "material to the entire class" where "roughly half" of certain class members surveyed would have made the same purchase regardless of the alleged misrepresentation. *Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544, 565 (2011).

Nevertheless, the district court disregarded Hanssens' empirical findings (which were not challenged by Plaintiffs), instead characterizing the survey as "weak" because a *different* question asked whether a

consumer would find a certain amount of animal testing to be "acceptable" in light of a no-animal-testing representation rather than asking what the representation "mean[s]." 1-ER-4. But the district court's disdain for that question was misguided. Those who find a representation "acceptable" in light of certain facts cannot be materially misled by it.

The district court apparently was skeptical of the survey answer that 30% of respondents found *some* animal testing acceptable despite a no-animal-testing statement. *See* 12-ER-2560–61. Apart from being unchallenged by contrary evidence, however, that answer made sense. People who cared little (or not at all) about animal testing would not change their purchase decisions based on a no-animal-testing statement. That's especially true if the testing was minimal or geographically distant. In contrast, those who staunchly opposed animal testing would shun any product animal tested for any reason. Ultimately, the district court's view of a single question provided no basis to completely disregard the rest of Hanssens' unchallenged results, which directly rebutted any inference of classwide reliance on the small-print, side- or back-label no-

animal-testing statements.[9] *See Folgers*, 159 F.4th at 1156 (rebuttal evidence may establish individualized nature of inquiry).

Critically, Plaintiffs offered no evidence that could carry their burden to show common proof of reliance was available. For example, they offered no scientifically-conducted "consumer survey or other market research to indicate how consumers reacted to the . . . statements, and how they valued these statements compared to other attributes of the product[.]" *In re 5-Hour Energy Mktg. & Sales Pracs. Litig.*, 2017 WL 2559615, at *8 (C.D. Cal. June 7, 2017). The evidence they did offer showed that, for a substantial "portion of the class," the Label Claims were "not in fact material," *Noohi*, 146 F.4th at 870, either taken in isolation or measured against many other attributes that were more important to them.

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[9] It is not at all unreasonable to believe consumers have nuanced views on both animal testing practices and "no animal testing" labels. Although the court found one of JPMS's proposed interpretations "inconceivable" (1-ER-5), Hanssens' survey showed a high degree of variation in consumer understanding of the Label Claims. *See* 12-ER-2560–61.

That failure of proof precludes a finding of classwide reliance, which means the fact-intensive issue of reliance would have to be determined on an individualized basis, defeating predominance. Because, on this record, "the misrepresentation . . . 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.* at 868 (quoting *Stearns*, 655 F.3d at 1022–23, and *Vioxx*, 180 Cal. App. 4th at 129).

Of course, that a defendant can rebut the inference of classwide reliance does not mean no class could ever be certified. It simply means Plaintiffs must identify common evidence showing reliance by the class—which Plaintiffs here did not. That failure leaves a record showing that "many class members weren't deceived, and figuring out who was and who wasn't will require consumer-by-consumer inquiries into each class member's individual tastes, interpretations, and circumstances, undermining the efficiencies class actions are intended to provide." *Folgers*, 159 F.4th at 1156. That defeats predominance and requires reversal.

III. Individualized Issues Predominate Because Undesigned Damages Models Cannot Satisfy *Daubert* or *Comcast.*

This Court has held "that class action plaintiffs may rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof so long as the district court finds, by a preponderance of the evidence, that the model will be able to reliably calculate damages in a manner common to the class at trial." *Lytle*, 114 F.4th at 1024. But the district court here ignored the substantial—and dispositive—difference between an "unexecuted" study and one not even *designed*.

The difference is critical because the Federal Rules of Evidence require expert testimony to be "based on sufficient facts or data" and "the product of reliable principles and methods," and to "reflect[]"—not just raise the possibility of—"a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702(b), (c), (d). "[I]f the predominance inquiry is to serve its critical function, it cannot be answered by 'maybe,' 'perhaps,' and other 'what ifs' that leave the hard questions for later[.]" *Speerly v. General Motors, LLC*, 143 F.4th 306, 324 (6th Cir. 2025) (en banc).

Lytle holds—in contrast with other circuits—that plaintiffs may avoid the time and expense of collecting data and actually testing a

model, and that an unexecuted model may suffice at class certification without surviving a full *Daubert*/Rule 702 analysis. By diluting the application of Rule 702 at class certification, *Lytle* improperly departs from Circuit precedent and the Rule's plain meaning. This Court sitting *en banc* squarely held that "evidence at certification must meet all the usual requirements of admissibility[.]" *Olean*, 31 F.4th at 665 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)).[10] To the extent the *Lytle* panel suggested a diluted evidentiary standard applies at class certification, the *en banc* opinion in *Olean* is controlling. *See Yovino v. Rizo*, 586 U.S. 181, 183 (2019) (*en banc* opinion "constitutes a precedent that all future Ninth Circuit panels must follow") (citing *United States v. Caperna*, 251 F.3d 827, 831 n.2 (2001)).

[10] Other circuits agree. As the Sixth Circuit has held, "If expert testimony is insufficiently reliable to satisfy *Daubert*, it cannot prove that the Rule 23(a) prerequisites have been met in fact through acceptable evidentiary proof." *In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239, 253 (6th Cir. 2024) (citation and quotations omitted); *see also Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corp.*, 99 F.4th 770, 774 (5th Cir. 2024) ("*Daubert* … applies with the same rigor at the class certification stage as at trial."); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (same); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (same).

Even assuming the lower standard suggested in *Lytle* applies, however, an actual model—not a genus of models—was necessary in *Lytle* (*see* 9-ER-2132–46), and should have been necessary here as well. Here, the Order goes too far in approving not-yet-designed damages models. Under the Order, a class could be certified so long as an expert pulls an equation out of a textbook, states that the formula is recognized for its validity, and speculates how he might apply that equation to whatever variables he ultimately decided were pertinent. Macartney might as well have said he would conduct a hedonic regression and a conjoint analysis and left it at that.

Neither Plaintiffs nor the Order can explain how to conduct *Daubert* and *Comcast* analyses without knowing what the expert is going to do. The Order effectively replaces those analyses with a cursory review based only on the credentials of the Plaintiff's expert, which, in this case, included a *lack* of experience with conjoint analysis. Models that have not been designed cannot serve as common proof of anything, and without a common method of proving damages, no class could be certified here.[11]

[11] This issue was raised at 3-ER-470–73, 9-ER-1975–89, 2-ER-125–34.

A. The Order Misapplied *Lytle* to Encompass Generic, Undesigned Damages Models.

The district court stretched *Lytle* beyond sustainable bounds. The *Lytle* Court indicated the limits of its holding when it recognized that whether "a model is underdeveloped may weigh against a finding that it will provide a reliable form of proof." 114 F.4th at 1032. A completely inchoate model, where *none* of the key choices have been made, is too "underdeveloped" to support the necessary finding of reliability under Rule 702: "Merely gesturing at a model or describing a general method will not suffice . . . ." *Id.* Rather, the expert must "demonstrate that *the* proposed method will be viable"—not that a cluster of possible alternate methods might work depending on choices not yet made. *Id.* (emphasis added).

1. *Macartney's report and testimony failed to specify the most basic details of his proposed damages models.*

Macartney's report and testimony merely identified two generic types of analysis—hedonic regression and conjoint analysis—saying either "*can be used*" to calculate a price premium. 14-ER-3143, 14-ER-3147 (emphasis added). His bare-bones summaries did not even specify whether he would undertake one or both methodologies to calculate damages in this case.

Macartney identified "[o]ne *possible* hedonic pricing regression model" but did not say whether he would actually use that model or would choose an undisclosed model. 14-ER-3145 (emphasis added). Nor did he explain why the disclosed model is superior to other hedonic models. *Id.* His report's description of a contemplated hedonic regression consisted of (i) a few paragraphs generically describing hedonic analysis (14-ER-3143–44, 14-ER-3146), (ii) an assertion that, generally, data is available from Nielsen, Circana, and/or Mintel (14-ER-3144), (iii) a "possible hedonic pricing regression model specification" (i.e., a possible equation) he might or might not use for his regression (14-ER-3145), and (iv) a vague list of "[p]otentially relevant characteristics" (*id.*).

Macartney's deposition testimony then confirmed that many other aspects of the hedonic regression were equally up in the air. When asked how he would take into account different product types, he simply responded that "very rich sources of scanner data" might provide "prices that consumers pay" as well as "product characteristics and . . . certain segments of products." 2-ER-145–46. Because of this, he concluded, "the regression method *can* include those characteristics as controls in the regression." *Id.* (emphasis added). But he couldn't say which, if any,

characteristics he would use. *See id.* He also didn't know whether his model would be "cross-sectional" or would "var[y] over time." 3-ER-437–48. Macartney also provided no detail about which data he would actually use, or which product characteristics or segments he would consider. A regression without known variables is too generic to show anything.

Macartney's description of a conjoint analysis in his report was even vaguer, consisting of only a few paragraphs broadly describing the general principles of conjoint analysis.[12] 14-ER-3147–49. Macartney's deposition testimony also made clear he had decided virtually nothing about what he would do. He "ha[d]n't decided exactly what th[e] [product] attributes" tested in his conjoint analysis were "going to be[,]" but stated he would "do [his] own market research" to identify and choose "around six" of them. 3-ER-403–05; 3-ER-407 ("I'm not saying it will be exactly six[.]"). Nor had he chosen "the specific levels of the attributes" to test, saying only that he would probably select between two and six

[12] In contrast to the expert in *Lytle*, on whose track record of successful conjoint analyses this Court relied, 114 F.4th at 1033, Macartney had never executed a conjoint survey, and the only conjoint survey he had designed was for a wage and hour case. 3-ER-391–93.

levels per attribute. 3-ER-404; 3-ER-408. He "would consider using brands that are comparable to each other," but didn't know what "comparable brands" he would consider or how he would identify and select them other than through unspecified "analysis and research." 3-ER-414. What, if any price information he used "would depend on what data is available"; he "would decide what to use, . . . when it came to actually doing it." 3-ER-424–25.

Nor had Macartney determined which allegedly false representation he would test. Not until his "pre-survey analysis" would he "determine what's the most appropriate term or what sort of terms should be used and if it should be used and if it should be defined or qualified to also mean one or the other." 9-ER-2115.

Similarly, Macartney said "product quality and brand effects *can* be controlled for by asking consumers to consider two products with the same ingredients and brand name" that were "identical apart from the labeling" (14-ER-3149 (emphasis added))—but he never said how a survey could incorporate the fact that the pertinent labeling is on the side or back of product packaging. In short, the structure and contents of the conjoint analysis would depend on a "qualitative and quantitative pre-

survey analysis" he had not performed, might not perform, and could not describe. *See* 3-ER-411; 3-ER-431; 3-ER-439–40.

Critically, Macartney did not explain how either his conjoint or hedonic model would adequately capture a uniform willingness to pay among different types of products having inherently different characteristics. While Macartney indicated he would calculate a "price per ounce" premium (14-ER-3146), he again did not explain how he would account for the vastly different prices per ounce of different products and different package sizes—only that they "can be controlled" somehow. 3-ER-397. This would be crucial in this case given that, as shown by JPMS's expert Dr. Keith R. Ugone, there is significant variation in the average price per ounce even among JPMS shampoo products, ranging from $0.09 to $2.61 per ounce. 13-ER-2941–44.

Nor did Macartney address how he would account for the strikingly different characteristics of different products. For example, "ability to clean" is an inherent attribute of a shampoo—but not a hair gel. "Ability to hold hair" is an attribute of a hair gel but not a shampoo or conditioner. In addition, there are differences in inherent attributes *within* each type. Just as one example, there are shampoos for blonde hair, shampoos for

color-treated hair, thickening shampoos, detangler shampoos, shampoos plus conditioner, dry shampoos, and anti-frizz shampoos. *See, e.g., id.*; 9-ER-2009–47.

Macartney attempted to bolster his inchoate models with a largely irrelevant literature review, concluding that "there is meaningful research in the literature that acknowledges and measures a market price premium for products that are labelled as cruelty-free[.]" 14-ER-3132. Macartney himself did not conduct any of this research, and his review is neither reliable nor probative for multiple reasons. Many of the studies were conducted overseas. 14-ER-3133–34, 14-ER-3138–39 (citing studies from Portugal, Indonesia, India, Germany, France, United Kingdom, Spain, and Belgium). Several studies indicate meaningful variation in attitudes towards cruelty-free products across cultures. One noted "that consumers' willingness to pay for different attributes of an ethical product varies significantly based on their cultural worldviews." 10-ER-2432. And findings in one other study "contradict[ed] previous studies in other countries." 10-ER-2443. Many of the studies Macartney cited are not about "cruelty-free" at all but instead concern "ethical business behavior," "no child labor," "sustainability," or other

"environmental, social, and governance ('ESG')-related claims." 14-ER-3134–35. Ultimately, Macartney failed to explain how, for example, evidence of a certain price premium for ethically-sourced fish in the United Kingdom has any bearing on the measurement of a price premium, if any, for a "no animal testing" representation on JPMS-branded hair-care products in the United States. This portion of his report—one-third of it—undermines rather than bolsters the reliability of his damages analysis.

The district court found that "JPMS's objection to Macartney's literature review fail[ed] because a damages expert can assume the merits of a case." 1-ER-6. But that was beside the point. JPMS's objection to Macartney's irrelevant literature review was not that it assumed the merits—a point JPMS conceded (2-ER-134)—but that it was largely based on foreign studies or studies that often did not mention "cruelty-free" products at all.

2. *The Order misapprehended Macartney's analysis and misapplied* Lytle.

The district court misapplied and overextended *Lytle* in finding Macartney's rudimentary analysis adequate. The court erroneously asserted that Macartney had "identified certain variables that *might* be

necessary to control for—including other label statements, brand and product characteristics, and marketing channels—and explained *how* he *would* determine which variables must be controlled for and *how* he *would* control for them in each of his two proposed models." 1-ER-5 (emphasis added). As explained above, each "how" overstates the record. Because of the minimal effort expended in designing the study, Macartney was unable to say how he would proceed in either type of study.

The Order also said Macartney "explained how he would get the data necessary" (*id.*), but Macartney—who had not collected any data—merely identified four possible data sources, one of which was further "market research," without identifying which he would actually use or why. 2-ER-150–51. Of the three other sources he named (Nielsen, IRI, and Mintel), he had not looked at one and did not know whether JPMS products were included in the other two. 2-ER-149; 2-ER-153. The Order also said Macartney had "explained . . . how he would determine the appropriate sampling population for a conjoint survey" (1-ER-5), but Macartney could not say how he would do that; he said only he would have "initial questions" and "consider looking at demographics[.]" 2-ER-

164–65. And the court held that Macartney need not explain *how* his price-premium analysis would "account for supply-side factors" because Macartney would "use actual market prices and sales data" in some unidentified way. *See* 1-ER-6.

Further, in trying to bring Macartney's models within *Lytle*, the district court quoted what the *defendant* in *Lytle* (not the Court) "contend[ed]" were characteristics of the report of the plaintiffs' expert in that case—that he had not "determined the precise demographic makeup of the individuals to be surveyed," had not "selected all of the parameters for his model[s]," and may "lack[] certain data needed to finalize his calculations." 1-ER-5 (quoting 114 F.4th at 1031). But this Court found the first two characterizations of the report were waived—not that such flaws would not matter if they were present. *See Lytle*, 114 F.4th at 1031–34. The Court found a basis to conclude that the *Lytle* expert would be able to collect the necessary data, *id.* at 1031, in contrast with Macartney, who had barely looked at some possible data sources, thus providing no basis for similar confidence.

Lytle certainly did not hold that a report that neither determined who would be surveyed nor identified the models' parameters could

survive a rigorous analysis under *Daubert* or Rule 23. Yet the district court did not assess Macartney's fragmentary proposals against this Court's admonition that an "underdeveloped" expert report might well fail a reliability analysis under Rule 702. *Lytle*, 114 F.4th at 1032. If "the fact the model has not been executed remains relevant[,]" *id.*, the fact the model has not even been designed should be dispositive.

3. *Macartney's models do not measure up to any expert report approved by this Court.*

Macartney's report is also deficient when compared to class certification expert reports that have passed muster in this Court. The striking contrast between the detailed analysis in *Lytle* and what Macartney did here was presented to the district court—and ignored. *See* 9-ER-2132–46 (*Lytle* report). The expert report in *Lytle* identified the target population and sample design (9-ER-2132–33), the retail data the expert had in his possession already (9-ER-2133–38), and the survey methodology with all attributes and levels (9-ER-2138–46). The *Lytle* expert "identif[ied] the target population, analyz[ed] economic data to determine the structure of the market, and specif[ied] the mathematical analysis he will perform on the survey results." 114 F.4th at 1031. Macartney did none of that.

More recently, this Court applied *Lytle* to the plaintiffs' expert report in *Noohi*, 146 F.4th at 854. The Court found that report "sufficiently developed" because the expert "explain[ed] how, through a combination of qualitative and quantitative surveying, he will measure classwide damages." *Id.* at 864. Although the expert had not yet "finally worded the questions or executed the survey," "he had designed the survey methodology and identified target respondent populations." *Id.* at 864–65. In contrast, Macartney did not design the survey methodology, did not identify the target respondent population, and did not secure relevant retail data at the time of class certification. Simply put, the challenged expert reports in *Lytle* and *Noohi* were far more advanced than Macartney's—and their contemplated studies were fully designed.

The report here more closely resembles one Judge Koh rejected in *Bruton v. Gerber Products Co.*, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018). There, the expert provided "a partial list of the variables that might distort the proposed Regression Model's analysis," but "merely state[d] that subsequent analysis will be 'controlling for these factors'" while "declin[ing] to elaborate further." *Id.* at *11. That is almost exactly

what Macartney did here, except for the most part he declined to even identify the variables he would use—or the equation he would use for the hedonic regression. As Judge Koh observed in another case, "it is not enough [for an expert] to just say" that a regression model "controls for other factors"; the expert "must show the Court that the model can" do what the expert says. *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873, at *13 (N.D. Cal. Nov. 6, 2014), *aff'd*, 660 F. App'x 531 (9th Cir. 2016).

In short, the district court here permitted what *Lytle* rejected. Macartney "[m]erely gestur[ed]" at two well-known models that were not sufficiently "applied to the facts of a given case" to permit a rigorous judgment of their reliability and their capability to provide a classwide answer on damages. 114 F.4th at 1032. That was not enough to show that the issues of injury and damages were susceptible to common proof.

B. Inchoate, Hypothetical Damages Models Cannot Satisfy Rule 702.

In *Lytle*, this Court made clear that an unexecuted damages model must provide enough detail to allow the district court to "determin[e] whether the expert's methodology is reliable," 114 F.4th at 1031, as Federal Rule of Evidence 702 and *Daubert* require. That is why "the fact

the model has not been executed remains relevant." *Id.* at 1032. By accepting a not-yet-designed model, the district court foreclosed the analysis necessary under Rule 702 for expert evidence at any stage of litigation. Indeed, the district court could not and did not engage in the necessary analysis; the Order did not even use the word "reliable."

This Court *en banc* has confirmed that "evidence at certification must meet all the usual requirements of admissibility[,]" *Olean*, 31 F.4th at 665 (citing *Tyson Foods*, 577 U.S. at 454–55), observing that defendants may "challenge the reliability of an expert's evidence under *Daubert* . . . and Rule 702." *Id.* n.7. But Macartney's undesigned studies cannot satisfy an admissibility analysis. Even if only a "predictive judgment" of admissibility is necessary, *Lytle*, 114 F.4th at 1031, the district court here could not and did not make a rigorous "predictive judgment" about the reliability of Macartney's undesigned damages models. That is enough to bar their use for class certification—leaving damages as an entirely individualized issue that "will inevitably overwhelm questions common to the class." *Comcast*, 569 U.S. at 34.

C. Inchoate, Hypothetical Damages Models Cannot Satisfy *Comcast.*

The inchoate models offered here also cannot satisfy the requirement that common proof of damages match the plaintiff's theory of liability, measuring "only those damages attributable to that theory." *Comcast*, 569 U.S. at 35. There is no way to determine whether generically identified models will do that. *See Speerly,* 143 F.4th at 335 (court must "ensure that each damages model accounts for how each claim works").

Comcast requires that Plaintiffs' damages model be limited to their precise theory of classwide liability: that purchasers were misled by JPMS's labels and would have paid less for JPMS U.S. products if they knew JPMS products in China had been tested on animals. But a court cannot possibly apply a *Comcast* analysis to a proposed study identifying none of the variables, attributes, or levels—that does not even pick the data source, much less evaluate whether that source includes the right characteristics. And the district court did not purport to undertake a *Comcast* analysis.

The Order rubberstamped an inchoate expert analysis without rigorously examining what was left out. Without adequately developed

models, Plaintiffs have no common method to prove damages for the proposed class, and "cannot show Rule 23(b)(3) predominance." *Comcast*, 569 U.S. at 34.

CONCLUSION

The Order granting class certification should be reversed.

February 18, 2026

Respectfully submitted.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I am not aware of any case pending before this Court that is related to the instant matter.

Dated: February 18, 2026 DTO LAW

By: */s/ William A. Delgado*
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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