

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

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|----------|---------------------------------------------------|------|------------------|
| Case No. | CV 23-4570-GW-MRWx                                | Date | October 14, 2026 |
| Title    | <i>Wesley Africa v. Vision Path, Inc., et al.</i> |      |                  |

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| Present: The Honorable | GEORGE H. WU, UNITED STATES DISTRICT JUDGE |
|------------------------|--------------------------------------------|

Javier Gonzalez

None Present

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None Present

None Present

**PROCEEDINGS: IN CHAMBERS - TENTATIVE RULINGS ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [200]; and DEFENDANT VISION PATH, INC.'S MOTION TO EXCLUDE EXPERT REPORT, TESTIMONY, and OPINIONS OF DR. ELIZABETH HOWLETT, PH. D [202]**

Attached is the Court's Tentative Ruling on the above-entitled Motions [200, 202] set for hearing on October 15, 2026 at 8:30 a.m.

Initials of Preparer JG

*Africa v. Vision Path, Inc., et al.*, Case No. CV 2:23-cv-04570-GW-(MBKx)

Tentative Rulings on: (1) Defendant’s Motion to Exclude Expert Report, Testimony, and Opinions of Dr. Elizabeth Howlett, Ph.D; and (2) Plaintiff’s Motion for Class Certification

## **I. Introduction**

Wesley Africa (“Plaintiff”) filed this lawsuit in the Superior Court of the State of California, County of Ventura, on April 28, 2023, and defendant “Vision Path, Inc. d/b/a/ Hubble, a Delaware corporation” (“Defendant”) removed the case to this Court on June 9, 2023. The operative complaint in the case is the Fourth Amended Complaint (“FAC”) filed May 15, 2025.

Defendant owned and operated a business that manufactures and sells contact lenses to consumers who are prescribed contact lenses by their own licensed eye doctors. *See* FAC ¶ 9. The FAC alleges that, under applicable federal law (*e.g.*, 16 C.F.R. § 315.2), a “contact lens prescription” must contain eight items of information including “the base curve of the prescribed contact lens[,] the diameter of the prescribed contact lens[,] and . . . [i]n the case of a private label contact lens, the name of the manufacturer, trade name of the private label brand, and, if applicable, trade name of equivalent brand name.” FAC ¶ 11. Plaintiff also avers that “[s]ellers like Defendant Hubble are prohibited from altering any information on a Contact Lens Prescription by, for example, substituting a different brand, base curve or diameter in place of the brand, base curve and/or diameter prescribed by the consumer’s respective Prescriber . . . [and] it is illegal to sell contact lenses not in accordance with a Contact Lens Prescription.” *Id.* ¶¶ 12-13 (footnote omitted).

Generally-speaking, the lawsuit involves the allegation that Plaintiff and consumers paid monthly subscription dues to Defendant “believing that they were receiving (or going to receive) the same Contact Lenses prescribed by their Prescribers, and which were properly verified and sold by Defendant . . . in accordance with applicable law,” and that Plaintiff and consumers would not have purchased the subscription service from Defendant or used Defendant’s lenses “had they been informed of Defendants’ practice of unilaterally altering prescriptions, not properly verifying those altered prescriptions, and/or selling purported ‘contact lenses’ not in accordance with

their own Contact Lens Prescriptions.” *Id.* ¶ 30.<sup>1</sup> Among other causes of action, the FAC advanced claims for violations of California Civil Code § 1770, et seq., the Consumer Legal Remedies Act (“CLRA”), California Business & Professions Code § 17200, the Unfair Competition Law (“UCL”), and California Business & Professions Code § 17500, the False Advertising Law (“FAL”).

Plaintiff has now moved for class certification in connection with his CLRA, UCL and FAL claims (*see* Docket No. 200), and Defendant has moved to exclude the work of one of Plaintiff’s experts in connection with the Court’s consideration of that class certification motion (*see* Docket No. 202). The class Plaintiff seeks to certify is defined as follows: “All persons residing in California who purchased a subscription for Hubble Classic Daily lenses from hubblecontacts.com between April 25, 2019 and the present who were not prescribed Hubble Classic Daily lenses, and who do not seek personal injury damages.” Docket No. 200-1, at 13:23-26. The Court will address Defendant’s motion to exclude first, as it could theoretically impact the Court’s analysis of Plaintiff’s class certification motion.

## **II. Discussion**

### **A. Motion to Exclude – Overview**

Defendant argues that the opinions of Dr. Elizabeth Howlett, Ph.D (“Dr. Howlett”) should be excluded in connection with Plaintiff’s class certification motion, pursuant to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and Rule 702 of the Federal Rules of Evidence. Dr. Howlett offers two opinions that are the subject of this motion: one regarding materiality, and one regarding damages.<sup>2</sup>

Rule 702 provides that:

[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

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<sup>1</sup> For example, Plaintiff alleges that Hubble Classic Daily lenses come in only limited dimensions, *i.e.* “a base curve of 8.6mm and diameter of 14.2mm.” FAC ¶ 17. However, customers are never so informed and thus they may be sold contact lenses which are contrary to their prescriptions. In addition, to compound the problem, it is asserted that Defendant in its website does not allow inputs from the customers wherein the latter could insert their prescription restrictions/information. *Id.* ¶ 18.

<sup>2</sup> The reports that Dr. Howlett has offered in support of Plaintiff’s class certification motion are filed as exhibits to her declaration at Docket No. 200-3. Her materiality report begins at page 4 of 189. Her damages report begins at page 133 of 189.

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702; *see also City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014) (stating that Rule 702 provides expert testimony is admissible if “(1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert has reliably applied the relevant principles and methods to the facts of the case”). “Rule 702 of the Federal Rules of Evidence tasks a district court judge with ‘ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.’” *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1023 (9th Cir. 2022) (quoting *Daubert*, 509 U.S. at 597). “‘Expert testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.’” *Id.* at 1024 (quoting *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013)). In exercising its function in association with Rule 702, district courts are not tasked with deciding whether experts are right or wrong, but merely whether their testimony has substance such that it would be helpful to a jury. *See id.* at 1028; *Alaska Rent-A-Car*, 738 F.3d at 969-70.

As is apparent from the “more likely than not” phrasing in Rule 702, the proponent of the expert evidence must satisfy each of these four prerequisites by a “preponderance of proof.” *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1049 (9th Cir. 2025). However, Defendant acknowledges that, at the class-certification stage, a district court need not perform “a full Rule 702 gatekeeping analysis.” Docket No. 202-1, at 5:5-13 (citing and discussing *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011 (9th Cir. 2024)); *see also Lytle*, 114 F.4th at 1030 (rejecting argument “that the ‘rigorous analysis’ required at the class certification stage means that every expert opinion offered at that

stage must be subjected to a full evidentiary hearing to see if each such opinion meets the requirements of *Daubert*"). Generally-speaking, this means that a court is to consider whether expert evidence will be useful in evaluating whether class certification requirements have been met. *See Lytle*, 114 F.4th at 1031.

With respect to Dr. Howlett's materiality report, Defendant identifies three aspects that lead it to conclude her work is flawed. First, it asserts that Dr. Howlett's materiality survey "does not measure the materiality of any of Hubble's specific advertisements or webpages that allegedly contained misrepresentations or omissions," and therefore "cannot possibly 'fit' the facts of this case." Docket No. 202-1, at 1:24-26, 2:6-7 (emphasis omitted). Second, Defendant argues that Dr. Howlett's survey does not "account for or control acquiescence bias[,] the tendency of respondents to reflexively agree with the surveyor's line of questioning without careful thought," because it does not provide "don't know" or "unsure" options for answering any question, rendering her methodology unreliable in this respect. *Id.* at 2:8-12. Finally, Defendant charges Dr. Howlett with having "fail[ed] to screen for the relevant population: consumers who previously ordered contact lenses online," another way in which the survey assertedly does not "fit" the facts of the case. *Id.* at 2:16-17, 2:22-23.

As for Dr. Howlett's work on damages, Defendant notes that she plans to conduct a "Conjoint Analysis,"<sup>3</sup> and asserts that her work should be excluded for two reasons. First, it states that Dr. Howlett has only come up with a *proposal* that has not actually been conducted. *See id.* at 3:26-28. Second, it criticizes Dr. Howlett's methodology as inaccurate for the task of measuring class-wide damages because the product attributes it proposes to measure (in order to gauge the relative importance of each attribute) "are not based on her own analysis but are instead derived exclusively from the misrepresentations and omissions alleged in Plaintiff's Complaint" and because Dr. Howlett "disregards supply-side factors," fails to distinguish injured from uninjured class members, and fails to account for class members who paid only \$1 for a trial subscription

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<sup>3</sup> "[A] conjoint survey allows a researcher to test the economic value a consumer places on a given product feature, such as a particular statement on a package, by showing the product to individual survey participants with and without certain features, and then using survey responses to calculate the economic value consumers place upon the feature." *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1021 (9th Cir. 2024). "[C]onjoint analysis is a well-accepted technique that is frequently used to establish damages in CLRA actions." *Id.* at 1033.

and then cancelled. *Id.* at 4:6-16.

1. Materiality

While appearing to cloak its challenge in both “helpfulness” and “reliability” garb, Defendant’s argument concerning Dr. Howlett’s materiality survey not testing any representation Defendant “ever actually made,” Docket No. 202-1, at 6:10-11, appears to the Court to actually be a criticism of the weight of Dr. Howlett’s opinion in this regard. For instance, it cites its own expert’s statement that “the closer the survey context comes to marketplace conditions, the greater the evidentiary weight it has” and then asserts that Dr. Howlett “intentionally avoided all attempts at reflecting marketplace conditions.” *Id.* at 7:4-10. As Plaintiff notes in his Opposition, the Ninth Circuit’s 2024 decision in *BillFloat Inc. v. Collins Cash Inc.*, 105 F.4th 1269 (9th Cir. 2024), would certainly support that conclusion. *See id.* at 1275 (noting 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” and that “follow-on issues of methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility”) (omitting internal quotation marks).<sup>4</sup>

“If the proposed testimony meets the thresholds of relevance and reliability, its proponent is ‘entitled to have the jury decide upon [its] credibility, rather than the judge.’” *Elosu*, 26 F.4th at 1024 (quoting *United States v. Sandoval-Mendoza*, 472 F.3d 645, 656 (9th Cir. 2006)). The Court concludes that Dr. Howlett’s materiality-related work meets those requirements under the applicable preponderance standard. As Plaintiff explains, Dr. Howlett’s qualifications in the areas covered by her opinions are extensive, and she has significant experience in crafting the types of surveys and analyses offered/proposed here. *See* Docket No. 206, at 5:21-6:6. As to the materiality survey in particular, Plaintiff explains that Dr. Howlett “was not testing whether a particular [Defendant] advertisement was misleading, but whether the allegedly concealed or misrepresented information mattered to consumers” and that “[h]er questions map directly to the alleged representations and omissions.” Docket No. 206, at 1:14-17; *see*

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<sup>4</sup> The Court will address Defendant’s criticisms of this view *infra*.

*also id.* at 7:13-16. That work would plainly be “helpful” to the trier of fact in this action (and to this Court in deciding whether the Rule 23 requirements have been satisfied, such as whether key common questions could be answered “in one stroke,” *see infra*), and the Court can think of no reason why it would present a “reliability” problem (outside of aspects of it that Defendant can feel free to criticize in its own presentation to the factfinder). In sum, as Dr. Howlett designed the survey, the Court finds it sufficiently helpful and reliable, both in methodology and data, for purposes of satisfying Rule 702. *See id.* at 9:9-10:6.

In the end, if Defendant believes that it has identified a logical flaw in the relationship between the survey questions-asked and the theory in this case, “shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.” *Elosu*, 26 F.4th at 1024 (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)); *see also Daubert*, 509 U.S. at 596 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”); *Alaska Rent-A-Car*, 738 F.3d at 969 (“Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable.”). For reasons explained further below, the Court is not convinced that this is an improper or antiquated way of looking at things in this regard.

As to Defendant’s assertion that Dr. Howlett’s materiality survey is “biased,” Defendant’s motion reveals a concern about “acquiescence bias” and “demand-effect bias.” *See* Docket No. 202-1, at 9:1-4, 9:16-21; *see also Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 867 (9th Cir. 2025) (“[P]oorly worded survey questions might induce bias in respondents, or survey conditions might not accurately replicate the conditions faced by consumers in stores.”), *cert. denied*, 146 S.Ct. 2587 (Apr. 20, 2026). Yet, it cites only one decision supporting the exclusion of a survey because of “bias” – *Brighton Collectibles, Inc. v. RK Texas Leather Mfg.*, 923 F.Supp.2d 1245 (S.D. Cal. 2013). The type of “bias” present in that case is not the “acquiescence bias” or “demand-effect bias” Defendant raises here. *See id.* at 1257. Moreover, Defendant has presented its criticisms via the response of its own expert on the point. *See* Docket No. 202-1, at

9:16-27. Those criticisms can be made to the trier of fact. *See Noohi*, 146 F.4th at 867 (“Should Dr. Roberts’ execution of the survey fall short of that mark [*i.e.*, conducting the pricing survey in a “neutral” manner], JJCI may explore that failure at summary judgment, in a renewed *Daubert* motion, or during cross-examination at trial.”). They do not prevent the Court from making any of the necessary Rule 702 findings here, especially at the class-certification stage.

The Court reaches the same conclusion about Defendant’s views regarding whether Dr. Howlett’s materiality survey examines the relevant population. There is no dispute that the chosen population is comprised of contact lens-wearers/purchasers. *See* Docket No. 200-3, Exh. 3, ¶ 75 (“The target population for this survey consists of adult consumers (age 18 or older) residing in California who currently wear or have previously worn prescription contact lenses,” a “reference class [that] corresponds to the putative class definition in the complaint: California residents who purchased a Subscription Service from [Defendant] during the Class Period”). As Plaintiff argues, that population “is reasonably connected to the question whether [the information in question] matters to consumers.” Docket No. 206, at 11:24-25. Defendant simply thinks that the appropriate population must be limited to those who had ever purchased, or would consider purchasing, those products *online*. A trier of fact will be able to consider that criticism; it does not render Dr. Howlett’s materiality survey unhelpful or unreliable, in this Court’s opinion. *See id.* at 12:7-11 (“[Defendant] may argue that a narrower population would have been better. That disagreement does not make the responses of 898 actual California prescription-contact-lens wearers irrelevant or unreliable evidence of whether prescription-related information matters to those consumers.”).

## 2. Damages

To start, Defendant’s criticisms of what Dr. Howlett has to offer on the question of damages appears to be – like its materiality arguments, at least in part – also reliability-based. *See, e.g.*, Docket No. 207, at 11:5-8. With respect to Dr. Howlett’s damages opinion, Defendant insists that Dr. Howlett’s study is far too preliminary because she has not finalized the “attribute” list, while simultaneously – and seemingly inconsistently – asserting that its own experts have criticisms of the attributes Dr. Howlett *has* identified. Defendant also asserts that the Court must have a “fully formulated study

design” from Dr. Howlett in order for it to assess the reliability of her methodology in this regard. Docket No. 202-1, at 13:10-13.

In seeking to certify a class, a plaintiff must “establish[] that damages are *capable* of measurement on a classwide basis.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (emphasis added). However, “there is no general requirement that an expert actually *apply* to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage.” *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1019 (9th Cir. 2024) (emphasis added). Instead, “plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial.” *Id.*; *see also id.* at 1024; *id.* at 1032 (explaining that for purposes of supporting a Rule 23 commonality finding in connection with an “unexecuted damages model,” a plaintiff or his expert “must chart out a path to obtain all necessary data and demonstrate that the proposed method will be viable as applied to the facts of a given case”). At the same time, “a plaintiff may not avoid ultimate scrutiny of the admissibility of their experts’ final opinions simply by declining to develop those opinions in advance of class certification.” *Id.* at 1034.

Before proceeding further here, the Court must note that, in addressing the damages issue, Plaintiff’s Opposition brief divides up Dr. Howlett’s work into “Component B” that “raises a narrower market-price issue” and “Component A, the conjoint’s ability to measure consumer choice.” Docket No. 206, at 2:3-9.<sup>5</sup> The Court

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<sup>5</sup> “Component A” concerns “Full Refund (Lost Sales)” and is described in Dr. Howlett’s report as follows:

The share of respondents who choose the no-purchase option in the but-for world but would have chosen Hubble in the actual world. These consumers would not have transacted at all had the omitted facts been disclosed. Their damages equal 100% of the net revenue attributable to their subscription payments during the Class Period.

Docket No. 200-3, ¶ 38, at pg. 142 of 189. “Component B” concerns “Price Premium (Partial Refund)” and is described in this way:

Among respondents who would still have purchased in the but-for world, the price coefficient from the conjoint model enables estimation of the dollar-denominated willingness to pay (‘WTP’) reduction attributable to disclosure of the omitted facts.

has no doubt in concluding that Dr. Howlett has sufficiently “chart[ed] out a path” with respect to at least “Component A” of her planned damages study. *See* Docket No. 206, at 13:8-28. With respect to any uncertainty in the “attributes” to be used in her analysis, Plaintiff explains that the only holdup in that regard is due to the need to consult with a medical specialist “about the clinical wording” and “to ensure that the medical descriptions are accurate.” *Id.* at 14:16-20. The Court agrees that this does not result in Dr. Howlett’s analysis being insufficiently “chart[ed] out” such that it would prevent the Court from making any of the Rule 702 determinations. Other criticisms of the attributes chosen are arguments that Defendant can make to a factfinder. They do not indicate to the Court that Dr. Howlett’s design is unreliable.

However, Defendant next criticizes Dr. Howlett’s damages work – or her proposed work – because she has “fail[ed] to account for supply-side factors[,] such as how competitors might adjust their own prices or offerings in the but-for world, retail margins, cost of goods sold, and alternative brands available to consumers.” Docket No. 202-1, at 13:17-20; *see also id.* at 14:28-15:3 (“[W]ithout modeling how sellers would respond to a demand shift, one cannot determine the but-for price, and Dr. Howlett’s own conjoint proposal contains no such supply-side analysis.”). In the absence of that work, Defendant argues that Plaintiff lacks the necessary damages analysis connected to its liability theory, as required by *Comcast*, because “willingness to pay and market price are not the same thing” – “reduced willingness to pay does not establish what price [Defendant] or a competitor would actually have charged, nor does it show that a consumer who would have shopped elsewhere in the but-for world was damaged in the full amount of what they paid for [Defendant’s] product.” *Id.* at 15:13-18. Defendant identifies other cases where courts have excluded Dr. Howlett’s damages-related work for precisely this reason. It also asserts that Dr. Howlett “herself has no background in supply-side economic analysis or hedonic regression, the tool typically used to supply the missing supply-side component.” *Id.* at 14:20-22.

Plaintiff does not appear to have much of a response here. He simply argues that

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Damages for these consumers equal the difference between the actual price paid and the but-for WTP, multiplied by the number of months subscribed.

*Id.*, ¶ 39, at pg. 143 of 189.

this “does not . . . justify excluding Dr. Howlett’s opinions wholesale” and that “any need for additional economic analysis affects only . . . part of the damages model,” “Component B.” Docket No. 206, at 16:2-5; *see also id.* at 2:3-9 (stating that “[e]ven if additional economic analysis is ultimately required for” Component B, that would not impact Dr. Howlett’s Component A work, nor her materiality survey); *id.* at 19:24-26 (“To the extent Component B requires an additional step to establish a but-for market price, that issue can be addressed separately without excluding the conjoint for all purposes.”). If the Court understands the discussion correctly, it appears that for that “additional economic analysis,” Dr. Howlett intends “to use [Defendant’s] historical prices, sales, and revenue data.” *Id.* at 18:3. Apart from citing to this Court’s decision in *Favell v. University of Southern California*, No. CV 23-846-GW-MARx, 2024 WL 4868259, \*12 (C.D. Cal. Nov. 13, 2024), *see* Docket No. 206, at 18:24-27, however, it does not appear that Plaintiff has explained why that intent would necessarily save “Component B” from exclusion.

With Plaintiff’s apparent concession on the topic of Component B of Dr. Howlett’s proposed damages analysis, Defendant argues that “casting aside Component B . . . only further eviscerate[s] Dr. Howlett’s already flawed damages model” because the proposed method of calculating class-wide damages requires the combination of the Component A damages and the Component B damages into “Component C.” See Docket No. 200-3, ¶ 40, at pg. 143 of 189. Indeed, the Court has to ask: if Plaintiff has only Component A, can he satisfy *Comcast*? Is he not overly-concerned about this point at this juncture because he still has identified a *method* of measuring classwide damages and therefore feels that he has satisfied *Comcast* at the class-certification stage even if the Court excludes the “Component B” part of his expert’s damages analysis? *See Lytle*, 114 F.4th at 1025 (“[W]e have repeatedly found class treatment to be appropriate . . . based upon a showing that damages could be calculated on a classwide basis, even where such calculations have not yet been performed.”). The Court would be inclined to agree with that view, if so, but would appreciate the parties’ further discussion on this point at oral argument on these motions.

Defendant’s final reasons why it believes Dr. Howlett’s damages work should be excluded are that she has purportedly not accounted for class members who paid only a

\$1 trial-subscription fee before cancelling and therefore suffered little to no damages and that she has purportedly not separated injured from uninjured – *i.e.* those who received their *prescribed* Defendant-branded contact lenses – class members. However, as Plaintiff points out, the class Plaintiff seeks to certify *excludes* those who were prescribed Defendant’s lenses, so there is no question of a need to separate injured from uninjured in that particular regard if the Court certifies the class.<sup>6</sup> In addition, Plaintiff has explained how Dr. Howlett’s conjoint analysis both acknowledges and addresses Defendant’s \$1 introductory offer. *See* Docket No. 206, at 21:22-26. The Court agrees with Plaintiff that this issue does not affect its determination that Plaintiff has sufficiently designed its conjoint analysis at this class-certification stage.

### 3. The Position Defendant Takes in Its Reply Brief

In at least certain of its reasoning thus far, the Court has implicitly rejected a position Defendant takes in its Reply brief regarding the state of Ninth Circuit law regarding aspects of expert work that relate to weight, and not admissibility, and thus are more-properly the focus of competing presentations and arguments made in front of, and to, the factfinder, instead of to a court as part of a motion to exclude. It is appropriate to explain the Court’s thinking here.

Defendant’s approach in its Reply is to assert that the contention that flaws in Dr. Howlett’s work only go to weight, as opposed to admissibility, is no longer correct after the Ninth Circuit’s decision in *Engilis* (a case Defendant did not cite or mention in its opening brief). In *Engilis*, the Ninth Circuit discussed a December 2023 amendment to

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<sup>6</sup> In its Reply brief, Defendant criticizes Dr. Howlett’s Conjoint Analysis because it was designed *before* Plaintiff revised his desired class definition to exclude people who were prescribed Hubble Classic Daily lenses. Defendant therefore believes that it still has a justified criticism that Dr. Howlett’s analysis does not allow anyone to determine “whether class members who received exactly the product they were prescribed were, in fact, damaged,” and no methodology has been presented “for determining th[e] value that someone prescribed Hubble lenses would place on them.” Docket No. 207, at 13:9-15. The Court does not quite understand Defendant’s point – what is the relevance of a defect in Dr. Howlett’s study (if the Court were to agree with Defendant that there was one in this regard) if that defect relates only to individuals who would be expressly excluded from any certified class?

Defendant also presents the argument that because – in its telling – the Court cannot determine which class members were not prescribed Hubble lenses, the relevant measure of damages for *any* class member cannot be determined. As an initial matter, it is not clear that Defendant made this argument in its opening brief, and an argument made for the first time in a Reply brief – without a proper justification for waiting that long – will not be considered. In any event, as discussed in connection with Plaintiff’s class-certification motion, Defendant’s premise that there is no possibility of determining which class members were not prescribed Hubble lenses is not, in fact, the case.

Rule 702 of the Federal Rules of Evidence. After noting that the amendment “sought to ‘clarify and emphasize’ that proffered expert testimony must meet the admissibility requirements of Rule 702 by a preponderance of the evidence,” *Engilis* went on to quote the advisory committee’s note to that amendment to the effect that “[b]efore the amendment, ‘many courts’ had erroneously 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.’” 151 F.4th at 1049 (quoting Fed. R. Evid. 702 advisory committee’s note to 2023 amendment). Defendant clearly believes that *Engilis* – a case that, again, it had not cited at all in its opening brief – effected a major sea-change in Ninth Circuit law on this subject.

There are three major problems with Defendant’s reliance on *Engilis* for this proposition. First, *Engilis* is not an *en banc* decision, meaning that it cannot overrule or neuter earlier Ninth Circuit decisions on this point. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (*en banc*). Second, Defendant has not demonstrated that an advisory committee’s note – which, as mentioned above, is what *Engilis* was considering in the section of the opinion Defendant cites and relies upon in its Reply brief, *see* 151 F.4th at 1049 – can overrule otherwise-binding Circuit precedent. Third, *Engilis* itself – perhaps in recognition of the fact that it was not an *en banc* decision – expressly stated that “[f]or present purposes, we need not undertake an exhaustive examination of the effects, if any, of the 2023 amendment on our caselaw.” *Id.* Instead, after noting that the 2023 amendment “was ‘simply intended to clarify’ existing law,” *id.* (quoting Fed. R. Evid. 702 advisory committee’s note to 2023 amendment), the opinion simply “confirm[ed] that a proponent of expert testimony must always establish the admissibility criteria of Rule 702 by a preponderance of the evidence and that there is no presumption in favor of admission.” *Id.*<sup>7</sup>

To be clear, the Court believes that Plaintiff *has* established the admissibility criteria for Dr. Howlett’s work by a preponderance of the evidence. With one minor exception discussed at the conclusion of this paragraph, Defendant has not presented the

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<sup>7</sup> Still yet another reason Defendant’s reliance on *Engilis* as a “silver bullet” killing off Plaintiff’s reliance on “weight” instead of “admissibility” case law might also be mentioned here: that case, unlike this one, was *not* a challenge to an expert at the *class certification* stage.

Court with any sufficient reason for the Court to be troubled in reaching that conclusion. Defendant's reliability-based criticisms of Dr. Howlett's materiality-related opinion because "it fails to actually test the very misrepresentations and omissions challenged in Plaintiff's operative complaint, fails to include any mechanism to detect or control for acquiescence bias, and is comprised of an overbroad consumer survey population," Docket No. 207, at 2:21-3:1, do not preclude that determination, for the reasons set out above. The same is true with respect to at least the reliability of the proposed methodology for "Component A" of Dr. Howlett's damages conjoint study. The only hesitancy the Court has in its thinking here is with respect to "Component B" of Dr. Howlett's damages work, but the Court is not certain that this presents a Rule 702 problem. It may, instead, be a *Comcast* problem (and, for reasons expressed *supra* and *infra*, it may not even be that).

The Court is likely to deny Defendant's motion in its entirety. Before doing so, however, it would appreciate hearing more from the parties as to the effect on this motion (and Plaintiff's class certification motion) of Plaintiff's apparent concession regarding "Component B" of Dr. Howlett's damages work/proposal.

### **B. Class Certification Motion**

As noted earlier, Plaintiff has moved for class certification in connection with his CLRA, UCL and FAL claims, and covering the following class: "All persons residing in California who purchased a subscription for Hubble Classic Daily lenses from hubblecontacts.com between April 25, 2019 and the present who were not prescribed Hubble Classic Daily lenses, and who do not seek personal injury damages."<sup>8</sup> Docket No. 200-1, at 13:23-26.

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<sup>8</sup> The Court has questions as to the delineated class description. It appears to cover "all persons residing in California who purchased a subscription for Hubble Classic Daily lenses from hubblecontacts" in the relevant period and "who were not prescribed Hubble Classic Daily lenses;" but would not include individuals who "seek personal injury damages." The definition seems to limit the class to persons whose prescription included a particular brand of contact lens but were instead given only Hubble Classic Daily lenses. The question arises as to the situation of customers whose prescription did not identify any particular brand of contact lens. FAC ¶ 11 uses – in regards to prescriptions – the phrase "in the case of a private label contact lens," which suggests that a prescription may not always indicate a private label source for such lenses. In that case, would the sale of Hubble Classic Daily lenses to such a prescription holder fall within the class definition? Further, assuming that a customer was in fact prescribed Hubble Classic Daily lenses but the prescription included specific dimensions other than Defendant's "base curve of 8.6mm and diameter of 14.2mm," would the sale of Hubble Classic Daily lenses fall within the class definition?

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Comcast*, 569 U.S. at 33 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). The proponent of class treatment bears the burden of demonstrating that class certification is appropriate. *See Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982); *see also Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018) (“A representative plaintiff may sue on behalf of a class when the plaintiff affirmatively demonstrates the proposed class meets the four threshold requirements of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation.”). Before certifying a class, the trial court must conduct a “rigorous analysis” to determine whether the party seeking certification has met the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996).

Rule 23 requires the party seeking certification to satisfy all four requirements of Rule 23(a)<sup>9</sup> and at least one of the subparagraphs of Rule 23(b). *See id.* at 1234. “A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The court is permitted to consider any material necessary to its determination, though it should not go so far as to engage in a trial of the merits (while, at the same time, recognizing that *some* overlap with merits-considerations *may* be necessary in the certification analysis). *See id.* at 350-51 (noting that the “rigorous analysis” required at class certification will “[f]requently...entail some overlap with the merits of the plaintiff’s underlying claim”); *Ellis v. Costco Wholesale Corp.*, 657 F.3d

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<sup>9</sup> Rule 23(a) requires that the party seeking certification shows:

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

Fed. R. Civ. P. 23(a).

970, 981 (9th Cir. 2011) (“[I]t is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits *if they overlap* with the Rule 23(a) requirements.”) (last emphasis added); *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 949 (9th Cir. 2011); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 n.15 (9th Cir. 2009); *Blackie v. Barrack*, 524 F.2d 891, 900-01 & n.17 (9th Cir. 1975).

1. Numerosity

Rule 23(a)(1) of the Federal Rules of Civil Procedure requires a demonstration that “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Generally speaking, 40 or more individuals in a proposed class has been considered sufficient to satisfy the numerosity requirement. *See, e.g., Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 536 (N.D. Cal. 2012) (“While there is no fixed number that satisfies the numerosity requirement, as a general matter, a class greater than forty often satisfies the requirement, while one less than twenty-one does not.”); *Greko v. Diesel U.S.A., Inc.*, 277 F.R.D. 419, 425 (N.D. Cal. 2011).

Here, Plaintiff has presented evidence that Defendant sold its contact lenses to at least 95,543 different consumers in California since April 28, 2019. As discussed *infra* in connection with the Court’s examination of the topic of predominance, Defendant presents reasons why it may not be possible *right now* to *identify* class members, but nothing it has said in any way suggests that the number of class members could be so perilously low as to fall short of the recognized sufficient minimum number. The Court is quite-comfortable inferring from the number of California consumers (along with evidence concerning the limited distribution of Defendant-brand “fitting kits” and the number of consumer complaints concerning wrong contact-lens brand, base curve or diameter mentioned in Plaintiff’s Reply, *see* Docket No. 208, at 14:23-15:8) that the number of class members here is sufficient to satisfy Rule 23(a)(1)’s numerosity requirement.

2. Commonality

Rule 23(a)(2) requires “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The commonality requirement has been permissively construed. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Although there must be

common questions of law or fact, it is not necessary that *all* questions of law or fact be common. *See id.* (“The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.”); *see also Staton v. Boeing Co.*, 327 F.3d 938, 953-57 (9th Cir. 2003). There needs to be only a single common question. *See Wal-Mart*, 564 U.S. at 359. Crucially, “[w]hat matters to class certification...is not the raising of common ‘questions’ – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Id.* at 350 (omitting internal quotation marks) (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131-32 (2009)).

Plaintiff asserts that the order page on Defendant’s website has, *in the relevant respects*, “remained virtually unchanged during the entire class period,” Docket No. 200-1, at 10:16-17, and that it has contained what it asserts are misrepresentations about selling “Contact Lenses” and in asking for information about “YOUR PRESCRIPTION.” In addition, it is Plaintiff’s theory that Defendant has engaged in actionable *omissions* by: failing to advise consumers that contact lens sellers can only sell contact lenses to consumers in accordance with a consumer’s contact lens prescription; failing to disclose that, by enrolling in Defendant’s subscription service, consumers might receive a contact lens other than the one they were prescribed; failing to disclose that it would seek prescriber verifications of prescriptions for *Defendant’s* lenses (of a particular base curve and diameter) no matter what the consumer had been prescribed (or whether the prescription was expired); and failing to advise consumers that wearing contact lenses other than those prescribed would pose significant health and safety risks.

“California’s UCL, FAL, and CLRA require basic fairness in advertising and permit a civil remedy against those who deceive consumers.” *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771, 777 (9th Cir. 2024). “California’s UCL prohibits any ‘unlawful, unfair or fraudulent business act or practice.’” *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020) (quoting Cal. Bus. & Prof. Code § 17200). “California’s FAL prohibits any ‘unfair, deceptive, untrue or misleading advertising.’” *Id.* (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 937 (9th Cir. 2008)). “Any

violation of the [FAL] . . . necessarily violates the [UCL].” *Id.* (quoting *Williams*, 552 F.3d at 938) (omitting internal quotation marks). “California’s CLRA prohibits ‘unfair methods of competition and unfair or deceptive acts or practices.’” *Id.* (quoting Cal. Civ. Code § 1770). “Claims under each of these statutes are governed by the ‘reasonable consumer’ standard, which requires a plaintiff to ‘show that members of the public are likely to be deceived’ by the defendant’s marketing claims.” *Whiteside*, 108 F.4th at 777 (quoting *Williams*, 552 F.3d at 938). The question of materiality is also common to these claims. *See Noohi*, 146 F.4th at 868, 871; *see also Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (indicating that a plaintiff may prove reliance on an omission claim “by simply proving ‘that, had the omitted information been disclosed, one would have been aware of it and behaved differently’” and “[t]hat one would have behaved differently can be presumed, or at least inferred, when the omission is material”) (quoting *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1093 (1993)).

The question of whether the alleged misrepresentations and/or omissions are actually actionable or would merit relief, if true, is not presently before the Court. The only current question is whether resolving the merits of these claims presents common questions. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 666-67 (9th Cir. 2022) (en banc) (“In determining whether the ‘common question’ prerequisite is met, a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial.”). It is obvious that it does. Whether these misrepresentations/omissions are problematic (*e.g.*, unfair, deceptive) or not under the CLRA, UCL and FAL will be resolved “in one stroke” across the class. *Wal-Mart*, 564 U.S. at 350 (indicating that claims “must depend upon a common contention” that “must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”). As Plaintiff also argues, the materiality element resident within each of these claims, as to each of the alleged misrepresentations and/or omissions, is also *capable* of being resolved “in one stroke,” aided by the work of Dr. Howlett. *See Noohi*, 146 F.4th at 868 (indicating that materiality for CLRA claim is adjudged according to “reasonable consumer standard,” meaning that both materiality

and reliance “under the CLRA is generally susceptible to common proof” and that “[t]he same is true as to whether a statement is likely to deceive ‘members of the *public*’ under the FAL and UCL,” making “deceptive marketing claims under these California consumer protection statutes . . . generally ‘ideal for class certification’”; *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011) (indicating that, in CLRA claim, causation can be established by materiality showing, and materiality showing leads to inference of reliance for the entire class). This is true in these types of cases even before considering Plaintiff’s additional argument for why materiality is a common question here – and can be proved by an expert report Plaintiff has presented that is *not* the subject of Defendant’s companion motion-to-exclude – under the theory that materiality is present where a product creates an “unreasonable safety risk,” as he asserts is the case with improperly-fitted or non-prescribed contact lenses. *See Daniel*, 806 F.3d at 1225.

Defendant does not appear to challenge Plaintiff’s ability to satisfy the commonality requirement in this case. Instead, as discussed further *infra*, it leads the argument section of its Opposition brief with a lengthy explanation of why it concludes Plaintiff’s class-certification ship falters on the rocks of the independent – though certainly related – *predominance* requirement.

Plaintiff has satisfied Rule 23(a)(2)’s commonality requirement. However, as noted in footnote 8, *supra*, the Court has questions as to the scope of the class definition.

### 3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. “The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose . . .” *Id.* (citation and internal quotation marks omitted). “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Id.* (citation and internal quotation marks omitted); *see also General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (“*Falcon*”) (indicating that class

representatives “must be part of the class and possess the same interest and suffer the same injury as the class members”); Stevenson & Fitzgerald, *Rutter Group Prac. Guide: Federal Civ. Pro. Before Trial* (The Rutter Group 2026) (“Stevenson & Fitzgerald”), ¶ 10:289 (“A plaintiff’s claim is typical if it: arises from the same event or practice or course of conduct that gives rise to the claims of other class members; and is based on the same legal theory as their claims.”) (emphases omitted). The representative plaintiff’s claims need not be identical to those of the class, but rather need only be “reasonably co-extensive with those of absent class members . . . .” *Hanlon*, 150 F.3d at 1020. In practice, “[t]he commonality and typicality requirements of Rule 23(a) tend to merge.” *Falcon*, 457 U.S. at 157 n.13.

Here, Plaintiff’s claims are based on the same alleged misrepresentations and/or omissions, and he claims that he was injured by this conduct as a result of his payment to Defendant. There is no distinction between his theory and claims – insofar as the claims he seeks certification for – and those of the class he seeks to represent.

Defendant asserts that Plaintiff is not even a member of the putative class because he asserts claims for physical injury. Those claims for physical injury, however, are not part of claims for which he seeks class certification. What he seeks outside of that class construct is not relevant to his typicality within it. In addition, whether or not Plaintiff knew he was purchasing Defendant’s branded lenses does not address the theories of misrepresentations/omissions Plaintiff has identified in support of his claims (at least as part of his commonality/predominance showing on this motion). *See* Docket No. 208, at 4:7-9 (“Plaintiff’s theory is that consumers were deceived into purchasing contact lenses that they were not prescribed, not that they did not know that they were purchasing Hubble lenses.”). At best, therefore, Defendant appears to have identified differences relevant to Plaintiff’s individual setting that are not actually relevant to this *class* litigation.

Typicality is satisfied.

#### 4. Adequacy

Representative parties must also fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a)(4). Generally speaking, “[w]hether the class representative[] satisf[ies] the adequacy requirement depends on the qualifications of

counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (omitting internal quotation marks) (quoting *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) and *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)); *see Ellis*, 657 F.3d at 985 (“To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: ‘(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?’”); *see also Sali*, 909 F.3d at 1007; *Staton*, 327 F.3d at 957; *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (“*Sands*”) (“The record indicates clearly that [the class representative] understands his duties and is currently willing and able to perform them. The Rule does not require more.”).

The Court sees no sign of any antagonism or conflict between Plaintiff’s interests and those of the class he seeks to represent, no sign of collusion, and no reason to question the adequacy of Plaintiff’s counsel to lead the charge here. Plaintiff and his counsel have prosecuted this claim to a Fourth Amended Complaint, through motions to dismiss, discovery, and a mediation, and are now seeking certification. They are clearly litigating the action vigorously on behalf of the putative class.

As Plaintiff notes, Defendant’s only argument directed towards adequacy appears to be the assertion – addressed *supra* – that Plaintiff is not a member of the class because he seeks personal injury damages. *See* Docket No. 201, at 23:14-15. That is not an adequacy-based criticism.

Plaintiff has satisfied Rule 23(a)(4).

##### 5. Rule 23(b)(3)

As noted above, in addition to meeting the requirements of Rule 23(a), plaintiffs seeking to proceed as a class must demonstrate satisfaction of one of the subparagraphs of Rule 23(b). Here, Plaintiff proceeds *primarily*<sup>10</sup> by way of Rule 23(b)(3). Under Rule

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<sup>10</sup> Plaintiff has proposed that, in the alternative to Rule 23(b)(3) in case the Court is concerned about class-wide monetary relief, the Court could certify a liability-only class under Rule 23(c)(4). For the reasons expressed herein – though *perhaps* with the exception of “Component B” of Dr. Howlett’s damages

23(b)(3):

[a] class action may be maintained if Rule 23(a) is satisfied and if:

...

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

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The predominance analysis focuses on “the legal or factual questions that qualify each class member’s case as a genuine controversy” and is “much more rigorous” than commonality. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). However, it does not involve counting the number of common issues, but weighing their significance. *See, e.g., Sands*, 244 F.3d at 1163 (contrasting the “number and importance” of common issues with the “few” and “relatively easy” individualized issues). In addition, the predominance analysis looks, at least in part, to whether there are common issues the adjudication of which “will help achieve judicial economy,” further the goal of efficiency and “diminish the need for individual inquiry.” *See Vinole*, 571 F.3d at 939, 944 (quoting and citing *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001)); *see also In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) (“A principal purpose behind Rule 23 class actions is to promote ‘efficiency and economy of litigation.’”) (quoting *Am. Pipe &*

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analysis – the Court does not see a serious problem with Plaintiff’s proposed damages theories and/or methodologies at this point, so there is no real need, at least at this juncture, to consider that alternative.

In addition, Plaintiff also argues that he can achieve Rule 23(b)(2) certification. If he is able to secure Rule 23(b)(3) certification, the Court does not see a need for an *additional* Rule 23(b)(2) certification. As such, the Court would only reach that topic if the Court ultimately does not certify under Rule 23(b)(3). For the record, the only disputes the parties have discussed in connection with a potential Rule 23(b)(2) certification are whether the primary class relief sought is monetary such that certification under Rule 23(b)(2) cannot be had and whether injunctive relief afforded through Defendant’s earlier settlement with the Federal Trade Commission renders injunctive relief inappropriate here.

*Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)); *Stevenson & Fitzgerald*, ¶ 10:411 (“The objective is to promote economy and efficiency in actions that are primarily for money damages. Where common questions ‘predominate,’ a class action can achieve economies of time, effort, and expense as compared to separate lawsuits, permit adjudication of disputes that cannot be economically litigated individually, and avoid inconsistent outcomes, because the same issue can be adjudicated the same way for the entire class.”).

The key questions in this litigation appear to be whether the alleged misrepresentations/omissions are unlawful, unfair, fraudulent, and/or deceptive (along with the subsidiary/threshold question of whether Defendant uniformly *made/failed to make* the alleged misrepresentations/omissions). The question of whether members of the public are “likely to be deceived” by Defendant’s practices will likely be a major focus of effort amongst the parties. A major issue connected to that showing will be whether the alleged misrepresentations/omissions are material. These are all common questions, and the Court concludes that they predominate.

As for its fight against that conclusion, Defendant asserts that “the Court can never determine which potential class members, if any, were prescribed a brand of contact lens other than Hubble Classic Daily lenses without nearly 90,000 individualized inquiries” because Defendant is not required to obtain a copy of any individual consumer’s prescription and if a prescriber does not respond within eight hours of Defendant’s verification request, the (unobtained) prescription is permissibly deemed “passively” verified, resulting in Defendant maintaining prescription records for only approximately 6,000 of the roughly 95,000 potential class members. Docket No. 201, at 1:9-16. However, if anything, this would be a problem relevant to *class-membership*, not to the theories of liability underlying Plaintiff’s CLRA, UCL and FAL claims. It is therefore not a Rule 23 problem. It does not skew the predominance analysis because it is not an issue that would need to be resolved in front of any factfinder as part of any liability showing. It also does not describe a problem that Defendant has in any way suggested would bring the number of class members anywhere close to the 40 individuals that are typically viewed sufficient from a numerosity perspective. That numerosity-evidence may be “overinclusive,” Docket No. 201, at 22:17-18, does not mean that the Court has a concern that fewer than 40 individuals are covered by the class given the

overall numbers of California purchasers.

To the extent Defendant presents this as an “ascertainability” issue, *see id.* at 22:3-28, ascertainability is not a Rule 23 requirement. *See True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 929 (9th Cir. 2018); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125-33 (9th Cir. 2017) (rejecting argument that Rule 23 requires that proposed class representative “demonstrate that there is an administratively feasible way to determine who is in the class”). Moreover, as Plaintiff explains in his Reply brief, membership in the class can be demonstrated by the class members themselves (through their own provision of their own prescriptions and/or through affidavits on the topic, for example), quite apart from whatever evidence Defendant has in its records with respect to the members’ prescription specifics. Thus, apart from being an issue that does not properly come into consideration when assessing Rule 23’s preponderance requirement, it is inaccurate to state or suggest that there are unmanageable roadblocks to assessing class-membership here.

While Defendant further contends – also in the context of discussing predominance – that its “customers were exposed to different versions of [Defendant’s] website, as well as to different business practices and prescription verification methods,” Docket No. 201, at 2:23-25, it does not appear that these differences concerned the alleged misrepresentations/omissions that Plaintiff has identified/relies upon here. As a result, Defendant’s argument that materiality and reliance cannot be shown across-the-putative-class – while an accurate point to make *in an appropriate case* – does not apply here because, again, Defendant has not shown differentiation in the respects that are germane/important to Plaintiff’s theory(ies) of liability. Moreover, if, as Defendant asserts, “[a]ll consumers were asked to verify that their prescription matched the Hubble Classic Daily lenses specifications” and “therefore were told they were purchasing Hubble-brand lenses,” Docket No. 201, at 12:16-18, that is not a reason that commonality (or predominance) would be defeated. That would simply present *another common issue* potentially impacting a factfinder’s ultimate determination and only bolsters the conclusion that the independent-but-related predominance requirement is satisfied in this

case.<sup>11</sup>

With respect to the “superiority” aspect of Rule 23(b)(3), the Court would agree with Plaintiff’s argument that the size of any individual recovery would make the pursuit of individual actions against Defendant unlikely, and cost-prohibitive. There is no other already-begun litigation covering this matter that the Court is aware of, no reason any other “particular forum” would be better-suited to handle litigation of this type (based upon California statutory claims impacting potentially tens-of-thousands of California consumers) against this Defendant, and no one has mentioned any “manageability” problems associated with handling this case as a class case (other than, conceivably, the class-membership issue already discussed).

Defendant asserts that superiority is not present here and/or that individual issues will predominate because some class members received a refund either from Defendant directly or as the result of a 2022 settlement Defendant reached with the Federal Trade Commission. Contrary to Defendant’s argument, there will not be a need to conduct “90,000 mini trials,” and adjustments to monetary relief because of any refunds – an individualized damages issue – does not prevent certification. *See, e.g., Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019); *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). In any event, Defendant has not demonstrated that the compensation *any* individual class member(s) received by way of any refund program made that/those individual(s) whole. As such, the Court could not conclude that such a program prevents this class litigation from meeting superiority or predominance requirements.

Finally, to be clear, though it is at best unclear whether Defendant even makes such an argument, there is no *Comcast* issue that would make individualized/uncertain damages a certification-stage problem. *See Nguyen*, 932 F.3d at 817 (“In short, ‘[u]ncertainty regarding class members’ damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages.’”) (quoting

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<sup>11</sup> The same is true with respect to Defendant’s assertions that it actually was permissibly *passively* verifying prescriptions. As Plaintiff explains in his Reply brief, Defendant’s “asserted compliance with the CL Rule through passive verification does not resolve whether its representations and omissions were deceptive under California’s consumer-protection statutes” – “resolving that common question [does not] require the Court to examine every individual verification request.” Docket No. 208, at 13:14-18.

*Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017)). Here, Plaintiff has proposed a full-restitution model for “damages” recovery. In the absence of that, Plaintiff has backup theories, including Dr. Howlett’s conjoint analysis. These are both theories that are clearly tied to the alleged harmful conduct and to Plaintiff’s theories of liability. The Court therefore disagrees with Defendant to the extent it asserts – as part of a “predominance” argument – Plaintiff has not come up with a “relevant” class-wide measure of harm. *See* Docket No. 201, 3:1-2. As to whether the damages measure is “reliable,” *see id.*, to the extent Defendant is not able to entirely preclude the measure and Plaintiff’s evidence via Rule 702 of the Federal Rules of Evidence – it appears it is not able to do so, as discussed earlier – Defendant is free to present to the factfinder the reasons for why it believes Plaintiff’s damages measure is problematic.

The Court concludes that a Rule 23(b)(3)-based certification is appropriate here.

#### 6. Arbitration/Class Action Waiver

As a final reason why it asserts no class can be certified here (though without tying it to any particular provision of Rule 23(a) or (b)), Defendant asserts that its Terms of Service contain an arbitration agreement, and one that requires pursuit of only individual claims. A similar issue led the Ninth Circuit to affirm a denial of class certification in *Lawson v. Grubhub, Inc.*, 13 F.4th 908, 913 (9th Cir. 2021).

The Court is unaware of Defendant having filed any motion to compel arbitration in this case. As Plaintiff argues in his Reply brief, there would be a real question as to whether Defendant has waived its right to rely upon that agreement/those provisions by virtue of litigating this matter – filed on April 28, 2023 – in court. In any event, even that question would seem to be common<sup>12</sup> (at the very least to what presumably could become a *subclass*), to the extent the parties appropriately tee it up for consideration.

### III. Conclusion

For the reasons the Court has explained, it is inclined to deny Defendant’s motion and to grant Plaintiff’s motion for class certification. However, as indicated, it has invited further limited discussion regarding issues: (1) pertaining to “Component B” of

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<sup>12</sup> *See* Docket No. 201, at 27:3-5 (asserting that the Terms of Service contained a binding arbitration clause and agreement to bring claims only on an individual basis “at all relevant times”); *id.* at 29:25-26 (asserting that “[t]he putative class members each agreed to arbitrate”).

Dr. Howlett's damages analysis/plan, and (2) the language of Plaintiff's class definition.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

|          |                                                   |      |                  |
|----------|---------------------------------------------------|------|------------------|
| Case No. | CV 23-4570-GW-MRWx                                | Date | October 15, 2026 |
| Title    | <i>Wesley Africa v. Vision Path, Inc., et al.</i> |      |                  |

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|------------------------|--------------------------------------------|
| Present: The Honorable | GEORGE H. WU, UNITED STATES DISTRICT JUDGE |
|------------------------|--------------------------------------------|

Javier Gonzalez

Maria Bustillos

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Ryan J. Carlson  
Andrew J. Kubik

David J. Carrier

**PROCEEDINGS: PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [200]; and  
DEFENDANT VISION PATH, INC.'S MOTION TO EXCLUDE  
EXPERT REPORT, TESTIMONY, and OPINIONS OF DR.  
ELIZABETH HOWLETT, PH. D [202]**

The Court issued its Tentative Ruling on the above-entitled Motions [200, 202] on October 14, 2026 [210]. Oral argument is held. The Tentative Ruling is adopted as the Court's Final Ruling. The Court GRANTS Plaintiff's motion for class certification and DENIED Defendant's Motion to Exclude.

A scheduling conference is set for October 22, 2026 at 8:30 a.m. The parties are to file a joint scheduling report by noon on October 20, 2026.

Initials of Preparer JG

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