REDACTED VERSION

FILED UNDER SEAL

No. 25-4833

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

TERRY MYERS and DAWN OUTLAW,

Plaintiffs - Appellees

v.

SAZERAC COMPANY, INC.,

Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 3:23-CV-522-EMC
HON. EDWARD M. CHEN

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

This appeal challenges an order certifying a class without the showing that Rule 23 requires: that Plaintiffs' proposed damages model, if executed, could reliably calculate damages in a manner common to the class.

Plaintiffs claim that the labels on single-serving bottles of Sazerac's Fireball Cinnamon malt beverage ("Fireball Malt") mislead California consumers into believing that the product is Sazerac's whisky-based Fireball Cinnamon Whisky ("Fireball Whisky"). Fireball Whisky is sold at liquor stores and other retailers licensed to sell spirits, whereas Fireball Malt is sold at convenience stores and other retailers licensed to sell only beer and wine.

Plaintiffs' damages theory is that consumers paid more for Fireball Malt than they would have had the labels more emphatically identified the product as a malt beverage. Plaintiffs seek to prove a class-wide "price premium" by means of a choice-based conjoint survey intended to infer differences in consumer demand for Fireball Malt with the existing label as compared with a hypothetical label further emphasizing the product's malt base alcohol. Plaintiffs' proposed conjoint survey, however, cannot reliably measure any class-wide price premium.

First, the survey population is not related to the class definition. Plaintiffs cannot even ensure that a single member of the putative class will be surveyed, while all but guaranteeing that the survey population will consist of consumers who are not reflective of class members, making the survey results meaningless.

Second, the survey omits the most important factor in purchases of ready-to-drink alcoholic beverages – convenience. The distortion caused by this omission will render the survey results unreliable.

Third, Plaintiffs ignore the supply-side factors that are essential to establishing prices. A conjoint survey, even if designed correctly, only reflects *demand*. To establish a price premium, supply-side factors must be considered. It is undisputed that Sazerac would not and could not change the price of Fireball Malt even if, as Plaintiffs claim, demand would decrease with a label change. Because Plaintiffs' damages model does not consider the supply side at all, it is incapable of establishing any price premium.

A plaintiff proffering a damages model to satisfy the predominance requirement of Fed. R. Civ. P. 23(b)(3) must show, by a preponderance of the evidence, that the model can reliably calculate class-wide damages. A district court may not certify a class unless it has determined, after conducting a "rigorous analysis," that a plaintiff has met this burden. The district court below conducted no such analysis, abdicated its gatekeeping responsibilities – treating foundational defects in Plaintiffs' model as matters of weight – and certified a class even though Plaintiffs' proposed damages model could not reliably establish class-wide damages.

Because the district court certified a class without determining whether the damages model was reliable, and because the record shows that the model could not reliably establish class-wide damages, the Court should reverse the class certification order.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). On February 12, 2025, the district court issued an order granting Plaintiffs' motion for class certification. Sazerac timely petitioned for permission to appeal pursuant to Fed. R. Civ. P. 23(f) on February 26, 2025. This Court granted the petition on July 31, 2025.

ISSUES PRESENTED

1. Whether the district court erred as a matter of law in certifying the class without requiring Plaintiffs to prove, by a preponderance of the evidence, that their damages model was capable of reliably calculating damages in a manner common to the class.

2. Whether the district court erred as a matter of law in certifying a class when Plaintiffs' damages model could not reliably calculate class-wide damages.

STATEMENT OF THE CASE

Sazerac is a producer of alcoholic beverages. Among its products are beverages sold in 50 ml and 100 ml single-serving bottles. (3-ER-474)

For single-serving "ready-to-drink" beverages, [redacted] (3-ER-383; 3-ER-470) Consumers value a product they can buy when and where they commonly shop – near home, on the way to work, and during extended store hours. (3-ER-470) With this in mind, Sazerac introduced Fireball Malt, a malt beverage version of Fireball Whisky. (1-ER-005; 3-ER-499) Fireball Malt and Fireball Whisky share the same flavor profile. (1-ER-003) But because the flavorless base alcohol in Fireball Malt is produced through fermentation rather than through distillation, Fireball Malt may be sold at retail locations licensed to sell malt beverages, including beer, whereas Fireball Whisky may only be sold at retail locations licensed to sell distilled spirits. (3-ER-499; 1-ER-004) Because there are 24,000 retailers licensed to sell malt beverages in California and only 14,000 spirits retailers, the introduction of Fireball Malt made the taste of Fireball more convenient to the public. (3-ER-499)

The labels of Fireball Malt and Fireball Whisky share some branding elements, such as the dragon image, color, and font to convey to the public that Fireball Malt has the same flavor profile as Fireball Whisky and is a genuine Fireball product. (3-ER-505) At the same time, the labels clearly identify Fireball Malt as a "MALT BEVERAGE" and state the product's lower alcohol percentage. (2-ER-340-41) Furthermore, Fireball Malt is sold at retailers that do not sell distilled spirits, such as convenience stores. (3-ER-500)

In this lawsuit, Plaintiffs Terry Myers and Dawn Outlaw claim that the labels on single-serving bottles of Fireball Malt mislead consumers into believing that they are purchasing Fireball Whisky. (1-

ER-002) Plaintiffs moved for certification of a class comprising all California consumers who have purchased Fireball Malt since February 3, 2019. (1-ER-002) In an effort to satisfy the predominance requirement of Fed. R. Civ. P. 23(b)(3), Plaintiffs assert that all putative class members paid a "price premium" for Fireball Malt. Plaintiffs' theory is that if the labels on single-serving bottles of Fireball Malt more conspicuously identified the product as a malt beverage, fewer consumers would purchase the product and Sazerac would have to reduce the product's price. (1-ER-018)

In support of this assertion, Plaintiffs proffered a declaration from Dr. Moshe Ben-Akiva proposing to conduct a "choice-based conjoint survey," which he claims will "measure" a "price premium that consumers paid as a result of their false belief that the Fireball Cinnamon is whiskey." (2-ER-272-73).[1] Dr. Ben-Akiva is a professor of

[1] "Conjoint analysis is a statistical technique capable of using survey data to determine how consumers value a product's individual attributes — often called the market's willingness to pay." *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-9366, 2014 U.S. Dist. LEXIS 179088, at *12, 2014 WL 7338930, at *4 (C.D. Cal. Dec. 18, 2014). "[I]n conjoint analysis, survey respondents are asked to make a series of choices between different combinations of product attributes. . .. Combining the responses to all of the choice sets, the analyst can then use established statistical methods to estimate the separate value (or part-worth) that

civil engineering who studies transportation systems. (2-ER-270) Although acknowledging that "careful attention to the design and implementation" of conjoint surveys "is essential" (2-ER-284), Dr. Ben-Akiva has no experience designing or implementing conjoint surveys pertaining to consumer products. (2-ER-101-102)

Dr. Ben-Akiva proposed fielding a conjoint survey to a sample of adult California residents who, in the prior year, purchased (a) any Fireball product and (b) any alcoholic beverage in a supermarket, convenience store, gas station, or drug store. (2-ER-284) For example, a Californian who purchased a bottle of Fireball Whisky sometime in the previous year and who also purchased a six-pack of beer at a convenience store during the same year would qualify to take the survey. This all but guarantees that the survey respondents will *not* reflect the relevant population (Fireball Malt purchasers) because Fireball Whisky greatly outsells Fireball Malt in California and because [redacted] of Fireball Whisky buyers have never purchased Fireball Malt. (3-ER-477; 3-ER-464)

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consumers attach to each product attribute." *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1118 (C.D. Cal. 2015).

For the survey, Dr. Ben-Akiva proposed using six attributes in his choice sets: brand name, product name, bottle size, alcohol percentage, alcohol type, and price. (2-ER-286-87) Notably absent from the list of attributes is "convenience" [redacted] (3-ER-383; 3-ER-470)

Dr. Ben-Akiva has no plans to study the supply side of the price equation. Rather, he will simply *assume* that Sazerac will sell the same quantity of Fireball Malt in the "but-for world" in which the product label is changed. (2-ER-289; 2-ER-309-13)

In its Opposition to the class certification motion, Sazerac argued that Dr. Ben-Akiva's proposed methodology was *incapable* of measuring damages on a class-wide basis. (Dkt. 65-7) Among other reasons why the proposed methodology would not and could not measure damages on a class-wide basis, Sazerac explained:

- Because the survey population was unlikely to include actual or likely purchasers of Fireball Malt – the relevant cohort – the survey results would be unreliable and meaningless.
- Although conjoint surveys are only valid if they include all of

the most important product attributes, the survey would omit [redacted] convenience.

- Even a properly constructed conjoint survey addresses only consumer preferences. To establish a "price premium," the supply side of the price equation in the "but-for world" must be analyzed. Plaintiffs' proposed methodology would not analyze the supply side at all, but would instead *assume*, without any basis, that sales volumes would remain the same and that the price would change.

(Dkt. 65-7)

The district court certified the putative class. (1-ER-041) Although noting that Fed. R. Evid. 702 required Plaintiffs to establish by a preponderance of the evidence that their methodology is based on "sufficient facts or data," is "the product of reliable principles and methods," and "reflects a reliable application of the principles and methods to the facts of the case" (1-ER-007), the district court concluded that the validity and reliability of their methodology was irrelevant, explaining that "even if Dr. Ben-Akiva's conjoint survey evidence were excluded under Daubert, that would not gainsay the fact that damages can and will be proven on a classwide damages [sic]. The fact that damages might, without the survey evidence, be found to be $0 does not gainsay the classwide nature of the resolution of this issues [sic]." (1-ER-018) The district court further concluded that Dr. Ben-Akiva's inapt survey population "goes to the merits of the survey, and not the admissibility of it" on the ground that Sazerac had not shown that the proposed survey "rises to the level of 'junk science.'" (1-ER-022) Similarly, the district court held that assuming away the importance of convenience to purchasing decisions did not render Plaintiffs' methodology inadmissible because "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility." (1-ER-025) Finally, the district court concluded that Plaintiffs' methodology adequately addresses supply-side factors because it used historical prices and quantities sold. (1-ER-027)

Sazerac timely petitioned this Court for permission to appeal from the class certification order pursuant to Fed. R. Civ. P. 23(f) on February 26, 2025. (2-ER-064) This Court granted the petition on July 31, 2025.

SUMMARY OF THE ARGUMENT

A class may not be certified unless a court determines, after a "rigorous analysis," that plaintiffs have proven, by a preponderance of the evidence, that all requirements of both Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b) have been satisfied. Where, as here, a plaintiff seeks to satisfy the predominance requirement of Rule 23(b)(3) by establishing a "price premium" applicable to all members of the putative class, the plaintiff must establish, by a preponderance of the evidence, that its model or proposed model is capable of reliably measuring such "price premium" damages. The district court ignored this requirement and certified a class without analyzing whether Plaintiffs' proposed damages model was reliable or admissible. Instead, the district court concluded that a class could be certified because whether or not Plaintiffs' damages model proved unreliable at a later stage of the case, that determination would be common to the class. This was reversible error.

Under the correct legal standard, it is plain that Plaintiffs cannot meet their burden of proving that their proposed damages model is capable of reliably measuring a "price premium." Plaintiffs' survey population is not tied to the class, so the results would not reliably reflect the views of class members – Fireball Malt purchasers. The proposed "conjoint survey" also elides any consideration of convenience – [redacted] – rendering the survey incapable of reliably estimating product values. Independently, Plaintiffs' damages model ignores supply-side factors, including the undisputed fact that Sazerac cannot and would not change the pricing of Fireball Malt even if demand fell as a result of re-labeling the product to emphasize even more that it is a "malt beverage." Without consideration of such supply-side factors, the model can say nothing about an alleged "price premium" – and certainly cannot reliably establish such a price premium. The district court therefore erred as a matter of law in certifying the class.

STANDARD OF REVIEW

A district court's "determination of underlying legal questions" in a class certification decision is reviewed de novo. *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1023 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025). "[W]hether an expert's damages model 'is capable of showing class-wide impact, thus satisfying one of the prerequisites of

Rule 23(b)(3) of the Federal Rules of Civil Procedure'" is reviewed for an abuse of discretion. *Id.* (quoting *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (*en banc*)).

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY CERTIFIED THE CLASS WITHOUT ENSURING THAT PLAINTIFFS' MODEL COULD RELIABLY MEASURE CLASS-WIDE DAMAGES.

A. Rule 23 required Plaintiffs to prove that their damages model could reliably measure class-wide damages.

"Before it can certify a class, a district court must be 'satisfied, after a rigorous analysis, that the prerequisites' of both Rule 23(a) and 23(b)(3) have been satisfied." *Olean*, 31 F.4th at 664 (quoting *Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 161 (1982)). "'[P]laintiffs wishing to proceed through a class action must actually *prove* – not simply plead – that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3),' and must carry their burden of proof 'before class certification.'" *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275-76 (2014)) (emphasis and alteration in original).

This appeal focuses on Rule 23(b)(3), which requires plaintiffs to establish, by a preponderance of the evidence, that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *Olean*, 31 F.4th at 665. The predominance requirement is "even more demanding" than Rule 23(a)'s requirements. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Where, as in this case, plaintiffs seek to satisfy Rule 23(b)(3) with a damages model purportedly "capable of showing class-wide impact," they must demonstrate "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; *see also Comcast*, 569 U.S. at 34 (plaintiffs must "establish[] that damages are capable of measurement on a classwide basis."). To satisfy these requirements, Plaintiffs need "a methodology that identifies damages that are . . . the result of the wrong." *Comcast*, 569 U.S. at 37. A methodology does not do so if it "fail[s] to measure damages resulting from the particular . . . injury on which [plaintiffs'] liability in th[e] action is premised." *Id.* at 36. Indeed, *Comcast* expressly rejected the notion that "at the class certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Id.* at 36 (emphasis in original).

A plaintiff seeking class certification must satisfy its Rule 23(b)(3) burden with admissible evidence. *Olean*, 31 F.4th at 665. Whether evidence is admissible, and whether a methodology can reliably calculate damages in a manner common to the putative class, is governed by Fed. R. Evid. 702. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016) (Fed. R. Evid. 401, 403, and 702 dictate whether evidence offered in support of class certification is reliable and admissible); Fed. R. Evid. 101(a) (the Rules of Evidence apply in all proceedings in United States courts unless excepted in Fed. R. Evid. 1101); *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 905 (3d Cir. 2022) (Rule 23 proceedings are not among the excepted proceedings).

"[A] proponent of expert testimony must always establish the admissibility criteria of Rule 702 by a preponderance of the evidence." *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1049 (9th Cir. 2025). "[T]here is no presumption in favor of admission." *Id.* "[C]hallenges to an expert's opinion go to the weight of the evidence *only if a court first finds it more likely than not that an expert has a sufficient basis to* *support an opinion*." *Id.* (emphasis added).[2]

B. The district court erred as a matter of law in certifying a class without engaging in a "rigorous analysis" of whether plaintiffs' damages methodology could "reliably calculate damages in a manner common to the class."

The district court certified a class without requiring Plaintiffs to prove, by a preponderance of the evidence, that Dr. Ben-Akiva's proposed methodology was capable of "reliably calculat[ing] damages in a manner common to the class at trial." *Lytle*, 114 F.4th at 1024. This Court reviews the legal error de novo. *Id*. at 1023.

Rather than holding Plaintiffs to their burden of showing a reliable method of calculating class-wide damages, the district court expressly disavowed the need for Plaintiffs to demonstrate that Plaintiffs' model could reliably measure class-wide damages. In the

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[2] This Court has previously held that "whether a 'full' or 'limited' *Daubert* analysis should be applied may depend on the timing of the class certification decision." *Lytle*, 114 F.4th at 1031. *Tyson Foods* and Fed. R. Evid. 101(a) cast doubt on the notion that anything short of a full Rule 702 analysis should be conducted as part of the "rigorous analysis" into whether all elements of Rule 23 have been met. Regardless, because Dr. Ben-Akiva has set forth his proposed methodology, it is clear at the class certification stage that the methodology does not satisfy Rule 702 and that a "predictive judgment" can be made at the class certification stage that it is unlikely that his methodology will "eventually bear fruit." *Lytle*, 114 F.4th at 1031.

district court's view, it did not need to do so because "even if Dr. Ben-Akiva's conjoint survey evidence were excluded under *Daubert*, that would not gainsay the fact that damages can and will be proven on a classwide damages [sic]. The fact that damages might, without the survey evidence, be found to be $0 does not gainsay the classwide nature of the resolution of this issues [sic]." (1-ER-018) The district court later repeated that conclusion, stating, "even if the conjoint survey evidence were, contrary to the Court's ruling herein, excluded under *Daubert*, that would only inform the amount of damages Plaintiffs could recover (including possibly $0). The ultimate decision, whatever it is, would still apply to the entire class." (1-ER-41)

The district court's conclusion that no reliability determination was necessary because a *future* determination of the methodology's admissibility would affect the entire class conflicts with well-established law. A class *cannot be certified* unless plaintiffs establish, by a preponderance of the evidence, that a proposed damages model "will be able to reliably calculate damages in a manner common to the class at trial." *Lytle*, 114 F.4th at 1024; *Olean*, 31 F.4th at 664 (plaintiffs must carry their burden of proving "that their proposed class satisfies each requirement of Rule 23 . . . *before class certification*.") (emphasis added); *Comcast*, 569 U.S. at 34 (to satisfy the predominance requirement, a plaintiff must "establish[] that damages are capable of measurement on a classwide basis."). As *Comcast* explains, it is not the case that "at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary," for that "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast*, 569 U.S. at 36. The district court's approach directly contravenes the requirements for class certification set forth by the Supreme Court and by this Court.[3]

The district court also explicitly disavowed any need to analyze Dr. Ben-Akiva's methodology pursuant to Rule 702. The court concluded that Sazerac's arguments regarding the methodology's unreliability "go[] to the merits of the survey, and not the admissibility of it" (1-ER-022); that the methodology was sufficient "at this stage"

[3] It is true that this Court has stated that "[t]he theoretical possibility that [a damages] model, when executed, will reveal no damages thus does not undermine predominance, because that result would nonetheless be common to the class." *Lytle*, 114 F.4th at 1026. But that refers to the *result* of a reliable methodology once implemented, not to the methodology itself.

because Sazerac had not demonstrated that the methodology "rises to the level of 'junk science'" (1-ER-022); and that "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility." (1-ER-025) This, too, was reversible error.

The Supreme Court in *Tyson Foods* and this Court in *Olean* have made it clear that plaintiffs seeking class certification must carry their burden of proving each element of Rule 23 through admissible evidence. *See Olean*, 31 F.4th at 665; *Tyson Foods*, 577 U.S. at 455. Simply "dismissing an argument as 'going to the weight, not admissibility, of [the expert's] testimony' is not a reliability determination." *United States v. Valencia-Lopez*, 971 F.3d 891, 899 (9th Cir. 2020); *see also* Fed. R. Evid. 702 Advisory Committee Note to 2023 Amendments ("[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)."). Rather, "challenges to an expert's opinion go to the weight of the evidence *only if a court first finds it more likely than not that an expert has a sufficient basis to support an opinion*." *Engilis*, 151 F.4th at 1049 (emphasis added).

"'Judicial gatekeeping is essential' to ensure that an expert's conclusions do not 'go beyond what the expert's basis and methodology may reliably support." *Id.* (quoting Advisory Committee notes to 2023 amendment to Rule 702). "The district court 'cannot abdicate its role as gatekeeper.'" *Id.* at 1050.

Here, however, the district court failed to act as a gatekeeper. It did not grapple with the question of whether Plaintiffs' methodology was incapable of measuring a price premium. The district court's view that admissibility determinations are only necessary with respect to "junk science" contravenes this Court's holding in *Engilis* that simply determining that an opinion is not "junk science" does not make it admissible – "'shaky' expert testimony, like any expert testimony, must still be 'admissible,' and this requires a determination by the trial court that it satisfied the threshold requirements established by Rule 702." *Engilis*, 151 F.4th at 1050.

Similarly, the district court misapplied *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025 (9th Cir. 2010), and *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867 (N.D. Cal. 2016), which it cited for the proposition that "technical inadequacies in a survey, including the format of the questions or the manner in which it was taken, bear on the weight of the evidence, not its admissibility." (1-ER-016) (quoting *Fortune Dynamic*, 618 F.3d at 1036). Both *Fortune Dynamic* and *Mullins* concerned "technical inadequacies" in surveys such as the format of the questions. *See Fortune Dynamic*, 618 F.3d at 1037 (challenge to failure to compare products side-by-side and "highly suggestive" questions); *Mullins*, 178 F. Supp. 3d at 905 (challenge to "survey question design"). Plaintiffs' survey design here is rife with such errors[4], but the issues here go beyond mere "technical inadequacies" and address the overall *incapability* of Plaintiffs' model to establish a price premium.

Here, the fundamental flaws identified by Sazerac show that Dr. Ben-Akiva's survey would not accord with accepted principles for measuring a price premium on the facts of this case. Although a conjoint survey may, as a general matter, be an acceptable method for

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[4] For example, the wording of Plaintiffs' survey suggests to respondents that "spirits" is the correct answer and primes respondents to understand that a "malt-based beverage" tastes like beer. Consequently, respondents familiar with the flavor of Fireball would eliminate "beer or other malt-based beverage" as an answer, distorting the responses. (3-ER-378-79)

measuring a price premium, the district court had a duty to ensure that the proposed survey "reflects a reliable application of the principles and methods *to the facts of the case*." Fed. R. Evid. 702(d) (emphasis added). The district court abdicated that duty here.

II. PLAINTIFFS' PROPOSED DAMAGES MODEL CANNOT RELIABLY ESTABLISH CLASSWIDE DAMAGES.

When examined under the proper standard, it is clear that Plaintiffs' proposed damages model is incapable of reliably measuring damages on a class-wide basis as required by *Comcast* and *Lytle*. *See Comcast*, 569 U.S. at 34 (plaintiffs must "establish[] that damages are capable of measurement on a classwide basis" to satisfy Rule 23(b)(3)); *Lytle*, 114 F.4th at 1024 (a plaintiff must demonstrate "by a preponderance of the evidence, that the [plaintiff's damages] model will be able to reliably calculate damages in a manner common to the class at trial."). First, Plaintiffs would survey the wrong population, ensuring that the results of their "conjoint survey" will not reflect the views of Fireball Malt purchasers. Second, the proposed conjoint survey cannot reliably determine consumers' relative willingness to pay for Fireball Malt as currently labeled and Fireball Malt with a different label, as it utilizes unrealistic choice sets and ignores [redacted]

[redacted] Third, the proposed damages model cannot reliably calculate a "price premium" because it does not account for supply-side factors.

A. The wrong survey population guarantees meaningless results.

In survey methodology, "[t]he definition of the relevant population is crucial because there may be systematic differences in the responses of members of the population and nonmembers." Shari Seidman Diamond, Reference Guide on Survey Research, in *Reference Manual on Scientific Evidence* 377 (3d ed. 2011). "A survey that provides information about a wholly irrelevant population is itself irrelevant." *Id.*; *see also* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:159 (4th ed. 2003) (a "survey of the wrong 'universe' will be of little probative value in litigation.").

Just as a survey of Kia owners would yield no meaningful information about the values Porsche buyers place on various automotive attributes, Plaintiffs' proposed survey population – which may not include any buyers or likely buyers of Fireball Malt at all and, at a minimum, would be dramatically overweighted with Fireball Whisky purchasers – cannot reliably establish whether purchasers of

Fireball Malt would place a higher or lower value on Fireball Malt as currently labeled than on a hypothetical Fireball Malt even more conspicuously labeled as a malt beverage.

Plaintiffs' proposed survey population would be comprised of adult California residents who, in the prior year, purchased (a) any Fireball product and (b) any alcoholic beverage in a supermarket, convenience store, gas station, or drug store. (2-ER-284) Because Fireball Whisky greatly outsells Fireball Malt in California (3-ER-477) and [redacted] of Fireball Whisky purchasers have never purchased Fireball Malt (3-ER-464), it is uncertain whether the survey would include *any* actual or likely Fireball Malt purchasers. The survey may not include a single member of the putative class.

Even if some Fireball Malt purchasers were surveyed, they would almost certainly be greatly outnumbered by Fireball Whisky purchasers, who unsurprisingly would express a greater preference for a whisky product and whose preferences say nothing about what Fireball Malt purchasers would pay for Fireball Malt with different labeling. (3-ER-477; 3-ER-464) Because "[a] survey that provides information about a wholly irrelevant population is itself irrelevant," Diamond, *supra*, Plaintiffs did not and cannot meet their burden of showing, by a preponderance of the evidence, that their methodology is capable of reliably measuring damages on a class-wide basis. Moreover, because the survey population is not reflective of the putative class and therefore cannot determine whether a label change would make any difference to class members, Plaintiffs cannot satisfy *Comcast*'s requirement that their damages model identify "damages that are . . . the result of the [alleged] wrong." *Comcast*, 569 U.S. at 37. Rather, Plaintiffs propose a model whose measurements would be completely "arbitrary" and therefore cannot establish a basis for class certification. *Id.* at 36.

B. <u>Plaintiffs' proposed survey ignores convenience,</u> [redacted]

It is fundamental to conjoint analyses that a survey's choice sets (a) closely approximate real-world market conditions and (b) include all primary purchase attributes. Plaintiffs' proposed conjoint survey fails to meet both requirements.

Extensive research demonstrates that conjoint surveys are unreliable if they do not closely replicate the real-world purchasing environment. *See, e.g.*, Greg M. Allenby *et al.*, Economic Valuation of

Product Features, 12 *Quantitative Marketing and Economics*, 421, 433 (2014) ("The guiding principle in conjoint design for economic valuation of feature enhancement is that the conjoint survey must closely approximate the marketplace confronting consumers."); John Hauser, Note on Conjoint Analysis, *MIT Sloan Courseware* 16 (2015) ("conjoint analysis accurately represents how consumers will behave when faced with new products" only if "the stimuli are realistic."). Indeed, Dr. Ben-Akiva acknowledged that if a survey does not provide information to respondents in the same context that they would have it in the real marketplace, the results "[w]ill not be predictable of what people are doing in the marketplace." (3-ER-380)

Similarly, research shows that a failure to include all meaningful attributes in a conjoint survey renders its results unreliable. *See, e.g.*, Greg M. Allenby, *et al.*, Valuation of Patented Product Features, 57 *J. of Law and Economics*, 629, 642 (2014) (failure to include significant product features in conjoint surveys "invite[s] the respondents to make attributions that are not correct" and to overstate the value of surveyed attributes); Neil T. Bendle, *et al.*, 155-56 Marketing Metrics (3d ed. 2016) (A conjoint analysis "must include all the important features according to which consumers make their choice. . .. The greatest potential error in this process would be to exclude meaningful attributes from the conjoint analysis."); Suneal Bedi & David Reibstein, *Damaged Damages: Errors in Patent and False Advertising Litigation*, 73 Ala. L. Rev. 385, 404 (2021) ("Omitting major features in order to estimate the willingness to pay for minor features biases the valuation of those included minor features upwards.")[5]

Plaintiffs' proposed survey involves patently unrealistic choice conditions and assumes away [redacted] (3-ER-383; 3-ER-470) [redacted] (3-ER-470) Plaintiff Myers's testimony exemplifies the importance of convenience. He testified that he purchased six bottles of Fireball Malt a week at a Chevron gas station on his way home from

[5] David Reibstein, Ph.D., catalogued the failures of Dr. Ben-Akiva's methodology in his report submitted in opposition to the class certification motion. (3-ER-344-453)

work because "[i]t was just convenient. It was there when I wanted it." (2-ER-091) He elaborated that "it was just convenient, you know, because I'm already there, I'm already popping in, it's two seconds, in and out." (2-ER-092) He further testified that although it would have been less expensive to buy a larger size bottle of Fireball Whisky at a liquor store, it made sense to purchase single-serving bottles of Fireball Malt at the Chevron gas station:

> My time's worth money . . .. I will buy a 4 dollar package of Tums at Chevron instead of going to Walmart and buying the 99 cent package because I'm not going to spend an hour going to Walmart to get a 99 cent package of Tums.

(2-ER-093-94)

Plaintiffs' proposed conjoint survey would focus on six attributes: brand names, product names, bottle size, alcohol percentage, alcohol type, and price. (2-ER-286) The survey omits convenience. *Id.*

As Allenby, *supra*, warns, this omission "invite[s] the respondents to make attributions that are not correct" and to overstate the value of the six attributes in the survey. More importantly, by omitting [redacted] attribute, the survey results will be unreliable. As Plaintiff Myers's testimony shows, consumers may well value Fireball Malt that is available where they commonly shop *more highly* than Fireball Whisky that would require a special trip to a liquor store. But those same consumers, responding to Plaintiffs' proposed survey, could indicate a higher value for Fireball Whisky than for Fireball Malt if asked to value only the survey's six attributes. This distortion renders the survey results unreliable. (3-ER-385)

The district court brushed off both the omission of convenience as an attribute and the departure from real-world market conditions by characterizing the issues as ones of "weight" rather than "admissibility." As discussed above, this is wrong as a matter of law. Plaintiffs bear the burden of establishing a *reliable* damages methodology and "dismissing an argument as 'going to the weight, not admissibility, of [the expert's] testimony' is not a reliability determination." *Valencia-Lopez*, 971 F.3d at 899.

The district court tried to bolster its conclusion by noting that the proposed survey would use "real world" brand names, bottle sizes, and alcohol percentages, suggesting that these elements would somehow counteract the failure to account for convenience. (1-ER-024) But the inclusion of *some* realistic features does not address the distorting failure to include convenience as an attribute. As Bendle and colleagues make clear, inclusion of some attributes in a conjoint analysis is not enough; a conjoint survey "must include *all* the important features according to which consumers make their choice." Bendle *et al.*, *supra*, at 155.

The district court also found reassuring Dr. Ben-Akiva's statement that "the choice sets in the conjoint survey will not include the Malt and the Whisky in the same choice set at the same time." (1-ER-24) That only compounds the problem. Comparing respondents' aggregated valuations of whisky products at a liquor store with different respondents' aggregated valuations of malt products removes any consideration of the value of convenience and says nothing about the relative values convenience store purchasers place on malt-based products available at the moment they are shopping versus spirit-based products that would require an investment of time and money to travel to a liquor store. And it fails to address the omission of convenience from the list of attributes that respondents are asked to value.

In short, a conjoint survey that omits convenience cannot reliably measure an alleged price premium attributable to the labeling of Fireball Malt. Rather, it would result in entirely "arbitrary" measurements, which would "reduce Rule 23(b)(3)'s predominance requirement to a nullity. *Comcast*, 569 U.S. at 36. The district court erred by certifying a class despite the lack of a reliable damages methodology.

C. The failure to consider supply-side factors renders the damages methodology unreliable.

As Dr. Ben-Akiva describes it, "the price premium is the difference between the price actually paid and an estimate of the market price of the same product if the consumers were fully informed about its attributes, or the 'but-for' scenario." (2-ER-289) Dr. Ben-Akiva acknowledges, however, that his proposed conjoint survey purports only to estimate consumer *demand* in a "but-for" world in which the Fireball Malt label emphasizes "malt beverage" more prominently. (2-ER-104-108); *see also In re Gen. Motors Ignition Switch Litig.*, 407 F. Supp. 3d 212, 235 (S.D.N.Y. 2019) (a conjoint survey "focuses only on changes to the demand side of the equation."). Consequently, a conjoint survey itself does not indicate a market price in a "but-for" world because "[t]he ultimate price of a product is a combination of market demand and market supply." *In re NJOY*, 120 F. Supp. 3d at 1119.

A failure to analyze "the 'supply' part of the supply/demand curve" therefore necessarily renders a conjoint-based price premium analysis unreliable and invalid. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 500 F. Supp. 3d 940, 949 (N.D. Cal. 2020), *aff'd sub nom. Schell v. Volkswagen AG*, 2022 WL 187841 (9th Cir. Jan. 20, 2022) (a damages model that "examines only what consumers say they would be willing to pay" but "ignores the 'supply' part of the supply/demand curve" "does not actually calculate a market price premium."); *In re NJOY*, 120 F. Supp. 3d at 1119 ("A consumer's subjective valuation of the [challenged] message, measured by their relative willingness to pay for products with or without the message, is not an accurate indicator of [ ] damages, because it does not permit the court to calculate the true market price of [the product] absent the purported misrepresentations"); *In re Gen. Motors*, 407 F. Supp. 3d at 236 (a conjoint analysis that does not analyze defendant's willingness to sell at different price points "does not provide competent proof of damages.").

That is the situation here. Plaintiffs' model does not analyze the supply side at all. Instead, the model simply infers that any difference in demand ascertained by the conjoint survey equates directly to a price decrease by assuming a constant sales volume. Put differently, the model assumes that Sazerac would reduce prices of Fireball Malt enough to maintain its current sales volume, even though the record shows that Sazerac would not and could not do that.

Dr. Ben-Akiva's "assumption that the seller under the 'but-for' scenario would not alter the product supply" and would instead lower prices (2-ER-290) may make computations easier, but it renders the methodology unreliable. Dr. Ben-Akiva provides no rationale for his assumption and there is no basis for it. *See, e.g.*, Rene Befurt *et al.*, *Supply Side Considerations When Using Conjoint Analysis in Litigation* (May 2024), https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=10240, at 39 (assuming that a seller "will supply exactly the same number of products in the 'but for' world as in the 'as is' world" is "a heroic assumption."). That constant-volume assumption is economically implausible. Take the situation where $4.75 is the cost of producing and distributing a breakfast cereal sold at retail for $5.00. A conjoint survey might suggest that demand for cereal would drop by 20 percent if the packaging no longer claimed "low sugar." No reasonable seller, however, would reduce the price to \$4.00 to maintain a constant sales volume and lose 75 cents on every sale. Instead, a rational seller would accept a lower sales volume and price the cereal above \$4.75 to ensure a profit.[6]

Further, Dr. Ben-Akiva's assumption is inconsistent with the undisputed evidence before the district court that Sazerac *would not* and *could not* decrease the price of Fireball Malt, even if demand decreased. (3-ER-474)

First, Sazerac line-prices its spirit-based products (including Fireball Whisky) and malt-based products (including Fireball Malt). The suggested retail price of all 50 ml bottles of brands available in both malt-based and spirit-based versions is the same, despite different levels of demand for the individual brands, and that the suggested retail price of all 100ml bottles of brands available in both malt-based and spirit-based versions is the same, even though there are different levels of demand for different brands. (3-ER-473-74) In other words,

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[6] The assumption of a vertical supply curve also fails to account for the possibility that, in response to a drop in demand for the subject cereal, competing sellers increased their prices, making it possible for the seller of the subject cereal to *increase* the subject cereal's price and still gain market share.

Sazerac *maintains the same pricing regardless of changes in demand.*

Second, Sazerac faces constraints that prevent it from reducing the price of Fireball Malt even if demand were to fall. As explained by Sazerac's Executive Chairman:

[redacted]

(3-ER-474)

Third, Fireball Malt [redacted] Fireball Whisky. (3-ER-477)

The district court ignored this undisputed evidence. It also failed substantively to address the absence of supply-side analysis in Dr. Ben-Akiva's proposed methodology. Instead, the district court concluded that Dr. Ben-Akiva had adequately accounted for supply-side factors because he proposed to use "actual market prices" in his conjoint survey and "actual quantities sold" to estimate damages. (1-ER-027) In doing so, the district court embraced a common misapprehension of supply-side factors that first appeared in *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. 2018). In *Hadley*, the court erroneously concluded that "conjoint analyses can adequately account for supply-side factors—and can therefore be utilized to estimate price premia without running afoul of *Comcast*—when (1) the prices used in the surveys underlying the analyses reflect the actual market prices that prevailed during the class period and (2) the quantities used (or assumed) in the statistical calculations reflect the actual quantities of products sold during the class period." *Id.* at 1105. Here, the district court erred as a matter of law in adopting *Hadley*'s misapprehension of supply-side factors.

The use of "actual market prices" in conjoint survey choice sets may make the survey more realistic than if the survey used arbitrary and unrealistic prices in its choice sets, but, as noted above, a conjoint survey still only purports to estimate *demand*. Using "actual market prices" in a conjoint survey says nothing at all about the supply side. Moreover, "actual market prices" reflect prices given the set of marketplace offerings in the actual world, whereas the stated objective of Dr. Ben-Akiva's proposed methodology is to determine prices in a but-for world in which the offerings are *different* than in the actual world. (2-ER-289) Without analyzing how prices would change in the but-for world, no price premium analysis is valid. *See, e.g.*, *In re NJOY*, 120 F. Supp. 3d at 1119.

Use of "actual quantities sold during the class period" likewise has nothing to do with the supply-side factors necessary to estimate a price in the but-for world; it is instead an unwarranted shortcut to *avoid* supply-side analysis by making the "heroic assumption" that a seller would sell the same quantity of products in the but-for world that it does in the real world.

The district court adopted the same mistaken premise here by allowing Dr. Ben-Akiva's promise to use "actual market prices" and "actual quantities" to obviate the need to analyze *any* true supply-side factors in the but-for world and to relieve Dr. Ben-Akiva of any obligation to consider the undisputed fact that Sazerac would not and could not decrease prices for Fireball Malt in the but-for circumstance. Rather than requiring Plaintiffs to demonstrate "by a preponderance of the evidence, that the [damages] model will be able to reliably calculate damages in a manner common to the class at trial," *Lytle*, 114 F.4th at 1024, the district court effectively excused any requirement to analyze supply-side factors. That "convert[ed] what is properly 'an objective evaluation of relative fair market values into a seemingly subjective inquiry of what an average consumer wants.'" *In re NJOY*, 120 F. Supp. 3d at 1119 (quoting *Saavedra v. Eli Lilly and Co.*, No. 2:12–cv–9366, 2014 U.S. Dist. LEXIS 179088, at *14, 2014 WL 7338930 at *5 (C.D. Cal. Dec. 18, 2014)).[7]

Next, the district court quoted *In re General Motors* for the proposition that "a conjoint survey that asks respondents whether they would rather pay x for a product labeled "100% Fruit Juice" or y for a

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[7] The district court sought to distinguish both *In re NJOY* and *Saavedra* on the ground that "[t]he conjoint analysis in those two lawsuits involved consumers' valuations of products that did not actually exist (i.e., what consumers would pay for an electronic cigarette in *In re NJOY* that included safety disclosures, and what consumers would pay for a prescription drug with more accurate withdrawal disclosures in *Saavedra*)." (1-ER-028) But that is precisely what Dr. Ben-Akiva claims to do here: estimate consumers' valuation of Fireball Malt with a label placing greater emphasis on "malt beverage."

similar product labeled "50% Fruit Juice," for example, would account for supply-side factors if both x and y reflect the prices for which juice companies actually sell similarly labeled products in the marketplace." *In re Gen. Motors*, 407 F. Supp. 3d at 239. It may be the case that if pricing data exists for the same product with two different labels, supply and demand would both be reflected in the real-world prices for the two variants of that product. But that situation does not exist here, where *x* (the average retail price of Fireball Malt with the existing label) is known, but *y* (the price of Fireball Malt with a label stating "malt beverage" more prominently) is not.

Finally, the district court again retreated to the position that Dr. Ben-Akiva's failure to consider supply-side factors "goes to weight, not admissibility." (1-ER-028) As discussed above, this falls short of a district court's obligation to conduct a "rigorous analysis" to ensure that a damages model "will be able to reliably calculate damages in a manner common to the class at trial." *Lytle*, 114 F.4th at 1024. Because Plaintiffs' methodology is bereft of any analysis of supply-side factors, it cannot reliably calculate damages. Any measurement would be entirely "arbitrary." *Comcast*, 569 U.S. at 36. The district court therefore erred as a matter of law in certifying the class.

CONCLUSION

The district court was required to conduct a "rigorous analysis" to ensure that Plaintiffs' damages model "will be able to reliably calculate damages in a manner common to the class at trial." It failed to do so. Because damages cannot be established in a manner common to the class, this Court should reverse the district court's class certification order and direct the district court to proceed only with respect to the named plaintiffs.

Respectfully submitted this 23rd day of March, 2026.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,787 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated this 23rd day of March, 2026.

/s/ Creighton R. Magid
Creighton R. Magid

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 23, 2026.

I certify that all participants in the case are registered users and that service will be accomplished by the appellate CM/ECF system.

/s/ Creighton R. Magid
Creighton R. Magid

Class Actions or Crass Actions? The Latest on Class Action Litigation in North America

IADC Annual Meeting 2026

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I. Does Rule 702 Apply at Class Certification?

Motions for class certification often rely on expert reports or declarations. Federal Rule of Evidence 702 sets forth the criteria that must be met before a witness may testify as an expert. Federal Rule of Evidence 101(a) provides that the Rules of Evidence apply in *all* proceedings in federal courts unless excepted in Federal Rule of Evidence 1101; Rule 23 proceedings are not among the excepted proceedings. The U.S. Supreme Court has said that whether a particular methodology is "permissib[le] turns not on the form a proceeding takes — be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016) (citing Fed. R. Evid. 401, 403, and 702). Accordingly, most Circuits have held that expert testimony proffered in support of or in opposition to a class certification motion must satisfy Rule 702. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015); *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021); *In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239 (6th Cir. 2024); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010); *Sher v. Raytheon Co.*, 419 F. App'x 887 (11th Cir. 2011). The Eighth and Ninth Circuits, however, have held otherwise. *See In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996 (9th Cir. 2018).

Although ensuring that proffered expert testimony satisfies Rule 702 is part of a district court's "gatekeeping" responsibilities, many courts view methodological flaws as issues of weight rather than of admissibility. The 2023 amendments to Rule 702 made clear that this view is mistaken: "[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)." Rule 702 Advisory Committee cmt. 2023; *see also Engilis v. Monsanto Co.*, 151 F.4th 1040, 1049 (9th Cir. 2025) ("Properly applied, Rule 702 requires that challenges to an expert's opinion go to the weight of the evidence only if a court first finds it more likely than not that an expert has a sufficient basis to support an opinion."); *In re Keurig Green Mtn. Singleserve Coffee Antitrust Litig.*, 2025 WL 354671, at *2 (S.D.N.Y. Jan. 30, 2025) (quoting Rule 702 Advisory Committee cmt. 2023) (a court "cannot bypass this gatekeeping responsibility and pass it off to the jury by declaring 'questions of the sufficiency of an expert's basis, and the application of the expert's methodology, [to be] questions of weight and not admissibility.'") (alternation in original).

II. What Is Required to Establish Price Premium Damages?

Federal Rule of Civil Procedure 23(b)(3) requires, as a condition of certifying a class, that the court find "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 U.S. Supreme Court has made clear that plaintiffs must "establish[] that damages are capable of measurement on a classwide basis" to satisfy Rule 23(b)(3). *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). This poses a problem for plaintiffs when damages among class members differ – or when some class members suffer no damages at all. Plaintiffs in consumer class actions have sought to circumvent the problem by asserting that allegedly misleading advertising or labeling allows the defendant to charge a "price premium" for the product – essentially, that the defendant charges more for the product than it could without the advertising or labeling and thereby overcharges *all* purchasers, regardless of their subjective valuations of the product.

Typically, plaintiffs base a "price premium" theory on a "choice-based conjoint survey" that purports to measure the difference between consumers' "willingness-to-pay" for the defendant's product as-is and consumers' "willingness-to-pay" for the product without the allegedly deceptive advertising or labeling. A choice-based conjoint survey identifies the primary attributes of a product and asks survey respondents to make choices among attributes. For example, a choice set in a survey involving smartphones might ask respondents to choose among (a) an Apple phone with 512 GB of memory, a 6.9 inch screen, five camera zoom options, and a $1400 price; (b) an Apple phone with 256 GB of memory, a 6.5 inch screen, three camera zoom options, and a $1000 price; (c) a Samsung phone with 512 GB of memory, a 6.3 inch screen, five camera zoom options, and a $900 price; or (d) none of the choices. In theory, by varying the "attributes" such as memory, screen size, zoom options, and price in the choice sets given to a large number of respondents, the "part worth" of each attribute – that is, the relative effect each attribute has on product choice – can be measured.

Plaintiffs' experts then use the "willingness-to-pay" differential identified by the choice-based conjoint survey and multiply that percentage by the defendant's total sales to between the defendant's product to posit a damages total. For example, if the conjoint survey suggests that a manufacturer of a food product labeled "all natural" but containing a synthetic preservative charges 20 percent more for the product than the manufacturer could charge without the "all natural" claim on its label, and if the total retail value of the product's sales are $500,000,000, plaintiffs will claim "price premium" damages of $100 million.

There are multiple problems with this approach, even if the conjoint survey is appropriately designed (which it usually is not).

First, measuring the "part worths" of various attributes doesn't accurately address the legal issue. A conjoint survey might determine that, in the abstract, consumers would pay (or, more accurately, *say* that they would pay) 20 percent more for "all natural" food products than for food products that were not "all natural," but that does not necessarily mean that consumers would pay 20 percent more for a particular product labeled "all natural" than for the same product without an "all natural" label, or a label that included an "all natural" claim with an asterisk noting that the product also contained citric acid. The mismatch between a false advertising or mislabeling claim and a measurement of "attributes" would seem to run afoul of the Supreme Court's admonition that a damages methodology cannot satisfy Rule 23(b)(3) if it "identifies damages that are not the result of the wrong." *Comcast*, 569 U.S. at 37.

Second, a conjoint survey only measures (if anything) what consumers say they would pay – that is, the *demand* for a product. A price, however, is a function of both demand *and* supply. A conjoint survey says nothing about the supply side of the equation. Typically, plaintiffs' experts brush over the absence of any analysis of the supply side by simply assuming a vertical supply curve – that is, by making the dubious assumption that the defendant would sell the same amount of product in the "but for" world with a different label, advertisement, or formulation that it does in the real world. A few courts have taken issue with the failure to address the supply side. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 500 F. Supp. 3d 940, 949 (N.D. Cal. 2020), *aff'd sub nom. Schell v. Volkswagen AG*, 2022 WL 187841 (9th Cir. Jan. 20, 2022) (a damages model that "examines only what consumers say they would be willing to pay" but "ignores the 'supply' part of the supply/demand curve" "does not actually calculate a market price premium."); *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015) ("A consumer's subjective valuation of the [challenged] message, measured by their relative willingness to pay for products with or without the message, is not an accurate indicator of [ ] damages, because it does not permit the court to calculate the true market price of [the product] absent the purported misrepresentations"); *In re Gen. Motors Ignition Switch Litig.*, 407 F. Supp. 3d 212, 236 (S.D.N.Y. 2019) (a conjoint analysis that does not analyze defendant's willingness to sell at different price points "does not provide competent proof of damages."). But the vast majority of courts are willing to accept the notion posited in *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1105 (N.D. Cal. 2018), that "conjoint analyses can adequately account for supply-side factors – and can therefore be utilized to estimate price premia without running afoul of *Comcast* – when (1) the prices used in the surveys underlying the analyses reflect the actual market prices that prevailed during the class period; and (2) the quantities used (or assumed) in the statistical calculations reflect the actual quantities of products sold during the class period." *See, e.g., Sharpe v. A&W Concentrate Co.*, 2021 WL

3721392, at *8 (E.D.N.Y. July 23, 2021); *Schechner v. Whirlpool Corp.*, 2019 WL 4891192, at *7 (E.D. Mich. Aug. 13, 2019); *McMorrow v. Mondelez Int'l, Inc.*, 2021 WL 859137 (S.D. Cal. Mar. 8, 2021); *Hasemann v. Gerber Prods. Co.*, 2024 WL 1282368, at *18 (E.D.N.Y. Mar. 25, 2024); *In re Folgers Coffee Mktg. Litig.*, 2024 WL 4068851, at *5 (W.D. Mo. July 31, 2024); *Fitzhenry-Russell v. Dr Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 606 (N.D. Cal. 2018); *Lessin v. Ford Motor Co.*, 2024 WL 5007092, at *5 (S.D. Cal. Oct. 31, 2024); *Andrews v. Sazerac Co., Inc.*, 2025 WL 1808797, at *9 (S.D.N.Y. July 1, 2025). This approach has no logical merit. Using "actual prices" in a conjoint survey may make the survey better than a survey that simply invents prices, but the survey still only measures consumers' stated demand. It says nothing about supply. Similarly, historical sales volumes say nothing about how sellers would react in the "but for" world posited by plaintiffs' experts; rather, it reflects a dubious assumption that sellers will sell the same amount of product in the "but for" world. (If, for example, a product costs 90 cents to produce and retails for $1.00, but the conjoint survey says that consumers will only pay 70 cents for the product if the label is changed, why should one assume that the selling company will choose to lose 20 cents on every product by maintaining its "historical sales volumes" rather than selling fewer units at a profit?) The issue is currently before the U.S. Court of Appeals for the Ninth Circuit in *Sazerac Company, Inc. v. Myers*, No. 25-4833, an appeal in which the IADC has submitted an amicus brief. (Briefs attached.)

III. Voucher Settlements

In response to numerous class action "coupon" settlements in which plaintiffs' counsel received sizeable fee awards but class members received nearly valueless coupons for a discount on future purchases – essentially product promotions – Congress enacted 28 U.S.C. § 1712 as part of the Class Action Fairness Act ("CAFA"). Section 1712(a) provides:

> If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

28 U.S.C. § 1712(a). Redemption in the CAFA context means coupons actually redeemed, not merely coupons issued to claimants. *In re Easysaver Rewards Litig.*, 906 F.3d 747, 755 (9th Cir. 2018). Congress placed these restrictions on coupon settlements "out of a concern that the full value of coupons was being used to support large awards of attorney's fees regardless of whether class members had any interest in using the coupons." *Id.* "By requiring courts to use the redemption-rate value of the coupons instead of the face value, CAFA 'ensures that class counsel benefit[s] only from coupons that provide actual relief to the class.'" *McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021) (quoting S. Rep. No. 109-14 at 15-

20 (2005)). In addition to CAFA, Fed. R. Civ. P. 23(e)(C)(2) require that the relief provided to the class be "adequate" in comparison with a fee award.

The most obvious implication of CAFA is that coupon or voucher settlements will be subjected to considerable scrutiny.

The Second Circuit and Eleventh Circuit view *any* settlement involving vouchers as constituting coupon settlements. In *Moses v. New York Times*, 79 F.4th 235 (2d Cir. 2023), the Second Circuit looked to dictionary definitions of "coupon" and held that any "item that entitles its user to free or discounted products or services" is a coupon. *Id*. at 247 – 249. Although both the class representative and the defendant argued that access codes to online *New York Times* content "differ from coupons because they 'provide an entire product free of charge, not merely a discount;' 'do not require class members to hand over more of their money in order to enjoy the Settlement's benefit;' and 'feature a long period of usability and are freely transferrable,'" *id*. at 249, the appeals court sided with the settlement objector and held that "[t]he Access Codes are coupons under the plain meaning of the word: they are, in substance, digital vouchers that are 'surrendered in order to obtain' a one-month subscription to a NYT publication." *Id*.

The Eleventh Circuit has concluded that a "coupon," for purposes of the Class Action Fairness Act, is "a voucher, certificate, or form that can be exchanged for one or more goods or services, or for a discount on one or more goods or services." *Drazen v. Pinto*, 106 F.4th 1302, 1349 (11th Cir. 2024).

The Seventh Circuit, too, has "rejected a narrow definition of 'coupon' by rejecting, for purposes of § 1712, a proposed distinction between 'vouchers' (good for an entire product) and 'coupons' (good for price discounts)." *In re Southwest Airlines Voucher Litig*., 799 F.3d 701, 706 (7th Cir. 2015) (quoting *Redman v. RadioShack Corp*., 768 F.3d 622, 636-37 (7th Cir. 2014)).

The Ninth Circuit takes a more flexible view of what constitutes a "coupon" for purposes of CAFA. The court, in *Easysaver*, summarized three factors to be considered in determining whether a settlement involved a "coupon:"

> (1) whether class members have 'to hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable.

In re Easysaver Rewards Litig., 906 F.3d 747, 755 (9th Cir. 2018) (quoting *In re Online DVD-Rental Antitrust Litig*., 779 F.3d 934, 951 (9th Cir. 2015)).

Applying these considerations, the Ninth Circuit in *In re Online DVD* (an antitrust case arising out of an agreement between Netflix and Walmart in which the companies divided the DVD business between them, with Netflix conceding sales of DVDs to Walmart and Walmart ceding DVD rentals to Netflix) concluded that a settlement providing class members with $12 Walmart gift cards was not a coupon settlement. The Ninth Circuit in *In re Online DVD* looked to the legislative history of the 2005 amendments to CAFA that added restrictions on coupon settlements. The court concluded that Congress, in enacting 28 U.S.C. § 1712(a), was concerned with settlements that provided class members with "little or no value" and with "settlements that involve a discount – frequently a small one – on class members' purchases from the settling defendant." *In re Online DVD*, 779 F.3d at 950 – 51. The court distinguished the Walmart gift cards from the "coupons" that concerned Congress by noting that $12 – "while not a lot of money these days even at Walmart" – was "still $12" and therefore not of "little or no value." *Id*. at 950. Further, unlike the settlements that drew Congress's ire, the settlement in *In re Online DVD* "gives class members $12 to spend on any item carried on the website of a giant, low-cost retailer. The class member need not spend any of his or her own money and can choose from a large number of potential items to purchase." *Id*. at 951.

The Ninth Circuit viewed the proposed settlement differently in *Easysaver*, which involved claims that an online business enrolled customers in a rewards program without the customers' consent and charged them an activation fee and a recurring monthly fee. The district court approved a settlement that awarded $8.7 million in attorneys' fees, $200,000 in litigation costs to plaintiffs' counsel, $80,000 in incentive payments to the named plaintiffs, $3.5 million for class administration and reimbursement of class members' membership fees, and a $20 credit for each class member that could be used on defendant's website. Only 3,000 class members sought refunds of their membership fees, for a total of $225,000. The district court valued the total value of the settlement at $38 million. An objector appealed, challenging the attorneys' fee award.

The Ninth Circuit vacated the attorneys' fee award, concluding that the $20 credits were "coupons." The Court of Appeals analyzed the credits as follows:

> To begin, the credits are categorically different from the Walmart gift cards [in *In re Online DVD*]. Defendants are decidedly not "giant . . . retailer[s]" in the mold of Walmart or other similar stores, and class members can only use the credits to purchase items from a limited universe of products: flowers, chocolates, and other similar gifts. This universe is even smaller if confined to products that class members can purchase without spending any of their own money – Defendants only claim to sell "15-25 products" for under $20. And that meager list does not even account for shipping charges. When asked in the fairness hearing whether class members could purchase anything from one of Defendants' websites for $20 or under if shipping charges are included, counsel responded: "If you include shipping, I'm not sure, but the

> defendants don't make money off the shipping." Regardless of whether money spent on shipping benefits Defendants, however, class members who spend money on shipping are required "to hand over more of their own money before they can take advantage of the coupon."
>
> Moreover, in *In re Online DVD*, Walmart's extensive inventory was significant in part because class members could use the gift cards without obtaining the product – DVDs – that led to their suit in the first place. Here, in contrast, class members cannot use these credits without purchasing an item from Defendants. And, to do so, they must hand over their billing information again to the very company that they believe mishandled that information in the first place, at the very least to pay for shipping. Thus, although class members do not have a product-specific complaint, they cannot reap the benefits of the settlement without reengaging in the same purchasing activity that they believe led to their injury.
>
> The credits at issue here are also far less flexible than those available in *In re Online DVD*. Although freely transferrable, they expire one year after issuance and have a series of blackout periods, including during the days before Valentine's Day, Mother's Day, and other holidays on which consumers most often buy flowers and chocolates.

Easysaver, 906 F.3d at 756 – 57.

The Ninth Circuit returned to the "coupon" question in *McKinney-Drobnis*, in which class members asserted that a membership-based spa-services company increased membership fees in violation of the membership agreement. The district court granted preliminary approval of the settlement, which allowed class members to submit claims for a voucher, which ultimately ranged in value from $36.28 to $180.68 depending upon the fee increase paid by the claimant. The settlement also allowed class counsel to seek a fee award of up to $3.3 million, and included both a "clear sailing" provision (a disfavored provision providing that the defendant would not object to the fee request) and a reverter provision specifying that if the court awarded less than $3.3 million in attorneys' fees, the difference between the actual award and $3.3 million would revert to the defendant.

Utilizing the three-factor framework set forth in *In re Online DVD*, the Ninth Circuit concluded that the vouchers were "coupons" for purposes of the Class Action Fairness Act. The court found the first *In re Online DVD* factor to be weigh in favor of considering the vouchers to be coupons, explaining that although "even class members receiving the smallest voucher, in the amount of $36.28, would be able to purchase entire products without spending their own money," it was also true that "a $36.28 voucher is not enough to purchase most of Massage Envy's services. Class members receiving the $36.28 voucher could not even purchase a single massage –

the service that is the basis for the membership fee that class members were allegedly injured by – without spending their own money." *McKinney-Drobnis*, 16 F.4th at 604. The court found the vouchers to be coupons under the second factor, as well, noting that the 251 products sold by Massage Envy "pale in comparison to the millions of low-cost products that Walmart sells, as in *Online DVD*." *Id*. at 605. The final factor, the court concluded, militated against the conclusion that the vouchers were coupons, because the vouchers were "flexible" – "the vouchers may be transferred, sold, and aggregated" – were valid for more than a year with no blackout dates, and did could be used multiple times until the value of the voucher was extinguished. *Id*. Taken together, the court concluded that the vouchers were coupons subject to 28 U.S.C. § 1712(a). *Id*.

The Fourth Circuit largely adopted the Ninth Circuit's approach in *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig*., 952 F.3d 471, 489-90 (4th Cir. 2020).

The Sixth Circuit, in *Doe v. Déjà Vu Consulting, Inc*., 925 F.3d 886 (6th Cir. 2019), did not specifically delineate what constitutes a "coupon settlement" under CAFA, but rejected objectors' argument that coupons could not be counted toward the total value of the settlement for purposes of determining the reasonableness of an attorneys' fees award on the grounds that the benefits to the class "do[] not require class members to 'hand over more of their own money' to be eligible to redeem the benefits of the Settlement Agreement." *Id*. at 897.

A practical implication of CAFA is that an attorneys' fees award in a voucher settlement must either (a) await judicial approval until "after the coupons' expiration date so that it knows for certain the value of the coupons that *were* actually redeemed," *Drazen*, 106 F.4th at 1350 (emphasis in original); *see also Dardarian v. Officemax N. Am., Inc*., 2013 U.S. Dist. LEXIS 98653, at *9-10 (N.D. Cal. July 12, 2013) ("Assuming final approval, the Court does not expect it can issue a fee award until the merchandise vouchers have been redeemed and the fairness of the settlement ascertained."); (b) be based on expert testimony estimating the redemption rate, *Drazen*, 106 F.4th at 1350; or (c) employ the lodestar method, in which the court applies a "good results" multiplier to the dollar value of hours actually expended by plaintiffs' counsel. *See, e.g., In re Southwest Airlines Voucher Litig*., 799 F.3d 701, 710 (7th Cir. 2015) ("§ 1712 permits a district court to use the lodestar method to calculate attorney fees to compensate class counsel for the coupon relief obtained for the class."); *Drazen*, 106 F.4th at 1350 ("The attorney's fees for coupon settlements under CAFA may be based on the value of the coupons that are redeemed, the lodestar method, or a combination of both.").

IV. Class Actions as an Alternative to Nationwide Injunctions

Injunctive relief is available to a class. Fed. R. Civ. P. 23(b)(2) permits class certification where "the party opposing the class has acted or refused to act on grounds that generally apply to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

In *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), the U.S. Supreme Court held that judges do not have the power to issue "universal injunctions" – injunctions applicable nationally. The Court recognized, however, that courts retained the power to issue nationwide injunctions on behalf of a class certified under Rule 23. *Id*. at 849-50; *see also id.* at 869 (Kavanaugh, J., concurring) ("plaintiffs who challenge the legality of a new federal statute or executive action and request preliminary injunctive relief may sometimes seek to proceed by class action under Federal Rule of Civil Procedure 23(b)(2) and ask a court to award preliminary classwide relief that may, for example, be statewide, regionwide, or even nationwide.").

In the wake of *Trump v. CASA*, plaintiffs in numerous cases have successfully enjoyed governmental actions through class actions. *See, e.g., Doe v. Musk*, 350 F.R.D. 246 (D. Md. 2025); *Mercado v. Noem*, 800 F. Supp. 3d 526 (S.D.N.Y. 2025); *Thakur v. Trump*, 800 F. Supp. 3d 1044 (N.D. Cal. 2025); *Barbara v. Trump*, 790 F. Supp. 3d 80 (D.N.H. 2025); *L.G.M.L. v. Noem*, 800 F. Supp. 3d 100 (D.D.C. 2025); *CASA, Inc. v. Trump*, 350 F.R.D. 246 (D. Md. 2025).

In many of these cases, plaintiffs sought and obtained "provisional" or "preliminary" class certification – certification that "will dissolve if the injunction does." William Rubenstein, 2 *Newberg and Rubenstein on Class Actions* § 4:30 (6th ed. 2022). The Supreme Court itself recognized the availability of such "provisional" or "preliminary" class certification for purposes of seeking an injunction in *A.A.R.P. v. Trump*, 605 U.S. 91 (2025), holding that "courts may issue temporary relief to a putative class." *Id*. at 98. In order to obtain preliminary injunctive relief in a class action, plaintiffs must meet their burden of establishing all of the elements of Rule 23(a) as well as Rule 23(b). *See, e.g., Barbara*, 790 F. Supp. 3d at 90. The rigor with which a court must analyze plaintiffs' Rule 23 showing is no less than in a regular class action. *Id*. Parties seeking preliminary injunctive relief by means of provisional class certification must, of course, also establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities is in their favor, and that preliminary relief is in the public interest. *Id*. at 101.

Note that because plaintiffs seeking provisional class certification may be required to make a later showing that they satisfy all of the elements of Rule 23 in order to obtain final injunctive relief, consideration should be given to seeking class certification on a non-provisional basis where there is no urgent need for preliminary relief.

V. Issue Classes

Fed. R. Civ. P. 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Where, for example, plaintiffs will have a difficult time showing that common issues may not be able to establish that common issues predominate regarding damages, they may seek certification of numerous "issue classes" as to which common damages issues allegedly predominate.

The Fifth Circuit takes a dim view of such "issue classes" and requires that Rule 23(c)(4) classes may only be certified when "the cause of action, taken as a whole" satisfies the predominance requirement of Rule 23(b)(3). *See Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350, 355 (5th Cir. 2005).

The District of Colombia Circuit, similarly, requires courts both "to ensure that the common questions within the certified issues predominate over any individual ones" *and* to "evaluate the relationship any certified issues have as to the dispute as a whole" so that a certified issue "encompass[es] a reasonably and workably segregable aspect of the litigation." *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746, 760-61 (D.C. Cir. 2023).

The Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits require only that the plaintiff "show that common issues predominate *in the resolution of the specific issues that are the subject of the certification motion* and not as to 'the cause of action, taken as a whole.'" *Jacks v. DirectSat USA, LLC*, 118 F.4th 888, 897 (7th Cir. 2024 (citation omitted) (emphasis added); *see also In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 274 (3d Cir. 2021); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003); *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

No. 25-4833

In the United States Court of Appeals for the Ninth Circuit

SAZERAC COMPANY, INC.,

Appellant,

v.

TERRY MYERS AND DAWN OUTLAW,

Appellees.

On Appeal from the United States District Court
for the Northern District of California
Civil No. 3:23-CV-522-EMC
The Honorable Edward M. Chen

BRIEF AMICUS CURIAE OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF APPELLANT SAZERAC COMPANY, INC. AND REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

IDENTITY AND INTEREST OF AMICUS

The International Association of Defense Counsel (IADC) has been serving a distinguished membership of corporate and insurance defense attorneys and insurance executives since 1920. Its activities benefit the approximately 2,500 invitation-only, peer-reviewed members and their clients, as well as the civil justice system and the legal profession. The IADC also takes a leadership role in many areas of legal reform and professional development. The IADC and its members have interest in the sound development of class action law. All parties to this case have consented to the filing of this brief.[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

This case presents an example of a pervasive problem in class litigation and provides the Court with the opportunity to solve it. The problem is a type of unreliable damages analysis that uses irrational assumptions to exaggerate price premiums, and the solution is to identify the error and refuse to certify classes based on analyses that make it.

In this case, as in most consumer class actions alleging false or deceptive marketing, the Plaintiffs claim that if the false or deceptive marketing claim were removed, the product's market price would drop. The amount of this drop—the "price premium" associated with the false or deceptive claim—is what the Plaintiffs claim for damages. Plaintiffs' incentive is to exaggerate the estimated price change so as to maximize their damages. And they do so by conducting an artificial analysis that is unreliable as a matter of law.

Specifically, they assume that if consumer demand for a product were to drop, the producer would nonetheless insist on making exactly the same number of sales—no matter how low it had to drop the price to do so, and no matter how much money it lost in the process. This is an irrational assumption. It has no support in economic theory. It has no support in reality. Plaintiffs make the assumption only because it results in wrongly predicting that huge price drops would follow from minor advertising changes, and it therefore allows them to claim huge damages.

Many economists and courts have seen through the error and refused to certify classes based on damages analyses that make it. This Court should now do the same. The Court has previously held that damages theories must comport with "market realities." *Zakaria v. Gerber Prod. Co.*, 755 F. App'x 623, 624 (9th Cir. 2018). One specific market reality is that companies will reduce their supply of a product if demand for the product decreases to avoid losing money, and damages analyses must account for this. This Court should hold that if a damages analysis artificially assumes a fixed supply—that a defendant would insist on making the same number of sales no matter how much it had to cut price to do so—it will be excluded as unreliable and cannot at any rate be the basis for certifying a class.

ARGUMENT

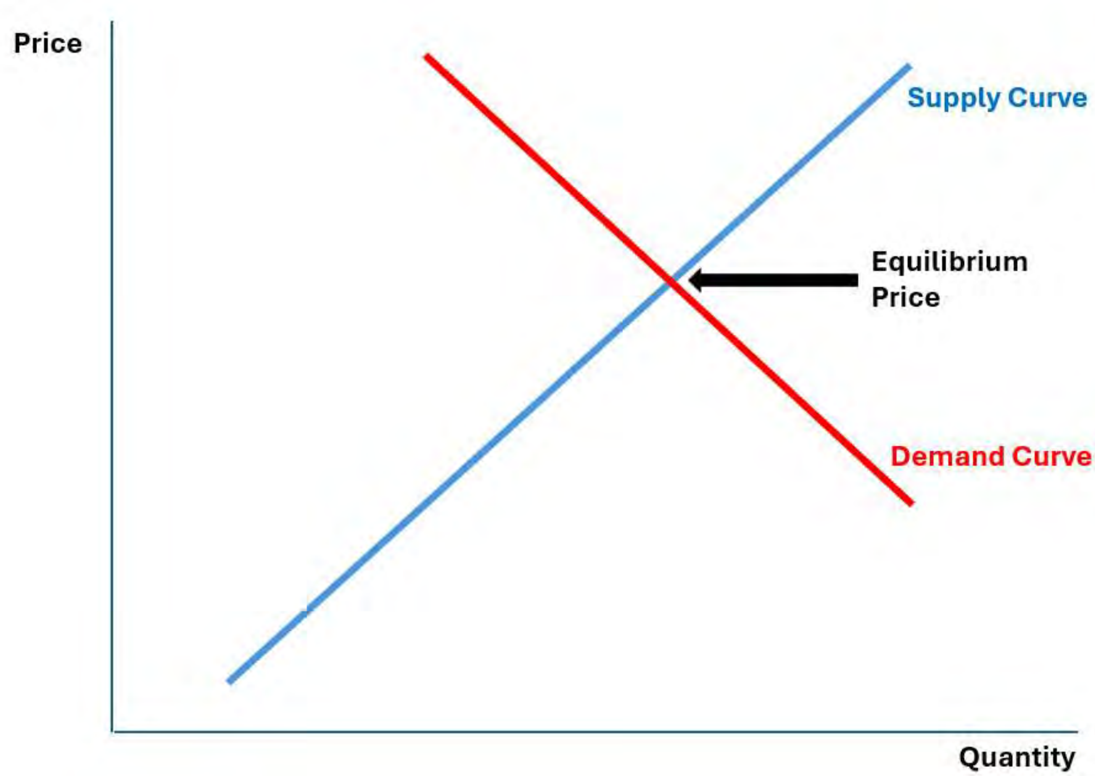
A. Market Prices Are Set By The Interaction Of Supply And Demand, So Estimating A Change In Price Requires Considering Both Of Them.

In false or deceptive advertising class actions like this one, the most common "measure of damages" is to calculate the "price premium" that the allegedly false or deceptive marketing claim caused. *In re NJOY, Inc. Consumer Class Action Litig.*, 2016 WL 787415, at *5 (C.D. Cal. Feb. 2, 2016). Under a price-premium approach, damages are defined as the difference between (i) the product's actual market price as sold with the misrepresentation (the "as-is" price) and (ii) the market price the product *would have had* if the misrepresentation had not been made (the "but-for" price, meaning the price the product would have had but for the misrepresentation). *See In re General Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d 212, 224 (S.D.N.Y. 2019). The price-premium damages measure is the one Plaintiffs' experts use in this case. (2-ER-289 (Plaintiffs' expert describing the price premium as "the difference between the price actually paid and an estimate of the market price of the same product if the consumers were fully informed about its attributes").)

Calculating a price premium thus requires two inputs. The first—the "price actually paid"—is a matter of historical fact. But the second is not. It is instead an estimate of what the price would have been had the alleged misrepresentation not been made.

Economists universally agree—and plaintiffs do not dispute—that market prices result from "a combination of market demand and market supply." *See In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1119 (C.D. Cal. 2015). High demand and low supply results in high prices, because only the consumers who want the product the most and can pay the most are able to get it. Consider tickets for the Super Bowl. In contrast, low demand and high supply results in low prices, because anyone who wants the product can get it, even those who don't value it much and can't pay much. Consider a plentiful commodity such as a plain paper plate.

Because consumers and producers are not all alike, economists express demand and supply as ranges, or "curves." The place where a product's demand and supply curves intersect is the market price for that product, as shown below:



The demand curve (red) shows how much product the total population of consumers would purchase at various price points—the lower the price, the greater the number of consumers who would buy the product, and the greater the volume of product that consumers as a whole would purchase. The supply curve (blue) shows how much product the total population of suppliers would produce at various price points—the higher the price, the greater the number of suppliers who would choose to supply it, and the greater the volume that suppliers as a whole would produce. The intersection of these two curves is the equilibrium price or "fair market value."

B. Conjoint Analyses Assess Only Demand, Not Supply.

The basic argument of plaintiffs in a false or deceptive advertising case like this one is that the false or deceptive statement increased consumer demand for the product—it made the product look better than it actually was. And therefore, if the false or deceptive statement was removed, demand for the product would decrease.

To assess the decrease in demand, plaintiffs usually rely on a choice-based "conjoint analysis." A conjoint analysis is "a statistical technique capable of using survey data to determine how consumers value a product's attributes." *NJOY, Inc.*, 2016 WL 787415, at *6 (quotation omitted). "[I]n conjoint analysis, survey respondents are asked to make a series of choices between different combinations of product attributes." *Id.* (alteration in original) (quotation omitted). By "[c]ombining the responses to all of the choice sets, the analyst can then use established statistical methods to estimate the separate value (or part-worth) that consumers attach to each product attribute." *Id.*

(quotation omitted). Using this technique, plaintiffs' experts can isolate the "willingness to pay" associated with a product attribute or representation relevant to plaintiffs' claims. *Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *4 (C.D. Cal. Dec. 18, 2014).

There are real doubts about whether a conjoint analysis can accurately quantify even a change in demand.[2] But what is undisputed is that a conjoint analysis ***only*** assesses changes in demand. A conjoint analysis makes no attempt to assess changes in supply, and it is incapable of doing so because it does not get input from suppliers.

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[2] Conjoint analysis was created to provide helpful, directional guidance on product design. *See, e.g.*, Rene Befurt et al., *Supply Side Considerations When Using Conjoint Analysis in Litigation*, in *Handbook of Marketing Analytics: Methods and Applications in Marketing, Public Policy, and Litigation* 2 (Natalie Mizik & Dominique Hanssens eds. 2024), https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=10240. Conjoint analysis was not created to provide quantitative measurements, and it is not good at doing so, as one of the leading authorities on conjoint models, Bryan Orne, explains:

> Conjoint analysis can reveal product modifications that can increase market share, but it will probably not reveal how much actual market share will increase. Conjoint analysis can tell us that the market is more price sensitive for Brand *A* than Brand *B*, but we probably do not know the exact price sensitivity of either one. Conjoint analysis can identify which market segment will be most likely to purchase your client's product, but probably not the exact number of units that will be purchased. . . .
>
> Do not let th[e] enthusiasm get out of hand. . . . While conjoint [models] are excellent tools for revealing strategic moves that can improve the success of a product, . . . we must avoid thinking that adjusted conjoint models can consistently and accurately predict volumetric [i.e., quantitative] absolutes.

Bryan Orne, *Getting Started with Conjoint Analysis: Strategies for Product Design and Pricing Research* 26–27 (4th ed. 2019).

A conjoint analysis only surveys consumers, and it can therefore assess only consumer willingness to purchase. It does not survey suppliers, and it therefore cannot assess willingness to supply.

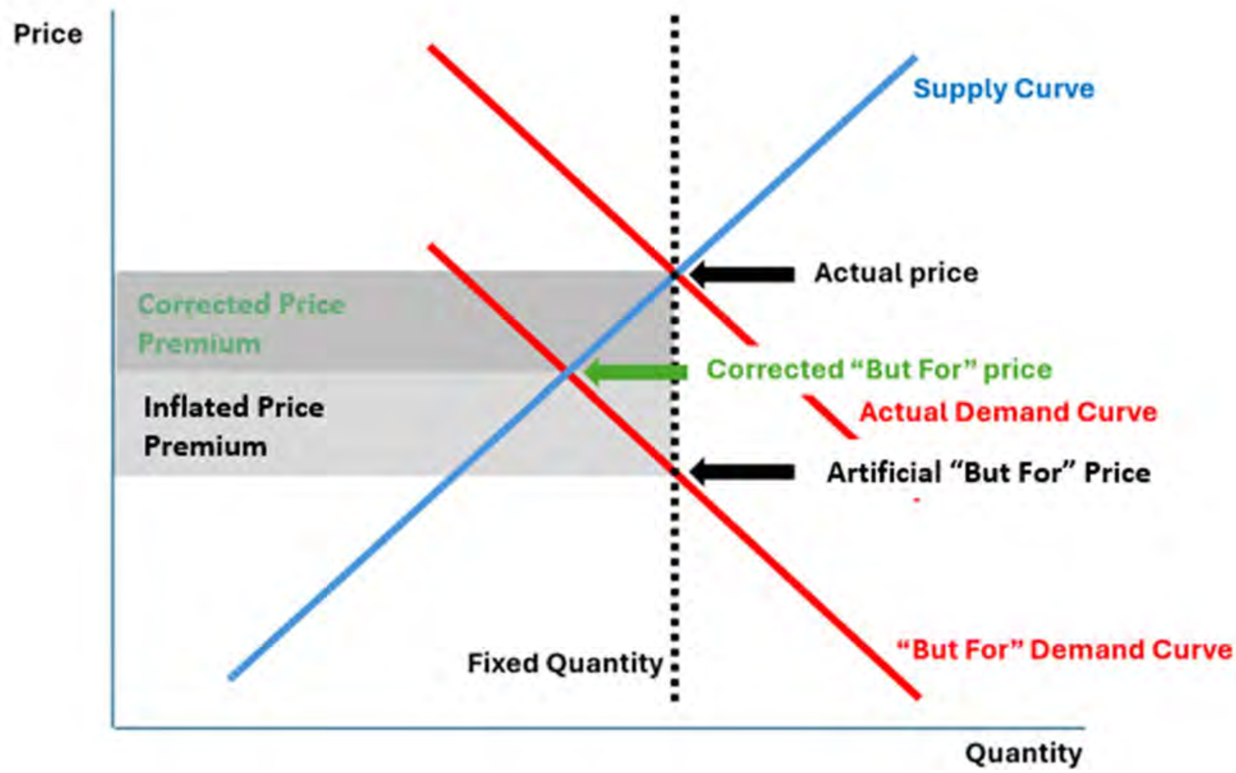
Because market prices depend on the interaction of supply and demand, some assessment of supply must be added to a conjoint analysis's assessment of consumer demand to estimate market price. This need to add a supply assessment is universally recognized. As one economist explains, "[w]illingness to pay is not market price . . . conjoint analysis provides the 'demand curve' . . . you need to consider demand and supply when setting the market price." *See* John Hauser, *Note on Conjoint Analysis* 16 (MIT Sloan Courseware Fall 2015), https://ocw.mit.edu/courses/15-810-marketing-management-analytics-frameworks-and-applications-fall-2015/resources/mit15_810f15_conjoint/. Or, to put it another way, "[c]onjoint studies can play a vital role in feature valuation provided that they are properly designed, analyzed, *and supplemented by information on the competitive and cost structure of the marketplace*." Greg M. Allenby et al., *Economic Valuation of Product Features*, 12 Quantitative Marketing and Economics 421, 455 (2014) (emphasis added).

C. Plaintiffs' Experts Err In How They Address Supply: They Irrationally Keep It Constant.

Plaintiffs' damages analysis becomes irrational and systematically unreliable at the step where it adds supply to estimate a market price. Instead of conducting a survey or collecting other data to determine how producers would change their supply in response to a change in demand, Plaintiffs simply ***assume*** that the Defendant would hold supply at a fixed level. To be perfectly clear, this means they assume that, if consumer demand for the defendant's product dropped, the defendant would insist on making the same total number of sales—no matter how far it had to lower its price to do so, even if it meant losing money on each sale. This assumption has no basis in economic theory, and Plaintiffs make no attempt to defend it based on evidence from the Defendant in this case. It is a false assumption, and its consequence is that Plaintiffs' analysis makes no attempt to measure how actual *market prices* would change. The analysis is therefore incapable or measuring a *market price* premium.

The most perceptive courts have said exactly this: a damages model that makes no attempt to assess how supply would change "does not actually calculate a market price premium" at all. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs. & Prods. Liab. Litig.*, 500 F. Supp. 3d 940, 949 (N.D. Cal. 2020), *aff'd sub nom. Schell v. Volkswagen AG*, 2022 WL 187841 (9th Cir. Jan. 20, 2022). Instead, by "look[ing] only to the demand side of the market equation," it "convert[s] what is properly an objective evaluation of relative fair market values into a seemingly subjective inquiry of what the average consumer wants." *NJOY, Inc.*, 120 F. Supp. 3d at 1119 (citation modified).

In economic terms, Plaintiffs' experts assume that supply is "inelastic." This assumption artificially forces the entire effect of lower demand to be reflected in a lower price, rather than a combination of lower supply and price. The precise way in which it exaggerates the amount by which price would drop—and therefore likewise exaggerates the "price premium" the allegedly false representation caused—is shown in the chart below:



To put it simply, "demand-side only valuations tend to overstate market prices." Greg Allenby et al., *Computing Damages in Product Mislabeling Cases: Plaintiffs' Mistaken Approach in* Briseno v. ConAgra, 45 Prod. Safety & Liab. Rep. 208 (Feb. 27, 2017) (as reprinted by Bloomberg Law, at 3). If the analysis properly assumed that suppliers would reduce quantity in response to reduced demand, the price drop and corresponding "price premium" would be much lower or even nonexistent. *Id.*

Plaintiffs sometimes retort that supply must be held constant in the but-for world because it is fixed as a matter of history in the actual world. But the same could equally be said of both demand and price—both are fixed as a matter of history in the actual world. But that does not mean they must be held constant in the but-for world. The whole purpose of the damages exercise is to estimate how supply, demand, and price would *change* in the hypothetical world where the alleged misrepresentation was not made. Demand is not the only things that would change in that hypothetical world. Supply would change, too.

Of course, once the but-for market price is calculated, the difference between that price and the actual, historic market price (the price premium) must be multiplied by the total quantity of actual historic sales to calculate damages. But that is the second step of the damages model. Plaintiffs' error is in the first step—how they calculate the price premium, which they do by making the irrational assumption that producers would insist on making exactly the same number of sales no matter how low it forced the price and how much money they lost.

To assume, in the but-for world, that producers would not lower their supply in response to a decrease in demand cannot be justified as a matter of economic theory, because it is economically irrational. Rational businesses try to make money, not lose money, so they will not insist on maintaining sales volume if it means cutting price below what is profitable. *See* Jeffrey Church & Roger Ware, *Industrial Organization: A Strategic Approach* 23 (Irwin McGraw-Hill 2000) ("At the equilibrium price both firms and consumers are able to fulfill their planned or desired trades: firms are able to sell their profit-maximizing quantities and consumers are able to purchase their utility-maximizing quantities."); Lisa Cameron et al., *Price Premium Damages in Product Market Litigation: Issues in Survey-Based Market Simulations,* in *Product Liability, 20th ed.*, *International*

Comparative Legal Guides 23, 26 (Adela Williams & Tom Fox eds. 2022) ("It is a fundamental principle of economics that any market price is determined by the interaction of willing buyers (who maximise utility) and willing sellers (who maximise profits)."); *In re Dell Inc., Sec. Litig.*, 591 F. Supp. 2d 877, 901 (W.D. Tex. 2008) (explaining that "all rational economic actors . . . seek to maximize their profits." (quotation omitted)). To assume otherwise is "heroic"—and that is not a good thing. *See* Rene Befurt et al., *Supply Side Considerations*, at 39. Consider a hypothetical example: Suppose a sunscreen retailed for $12.00 with a per-unit cost of $11 and a conjoint analysis showed that removing a "dermatologist recommended" claim would reduce demand by 20 percent. No reasonable seller would cut prices to $9.60 to maintain volume, just to sell every tube at a $1.40 loss. A rational seller would instead keep the price above $11, accepting fewer sales in order to keep making some money.[3]

In addition to being unsound as a matter of economic theory, the "fixed supply assumption" also ignores the factual record in this case and practical "market realities." *Zakaria*, 755 Fed. App'x at 624 (explaining that conjoint analysis needed to "reflect market realities"). Here, Sazerac made it unambiguously clear that it would *not* drop its

[3] In litigation, some experts may assert that there is a limit to how much their damages model would reduce prices. This sort of ad hoc limitation may allow experts to avoid the most egregious examples of the problem—e.g., but-for worlds in which a producer would sell at a significant loss to maintain volume—but there is no principled basis for it. In fact, the need to apply such a limitation is a tacit admission of the problem.

prices in response to reduced demand because of its overall product strategy. (3-ER-474.) Certainly, it would not drop prices indefinitely to keep sales volume constant.

D. This Court Should Join Those That Have Rejected Damages Analyses That Irrationally Keep Supply Constant, Contrary To Market Realities.

A damages analysis that refuses to consider how producers would lower supply in response to lower consumer demand is incapable of measuring a but-for market price and corresponding market price premium. This Court should join the courts that have excluded such analyses and declined to certify classes based on them.

A leading case is *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.* There, the court excluded expert damages opinions because they failed to account for supply side factors. 500 F. Supp. 3d at 949. As the court explained, "[c]alculating a premium by comparing (1) the actual price of vehicles sold with defeat devices to unwitting consumers, and (2) consumers' willingness-to-pay for vehicles with the defeat device (as opposed to the market price of vehicles with the defeat device) is comparing apples and oranges." *Id.* In particular, "presuming that Defendants would have sold the same number of cars, at the exact price that consumers would have been willing to pay, is not a way to reliably incorporate supply-side considerations." *Id.*

Many district courts across the country have reached the same conclusion and have refused to certify class actions based on damages analyses that irrationally and inaccurately hold supply constant in the but-for world. *See, e.g.*, *Gen. Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d at 237 (discounting report because it incorporated "demand-side-only evidence" and this "fail[ed] to estimate hypothetical market conditions"); *Zakaria*, 2017 WL 9512587, at *21 (decertifying damages class based on conjoint analysis that measured only plaintiffs' changed willingness to pay as "insufficient to establish a basis for calculating either restitution or actual damages"), *aff'd*, 755 F. App'x 623 (9th Cir. 2018); *NJOY, Inc.*, 2016 WL 787415, at *6–7 (denying class certification because plaintiffs' proffered conjoint analysis tested only what consumers were willing to pay "without considering other factors in a functioning marketplace," and therefore "[did] not address the fair market value of NJOY's e-cigarettes absent the misrepresentations and omissions." (emphasis and quotation omitted)); *Saavedra*, 2014 WL 7338930, at *5 (denying certification of damages class, in part because proffered conjoint analysis accounted for demand but not supply, and reasoning that such a "method of computing damages converts the lost-expectation theory from an objective evaluation of relative fair market values to a seemingly subjective inquiry of what an average consumer wants. The Court has found no case holding that a consumer may recover based on consumers' willingness to pay irrespective of what would happen in a functioning market (i.e., what could be called sellers' willingness to sell).").

The Court should add its voice to the weight of this authority and the relevant academic literature. As the Court has previously held, an expert's "analysis [must] reflect market realities and prices for [the relevant] products." *Zakaria*, 755 F. App'x at 624. When an analysis wrongly assumes that a defendant would insist on making the exact same number of sales in response to lower consumer demand, no matter how low it had to drop its prices to do so, the analysis does not reflect market realities. The analysis is therefore not helpful, relevant, or reliable. To put it simply, it is not an analysis of market price *at all*.

CONCLUSION

This Court should reverse the order granting class certification because it relies on precisely this kind of flawed analysis that fails to account for "market realities." *Id.*

Dated: March 30, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Fed. R. App. 29(a)(5), and 32(a)(7)(A) because it is fewer than 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Ninth Circuit Rule 32-1(c).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Office 365 ProPlus version of Word in 14-point Garamond.

Dated: March 30, 2026

s/ Aaron D. Van Oort
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2026, a copy of the foregoing document was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will cause a notice of electronic filing to be served on all registered counsel of record.

s/Aaron D. Van Oort
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No. 25-4833

In the

United States Court of Appeals
For the Ninth Circuit

TERRY MYERS AND DAWN OUTLAW,

Plaintiffs-Appellees,

v.

SAZERAC COMPANY, INC.,

Defendant-Appellant.

On Appeal from the U.S. District Court for the Northern District of California
The Honorable Edward M. Chen, No. 3:23-cv-00522-EMC

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

The National Association of Manufacturers ("NAM") states that it is a non-profit, tax-exempt organization incorporated in the State of New York. NAM has no parent corporation, and no publicly held company has 10% or greater ownership in NAM.

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

/s/ Matthew A. Fitzgerald
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Amici's members are often targeted as defendants in class actions. *Amici* thus are able to offer the business community's unique perspective on the significant costs class-action litigation imposes on the economy and consumers when courts fail to rigorously apply the requirements of Federal Rule of Civil Procedure 23 and Federal Rule of Evidence 702.[1]

INTRODUCTION

Alarm bells have long rung out against using conjoint analyses in false advertising litigation. This Court should heed the alarm. It should clarify that conjoint analysis alone cannot determine market value and warn lower courts against rubberstamping proposed conjoint analysis studies. This case demonstrates the pitfalls of failing to rigorously review such analyses in the class-action context.

Plaintiffs routinely offer flawed conjoint analyses to determine how much class members allegedly overpaid for a mislabeled product. But conjoint analysis alone is fundamentally incapable of doing what false advertising plaintiffs assert it does—it cannot calculate market value. Still, district courts have accepted these models and

[1] Counsel for all parties confirmed that they do not oppose the filing of this brief. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

certified classes based on them. In doing so, these courts—including the one below—fail in their duty to "conduct a rigorous analysis" of plaintiffs' damages model, *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013), violating Federal Rule of Civil Procedure 23's requirements. This Court should stop this worrying trend and re-direct district courts to the proper uses and limitations of conjoint analysis.

In any event, this case is an example of why this Circuit's deferral of a full Federal Rule of Evidence 702 expert inquiry until after class certification is flawed in both principle and practice. The opinion below is but the latest example of district courts failing to rigorously interrogate proposed damages models in mislabeling cases. For this reason, too, this Court should reverse the district court's class certification.

ARGUMENT

This Court has held that, "in the abstract," conjoint analysis may be "capable of measuring classwide damages." *Lytle v. Nutramax Lab'ys, Inc.*, 114 F.4th 1011, 1033 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025). But such cases should be very rare. Conjoint analysis "is being consistently misused" in the courts in false advertising litigation. Suneal Bedi & David Reibstein, *Damaged Damages: Errors in Patent and False Advertising Litigation*, 73 Ala. L. Rev. 385, 386 (2021) (emphasis removed).

The district court allowed Plaintiffs to pursue a price premium theory of damages based solely on conjoint analysis. In doing so, it erred. Failing to account for supply-side and market conditions, conjoint analysis is fundamentally incapable of measuring the hypothetical market value of an allegedly properly labeled product.

In addition, this case further exemplifies the flaws in this Court's view that full Rule 702 inquiries should be postponed until after class certification. This Court has allowed plaintiffs to rely on expert reports that have not been proved admissible under Rule 702, forcing defendants like Sazerac to shoulder the burdens of class litigation on the strength of untested expert evidence. This Court should better align itself with its sister circuits that apply Rule 702 in full at class certification.

I. Plaintiffs' proposed conjoint analysis is inadequate to determine price premium and thus constitute a classwide damages model.

Plaintiffs proposed, and the district court accepted, a conjoint analysis in support of their price premium damages theories. But conjoint analysis, even when done correctly, cannot alone determine the actual market value of an allegedly improperly labeled product. Thus, it cannot be used to determine how much class members purportedly overpaid for an allegedly mislabeled product, and how much they are accordingly entitled to in damages. Overlooking conjoint analysis's inherent limitations in false advertising cases, the district court erred in finding that Plaintiffs' proposed conjoint analysis is capable of calculating classwide damages.

Governed by Federal Rule of Civil Procedure 23, class actions are "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). Rule 23 is more than a pleading standard. Plaintiffs bear "the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Lytle*, 114 F.4th at 1023.

First, plaintiffs must satisfy Rule 23(a)'s "four requirements—numerosity, commonality, typicality, and adequate representation." *Wal-Mart Stores*, 564 U.S. at 349. Second, they must satisfy Rule 23(b). Here, Plaintiffs seek certification of a Rule 23(b)(3) class, Mot. for Class Cert. at 3, ECF No. 56 (May 21, 2024), which requires them to prove predominance and superiority, Fed. R. Civ. P. 23(b)(3). "Before it can certify a class, a district court must be satisfied, after a rigorous analysis, that the prerequisites of both Rule 23(a) and 23(b)(3) have been satisfied." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022) (en banc).

Rule 23(b)'s "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." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). To prove predominance, "a class action plaintiff must establish that damages are *capable* of measurement on a classwide basis." *Lytle*, 114 F.4th at 1024 (marks omitted). As with the other Rule 23 requirements, district courts must conduct a "rigorous analysis" to determine whether the offered damages model is "consistent with [plaintiffs'] liability case." *Comcast*, 569 U.S. at 35. The Supreme Court has rejected the argument that "at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be." *Id.* at 36. "Such a proposition," the Court held, "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* "[I]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013). At class certification, courts must determine that a damages model "is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial." *Lytle*, 114 F.4th at 1019.

Without a classwide damages model, plaintiffs fail to demonstrate that common issues will predominate over individualized ones. As the D.C. Circuit succinctly summarized: "No damages model, no predominance, no class certification." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 253.

Because Plaintiffs fail to put forward a classwide damages model, this class should never have been certified.

A. Because conjoint analysis only considers demand-side factors, conjoint analysis alone cannot support a price premium theory of damages.

Because conjoint analysis fails to account for supply-side and other market factors, conjoint analysis cannot determine the market value of a product but-for an alleged mislabeling. As a result, conjoint analysis alone cannot support a price premium theory.

Like many California false advertising plaintiffs, Plaintiffs pursue a price premium theory of damages for all their claims. Opinion at 18–19, ECF No. 79 (Feb. 12, 2025); *see also Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 865 (9th Cir. 2025) (noting that a "price premium" theory "is the standard measure of damages under the [Consumer Legal Remedies Act ('CLRA')] and of restitution under the [False Advertising Law ('FAL')] and [Unfair Competition Law ('UCL')]."), *petition for cert. filed*, No. 25-874 (U.S. Jan. 16, 2026).[2] A price

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[2] Due to the FAL and UCL's equitable nature, courts have discretion to determine damages under those two statutes. "However, that discretion is not unlimited" and "[t]he amount of restitution awarded under the False Advertising and Unfair Competition Laws and the CRLA must be supported by substantial evidence."

premium damages model seeks to determine how much class members overpaid for a mislabeled product. *Id.* To determine the price premium, courts subtract the market value—the price of the properly labeled product if "sold in an open market [and] if all of its defects and limitations were known at the time of sale"—from the amount the plaintiff paid for the mislabeled product. *Anderson v. Ford Motor Co.*, 74 Cal. App. 5th 946, 961 (2022); *see also Children's Hosp. Cent. Cal. v. Blue Cross of Cal.*, 226 Cal. App. 4th 1260, 1274 (2014). The difference is, in theory, how much each class member overpaid for the product because of the mislabeling and thus how much damage each class member suffered.

Plaintiffs agree that their damages theory turns on the proper calculation of the market value of Fireball Malt. Ben-Akiva Decl. at 22 ¶ 50, ECF No. 56-1 (May 21, 2024) (proposing to calculate damages as "the difference between the actual price of the Fireball malt beverage and the price the seller would have charged if consumers were not deceived to believe they were buying a whiskey beverage with an ABV of 33%."). To determine the proper market value of Fireball Malt, Plaintiffs

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Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 700 (2006), *as modified on denial of reh'g* (Jan. 31, 2006). Here, Plaintiffs only proceed on and presented evidence pertaining to an actual market value theory for the FAL and UCL claims, identical to their CLRA claims. *See* Opinion at 18–19.

propose to conduct a conjoint analysis. *See id.* at 5–6 ¶ 10.

But a conjoint analysis alone cannot determine market value here. Conjoint analysis (if done correctly) can, at most, determine the value consumers place on a product. *See, e.g.*, Bedi & Reibstein, 73 Ala. L. Rev. at 402 (conjoint analysis can determine "the value . . . that the respondent places on each of the features"); Neil T. Bendle *et al.*, *Marketing Metrics*, ch. 4, at 146 (3d ed. 2016) ("Marketers use conjoint analysis to measure consumers' preference."). Developed for marketing research, conjoint analysis "attempts to quantify the value of a given feature by looking at the trade-offs consumers are willing to make." Bernard Chao & Sydney Donovan, *Does Conjoint Analysis Reliably Value Patents?*, 58 Am. Bus. L.J. 225, 232 (2021); *see also* Bedi & Reibstein, 73 Ala. L. Rev. at 388. In false advertising litigation, including in this case, experts often rely on so-called choice-based conjoint analysis. Bedi & Reibstein, 73 Ala. L. Rev. at 400; *see* Ben-Akiva Decl. at 5–6 ¶ 10. In these studies, survey respondents "choose between different variations of the same product." Chao & Donovan, 58 Am. Bus. L.J. at 233.

The following example illustrates how choice-based conjoint analysis works: "[A]ssume that a researcher wants to understand how consumers value various features of computers. In particular, a researcher wants to understand how much consumers are willing to pay for (1) a larger screen size, (2) more memory, and (3) an Apple computer versus a Dell." Bedi & Reibstein, 73 Ala. L. Rev. at 400. Mixing and matching variations of these three product components, "a researcher will create product profiles to compete with each other." *Id.* at 401. For example, survey respondents could be asked to decide between buying a cheaper Apple computer with a larger screen but less memory or a more expensive Dell with a smaller screen but more memory. *Id.* Often, respondents are offered three to five products to choose between. *Id.* After running the surveys with multiple participants and profile sets, statisticians then perform a multinominal regression that, theoretically, allows them to "estimate[] the value (utility) that the respondent places on each of the features and their levels. The estimates from this regression are called 'part worths.'" *Id.* at 401–02. The smaller the part worth, the less value the survey respondents assign to that product feature. *Id.* at 402.

Accordingly, conjoint analysis at best measures the value consumers derive from product attributes. But it does not represent what manufacturers would sell the product for. Putting this in economic terms, conjoint analysis can determine demand, but alone it says nothing about supply.

Conjoint analysis therefore cannot determine market value in false advertising cases. The market value is determined based on where the supply and demand curves meet. Irena Asmundson, *Supply and Demand: Why Markets Tick*, F&D

Magazine (June 17, 2010), https://tinyurl.com/4mm6ndyf. Failing to account for supply, conjoint analysis can, at best, provide half of the equation.

In unpublished opinions, this Court has recognized the need for damages models to account for supply. *Mier v. CVS Health*, 2023 WL 4837851, at *1 (9th Cir. July 28, 2023) ("The district court reasonably concluded that [the plaintiff's] damages model does not adequately account for market supply and thus cannot measure class-wide damages based on market value."); *Zakaria v. Gerber Prods. Co.*, 755 F. App'x 623, 624–25 (9th Cir. 2018) (noting that when plaintiffs use conjoint analysis, "[s]uch methods must . . . reflect supply-side considerations and marketplace realities that would affect product pricing").

Other courts have recognized the same. For example, the Fifth Circuit reversed a district court's class-certification order, rejecting plaintiffs' proffered conjoint analysis for failing to account for supply-side and real-world factors. *See Earl v. Boeing Co.*, 53 F.4th 897, 902–03 (5th Cir. 2022). Plaintiffs' analysis purported to show that they would have paid less for airline tickets had they known about an alleged mechanical defect, but failed to account for the reality that, had the purported defect been known, airlines would not have continued to sell tickets. *Id.* at 899, 902–03. The alleged concealment of the supposed defect thus did not injure plaintiffs.

In another example, the Southern District of New York held that conjoint analysis cannot determine market value. *In re Gen. Motors LLC Ignition Switch Litig.*, 407 F. Supp. 3d 212, 235–36 (S.D.N.Y. 2019). Returning to Economics 101, the court noted that "market value is determined by the interaction of *both* supply *and* demand." *Id.* at 234. So, "[e]vidence that fails to account for both phenomena is not evidence of market value." *Id.* at 233. Since conjoint analysis only focuses on "the demand side of the equation" and not on supply, it alone could not determine market value. *Id.* at 235. "[W]here the law awards damages based on the difference in market value, evidence — including conjoint analyses — that measures only consumers' subjective valuation or willingness to pay is not sufficient evidence of such damages." *Id.* at 237.

Unless experts also apply some kind of supply-side analysis, conjoint analysis on its own cannot determine market price in false advertising litigation. And without a way to determine market price, plaintiffs fail to present a classwide damages model.

B. Plaintiffs' conjoint analysis fails to account for supply-side factors and so does not suffice for a reliable classwide damages model.

Not accounting for supply-side or other real-world market factors, Dr. Moshe E. Ben-Akiva's conjoint analysis is incapable of calculating Fireball Malt's market value.

Dr. Ben-Akiva insists that he "considered supply side factors when developing [his conjoint analysis] model." Ben-Akiva Decl. at 23 ¶ 54. Yet he explains that his market "simulation is based on an *assumption* that the seller under the 'but-for' scenario would not alter the product supply." *Id.* (emphasis added); *id.* at 22 ¶ 51 ("[t]he supply situation is *assumed* to remain unchanged") (emphasis added). In other words, he assumes that Sazerac, in a scenario where the product is no longer allegedly mislabeled, will suffer the resulting lower price to ensure the same volume of sales. But he provides no reason in support of his assumption.

In fact, the record evidence demonstrates the opposite. Sazerac's CEO explained that, regardless of a change in demand, Sazerac would not lower the price of Fireball Malt. Brown Decl. at 3 ¶ 9, ECF No. 64-8 (Aug. 19, 2024). This is because Sazerac has one uniform price for all of its products of a certain size—it charges the same amount for a 50-ml bottle of Fireball Malt and Fireball Whisky. *Id.* at 3 ¶ 10. In part, Sazerac maintains this system to ensure good relationships with its distributors—a very real market concern for Sazerac. *Id.* So, the evidence actually shows that Sazerac would rather have a lower volume of sales than lower its price; the *opposite* of Dr. Ben-Akiva's assumption.

Yet the district court held that Dr. Ben-Akiva's assumption was sufficient. It approved calculating supply "based on historical sales transactions," Opinion at 26, reasoning that the "analysis includes pricing and sales information from the actual marketplace because it measures consumers' valuations of real goods (e.g., the Fireball Malt and Whisky)," *id.* at 27. That doesn't make sense. In considering a "but-for" world, a model has to account for how *all* market actors would behave, not simply rest on unsupported assumptions on how some would act. *See, e.g.*, *Tyson Foods*, 577 U.S. at 459 (FLSA damages models cannot be based on "implausible assumptions"). Sazerac's uncontested evidence shows that, in Plaintiffs' counterfactual world, Fireball Malt would have the same price.

The district court stated that these issues go to weight, not admissibility. Opinion at 27. In doing so, the district court failed to perform the type of "rigorous" analysis that *Comcast*, 569 U.S. at 35, demands. Before certifying a class, "district court[s must] consider[] factors that may undercut [a proposed damages] model's reliability (such as unsupported assumptions, erroneous inputs, or nonsensical outputs such as false positives) and resolves disputes raised by the parties." *Olean Wholesale Grocery Coop.*, 31 F.4th at 683; *see also id.* at 678 (juries only consider the persuasiveness of damages models if "the evidence is admissible and, after rigorous review, determined to be capable of establishing [damages] on a class-wide basis"). Here, the flaws in Dr. Ben-Akiva's model are more than "[t]he speculative possibility that [he] might slip up in executing his model." *Lytle*, 114 F.4th at 1033.

Conjoint analysis models alone are incapable of determining market price and thus cannot support a false advertising plaintiff's price premium theory of damages.

Because Plaintiffs' model "does not even attempt" to "measure only those damages attributable [to their theory of liability]," the model "cannot possibly establish that damages are susceptible of measurement across the entire class." *Comcast*, 569 U.S. at 35.

II. The district court's opinion exemplifies the flaws in deferring a full Rule 702 analysis until after class certification.

While the district court erred under existing precedent, the fact that there is any question of the sufficiency of Dr. Ben-Akiva's model exemplifies the deep flaws in this Circuit's approach to Federal Rule of Evidence 702 and class certification. As other Circuits have found, the Federal Rules—as interpreted by the Supreme Court—require courts to conduct a full Rule 702 analysis at class certification. In any event, this Court's experiment in deferring these inquiries has failed in practice.

Rule 702 governs the admissibility of expert witnesses, like Dr. Ben-Akiva. The Rule requires that the proponent of expert testimony "demonstrate[] to the court" that the proffered testimony "is based on sufficient facts or data," is "the product of reliable principles and methods," and "reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702(b)–(d). In short, Rule 702 expressly recognizes judges' "responsibility of acting as gatekeepers to exclude unreliable expert testimony." Fed. R. Evid. 702, 2000 Amendments, committee notes. The 2023 Amendments to the Rule "clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." Fed. R. Evid. 702, 2023 Amendments, committee notes.

A. Deferring Rule 702 inquiries until after class certification violates Supreme Court precedent and the Federal Rules.

By declining to subject experts to the full rigors of Rule 702 at class certification, *Lytle*, 114 F.4th at 1030, this Court remains "on the short side of a lopsided circuit split," *Sali v. Corona Reg'l Med. Ctr.*, 907 F.3d 1185, 1189 (9th Cir. 2018) (Bea, J., dissenting from denial of en banc review). The Third, Fifth, Sixth, Seventh, and Eleventh Circuits have held that expert evidence must be fully admissible under Rule 702 to be considered at class certification. *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187–88 (3d Cir. 2015); *Prantil v. Arkema Inc.*, 986 F.3d 570, 575–76 (5th Cir. 2021); *In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239, 253–54 (6th Cir. 2024); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 817–19 (7th Cir. 2010); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011) (unpublished); *see also Loc. 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1258–59 (11th Cir. 2014). They are in the right.

Not only is the Ninth Circuit's position at odds with that of its sister circuits, it is irreconcilable with the Federal Rules of Evidence and Supreme Court precedent.

Rule 1101 specifies that the Federal Rules of Evidence apply in "civil cases and proceedings" in United States district courts. Fed. R. Evid. 1101(a), (b). Class certification under Civil Rule 23 is indisputably a "proceeding" in a "civil case" in a federal district court. As the Supreme Court clarified, the "permissibility [of evidence] turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable." *Tyson Foods*, 577 U.S. at 455 (citing Fed. R. Evid. 401, 403, and 702). The Federal Rules of Evidence—including Rule 702—thus fully apply at class certification unless there is an exception. And no such exception exists. *See, e.g.*, Fed. R. Evid. 1101(d)(1) (the only civil-case exception is for "the court's determination . . . on a preliminary question of fact governing admissibility").

Fully applying Rule 702 to class-certification proceedings reflects the evidentiary burden putative class plaintiffs must carry under Rule 23. Plaintiffs "must be prepared to prove that . . . *in fact*" the Rule 23 standards are met. *Wal-Mart Stores*, 564 U.S. at 350. "Actual, not presumed, conformance with Rule 23(a) remains indispensable." *Id.* at 351 (marks omitted). That is, plaintiffs must produce "evidentiary proof"—including of their damages model—to satisfy Rule 23.

Comcast, 569 U.S. at 33, 35. And this Court requires plaintiffs to "prove" those facts "by a preponderance of the evidence" before class certification. *Olean Wholesale Grocery Coop.*, 31 F.4th at 665. Such proof must be admissible under the plain text of the federal rules, requiring Rule 702's application.

B. In practice, deferring Rule 702 inquiries has wasted judicial and party resources.

Practice has demonstrated that this Court's certify-now-ask-questions-later approach does not work.

While in theory a district court may reconsider its class-certification decision (as it may revisit most interlocutory orders) when it conducts a later Rule 702 analysis, as a practical matter this rarely occurs. "In all but exceptional cases," courts have long recognized, "an order certifying a class will be the trial court's final word on the matter." *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 908 (3d Cir. 2022) (Porter, J., concurring); *see also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("[A]n order certifying a class usually is the district judge's last word on the subject."). This is because the multiplying effect of certification creates a risk of "devastating loss" that in turn leads to "in terrorem" class settlements even for "questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also* Fed. R. Civ. P. 23(f), 1998 Amendment, committee notes ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). In practice, class certification often "sounds the death knell of the litigation." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005).

Even when a district court does seriously consider or grant a decertification motion, it only underscores the extreme inefficiency and burden on parties and the courts that deferral of Rule 702 analysis imposes. For instance, the Northern District of California recently granted a defendant's Rule 702 motion and, "as a result," decertified that class. *In re Apple iPhone Antitrust Litig.*, 2025 WL 3124160, at *1 (N.D. Cal. Oct. 27, 2025) (rejecting an expert's "error-ridden" analysis), *perm. app. granted*, No. 25-7930 (9th Cir. Dec. 18, 2025). But in the intervening *nearly two years* between certification and decertification, the defendant and the court bore the significant burdens of (erroneous) certification. The parties engaged in discovery and extensive discovery disputes, requiring frequent court intervention. *See, e.g.*, *In re Apple iPhone Antitrust Litig.*, ECF Nos. 833, 834, 837, 859, 919, 949, No. 4:11-cv-6714 (N.D. Cal.). The district court held at least nine hearings, largely concerning discovery matters. *Id.* at ECF Nos. 796, 822, 835, 887, 896, 911, 966, 979, 1057. In all, the district court's docket reveals nearly 300 docket entries between certification, *id.* at ECF No. 789, and decertification, *id.* at ECF No. 1069.

In re Apple is not alone. *See, e.g.*, *Wallace v. Countrywide Home Loans Inc.*, 2013

WL 12642019, at *1, *5 (C.D. Cal. Feb. 12, 2013) (decertifying a damages class after granting a Rule 702 motion); *see also Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *14 (N.D. Cal. Dec. 15, 2014) (decertifying a class and denying defendant's Rule 702 motion as moot after finding plaintiff's expert's methodology flawed). These supposed success stories, too, involved months or years of wasted judicial and party effort. In *Wallace*, the district court approved class notice, ECF No. 63, No. 8:08-cv-01463 (C.D. Cal.), considered discovery disputes, *see, e.g.*, *id.* at ECF No. 107, and ruled on several partial summary judgment motions, *id.* at ECF Nos. 145, 192, 332, in the *four years* between certification and partial decertification. The *Werdebaugh* court likewise ruled on discovery disputes, ECF Nos. 140, 144, No. 5:12-cv-02724 (N.D. Cal.), and the parties fully briefed summary judgment between certification and decertification, *id.* at ECF Nos. 166, 187, 196.

This system isn't working—for either the parties or the courts. Applying Rule 702 in full at class certification would avoid significant needless effort by courts and parties. This Court should reconsider its precedent on Rule 702.

CONCLUSION

For these reasons and those in Sazerac's brief, the Court should reverse the order granting class certification.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,626 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in Equity A font using Microsoft Word, in 14-point size.

/s/ Matthew A. Fitzgerald
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2026, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ACMS system. All participants in the case are registered ACMS users and will be served by the system.

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