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June 9, 2021

No.:	21-80061
D.C. No.:	4:18-cv-06926-YGR
Short Title:	Thomas Bailey v. Rite Aid Corporation

Dear Appellant/Counsel

This is to acknowledge receipt of your Petition for Permission to Appeal under Federal Rule of Civil Procedure 23(f).

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The file number and the title of your case should be shown in the upper right corner of your letter to the clerk's office. All correspondence should be directed to the above address pursuant to Circuit Rule 25-1.

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PLEASE REVIEW PARTIES AND COUNSEL LISTING

We have opened this appeal/petition based on the information provided to us by the appellant/petitioner and/or the lower court or agency. EVERY attorney and unrepresented litigant receiving this notice MUST immediately review the caption and service list for this case and notify the Court of any corrections.

Failure to ensure that all parties and counsel are accurately listed on our docket, and that counsel are registered and admitted, may result in your inability to participate in and/or receive notice of filings in this case, and may also result in the waiver of claims or defenses.

PARTY LISTING:
Notify the Clerk immediately if you (as an unrepresented litigant) or your client(s) are not properly and accurately listed or identified as a party to the appeal/petition. To report an inaccurate identification of a party (including company names, substitution of government officials appearing only in their official capacity, or spelling errors), or to request that a party who is listed only by their lower court role (such as plaintiff/defendant/movant) be listed as a party to the appeal/petition as an appellee or respondent so that the party can appear in this Court and submit filings, contact the Help Desk at http://www.ca9.uscourts.gov/cmecf/feedback/ or send a letter to the Clerk. If you or your client were identified as a party to the appeal/petition in the notice of appeal/petition for review or representation statement and you believe this is in error, file a motion to dismiss as to those parties.

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If you will be replaced by substitute counsel, new counsel should file a notice of appearance/substitution (no form or other attachment is required) and should note that they are replacing existing counsel. To withdraw without replacement, you must electronically file a notice or motion to withdraw as counsel from this appeal/petition and include your client's contact information.

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Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS F. BAILEY, on behalf of himself and others similarly situated,
Plaintiff-Respondent,

v.

RITE AID CORPORATION,
Defendant-Petitioner.

On Appeal from April 28, 2021 Order Granting Class Certification
United States District Court, Northern District of California
The Honorable Yvonne Gonzalez Rogers
Case No. 4:18-cv-06926-YGR

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Petitioner Rite Aid Corporation states that it has no parent company and that no publicly held company owns 10 percent or more of its stock.

Dated: June 9, 2021

FOLEY & LARDNER LLP

s/ Jaikaran Singh
Jaikaran Singh

Attorneys for Defendant-Petitioner Rite Aid Corporation

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1332(d) because the named plaintiff is a citizen of a different state than Defendant, there are more than 100 putative class members, and more than $5 million is in controversy. (Dkt. 15, ¶¶ 17-19.)[1]

This Court has jurisdiction over this Petition under 28 U.S.C. § 1292(e), Fed. R. Civ. P. 23(f), and Fed. R. App. P. 5(a). The District Court's order granting class certification (Dkt. 129) was entered on April 28, 2021. Defendant timely moved for leave to seek reconsideration under N.D. Cal. Civ. L. R. 7-9 on May 10, 2021 (Dkt. 133), rendering the decision non-final. *See Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 634 (9th Cir. 2020) ("a timely filed motion for reconsideration extends the deadline for appealing the certification decision" until "fourteen days from the reconsideration order"). The District Court denied that motion by order entered May 26, 2021. (Dkt. 134.) This Petition is filed within 14 days of that decision, as computed under Fed. R. Civ. P. 6(a). Fourteen calendar days from May 26, 2021 is June 9, 2021.

[1] All "Dkt. _" citations are to the District Court docket.

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PRELIMINARY STATEMENT

The District Court committed manifest error in certifying a class of California consumers who purchased Rite Aid Rapid Release Gelcaps, an Over-the-Counter ("OTC") acetaminophen product whose label Plaintiff claimed to be deceptive ***if*** compared to another Rite Aid store brand acetaminophen product label that consumers did not purchase and may never have seen. Rather than conducting the required rigorous analysis under Rule 23, the District Court uncritically excused Plaintiff from demonstrating by a preponderance of the evidence that there was common proof of uniform exposure and class-wide materiality to the alleged misrepresentation at issue to support a presumption of reliance.

This is not a typical product mislabeling case where the challenged product label is alleged to be false or misleading ***on its face***. Rather, the crux of Plaintiff's complaint against Rite Aid Corporation ("Rite Aid") is that consumers who purchased Rite Aid Rapid Release Gelcaps were tricked into believing that they were getting a ***"faster"*** dissolving acetaminophen product ***when*** they saw the words "rapid release" on the gelcaps product label, ***but not*** on the label of the less expensive Rite Aid acetaminophen tablets or caplets product, despite the fact that the tablets and caplets "can be equally effective in the same, if not faster, time period." (Dkt. 15, FAC, ¶ 10.) The District Court found that Bailey's theory of liability required

consumers to make a particular comparison between the labels and prices of Rite Aid gelcaps and tablets or caplets.

Despite this finding, the District Court determined that Plaintiff had met his evidentiary burden to show uniform exposure and class-wide materiality without requiring common proof that class members consistently made the particular product comparison, without which there is no misrepresentation in the first place. Instead, simply because the Rite Aid gelcaps as well as the Rite Aid tablets and caplets are shelved in the pain relief section of a store within "eye-view" of one another (although on different shelves and among many other similar pain relief products), the District Court found class-wide exposure. Likewise, in finding class-wide materiality, the District Court largely relied on Plaintiff's advertising expert, Bruce Silverman, who opined that the phrase "rapid release" is material, while at the same time conceding that consumers would view the words "rapid release" to mean "faster" release ***only when*** they make the particular product comparison.

The District Court's decision contravenes this Court's analysis and requirements for common exposure to a uniform misrepresentation . Permission to appeal should be granted to correct these manifest errors before the Parties and the District Court expend substantial time, resources, and expense to litigate this case on a class basis. Review is also needed to clarify the application of these important legal principles in a case of first impression relating to a misrepresentation that is

received by consumers solely when two particular product labels have to be compared to each other—which, absent interlocutory review, will likely evade appellate scrutiny—as well as to ensure proper application and uniformity in the disposition of similar false advertising cases given controlling Ninth Circuit decisions.

STATEMENT OF THE FACTS

I. Rite Aid Rapid Release Gelcaps.

Rite Aid sells name brand and generic versions of OTC analgesic drugs such as acetaminophen—an OTC pain reliever and fever reducer that comes in a variety of forms, including liquid, tablets, caplets, and gelcaps. (FAC, ¶¶ 3-8, 24.) Among the name brand OTC acetaminophen products Rite Aid sells are Tylenol Extra Strength Rapid Release Gelcaps. All varieties of Tylenol gelcaps have the phrase "Rapid Release Gels" on the product label to differentiate them from other name brand OTC gelcap products and Tylenol's original gelcap formulation.

Rite Aid sells generic versions ofTylenol products under its own Rite Aid store brand in three varieties: Rite Aid Extra Strength Acetaminophen Rapid Release Gelcaps; Rite Aid Extra Strength Acetaminophen PM Rapid Release Gelcaps; and Rite Aid Sinus Congestion & Pain Acetaminophen Rapid Release Gelcaps. (FAC, ¶ 46.) Like its Tylenol gelcap counterpart after which it was originally modeled, each variety of the Rite Aid gelcaps has the phrase "Rapid Release Gelcaps" on the

lower right hand corner of the product label. Rite Aid also sells generic versions of each of the tablet forms of acetaminophen products, but, just like the comparable Tylenol tablet products, the labels do not say "rapid release."

Consistent with the philosophy underlying the sale of all generic drugs, Rite Aid's acetaminophen products mimic Tylenol in terms of the look of the pill, packaging, and product name. The Rite Aid product is placed ***immediately to the right*** of the Tylenol product of the same formulation on store shelves to convey to consumers that the products are comparable, but Rite Aid's is significantly less expensive. The labels of Rite Aid's acetaminophen products, whether gelcaps or not, direct consumers to compare the active ingredient to the Tylenol product of the same formulation. Rite Aid likewise uses bright yellow tags on the store shelf underneath its Rite Aid acetaminophen products that encourage consumers to compare them to the corresponding Tylenol brand product. (*See* Dkt. 109-5, Butler Report, ¶ 49, Fig. 1; Dkt. 92-6, Silv. Report, ¶ 68, Figs. 10-11.)

II. District Court Proceedings.

Plaintiff filed this class action lawsuit because he was allegedly deceived into believing that the Rite Aid gelcaps work faster than the Rite Aid tablets when, in comparing the two store brand products of different pill types, he saw the phrase "Rapid Release Gelcaps" on the gelcaps product label but not on the label of the tablets product. (FAC, ¶¶ 76-77.) The complaint brought claims for violations of

California's Unfair Competition Law (the "UCL"), False Advertising Law ("FAL"), and the Consumers Legal Remedies Act (the "CLRA"), as well as for express and implied breach of warranty, all based on the assertion that the label phrase "rapid release" deceives consumers into thinking that the product provides ***faster*** relief than other Rite Aid store brand acetaminophen products. Rite Aid moved to dismiss. The District Court dismissed Plaintiff's breach of warranty claims, holding that "plaintiff fails to refer to or to allege that there is actual language on the packaging for defendants Rite Aid RR Gelcaps (or elsewhere on the product), which actually *promises faster relief*." (Dkt. 60, MTD Order at 12:20-22 (emphasis in original)). It likewise noted that Plaintiff had not "cited to any actual wording which incorporates comparative representations—i.e., faster as opposed to fast or more rapid as opposed to rapid." (*Id.* at 12:23-25.)

Plaintiff sought class certification of his remaining claims on October 19, 2020. (Dkt. 92.) Rite Aid filed an opposition on January 15, 2021. (Dkt. 107-109.) Among the grounds raised in opposing Plaintiff's motion, Rite Aid argued that Plaintiff failed to meet the predominance requirement because he had not shown class-wide exposure to the alleged misrepresentation or that materiality could be established on a class wide basis. (Dkt. 107-4, Class Cert. Opp. at 14:22-16:11, 22:12-25:6.) In support of its opposition, as discussed in detail below, Rite Aid submitted a consumer survey conducted by Sarah Butler of NERA that showed that

consumers did not make the comparisons required by Plaintiff's theory and did not interpret "rapid release" to mean faster release, as Plaintiff alleged. (Dkt. 109-5, Butler Report.)

At oral argument, on the issue of in-store product placement, Plaintiff argued that the Rite Aid gelcaps and Rite Aid tablets were always within "eye-view" of each other. (Dkt. 131, Class Cert. Tr. at 11:1-17.) While Rite Aid acknowledged that the two products were in "general view" on different shelves in the pain relief section of the store aisle among many other pain relief products, it argued the more fundamental point that Plaintiff failed to show that consumers compared the Rite Aid product labels, such that there was uniform exposure to the alleged misrepresentation on the Rite Aid gelcaps label to support a presumption of reliance. (*Id.* at 8:24-9:25, 10:18-11:8, 11:18-12:8, 12:17-13-3.)

Both the District Court and Plaintiff acknowledged Plaintiff's evidentiary burden to demonstrate whether consumers made the alleged Rite Aid to Rite Aid brand product "visual comparison"[2]:

> **The Court:** Okay. But – but the label is insufficient. Right? Because the label under the FDA regs is in fact accurate. The only way this case survived in the first instance, which is why I started with the complaint, is because of a comparison. So the question is the comparison, not just the label.
>
> **Mr. Edwards:** Right.

[2] During oral argument, Plaintiff confirmed that "the whole point" is that class members made a "visual comparison" between the labels of the two particular Rite Aid brand products. (Class Cert. Tr. at 26:9-12.)

The Court: So the question is the comparison, not just the label.

Mr. Edwards: Understood, Your Honor.

(Class Cert. Tr. at 15:2-10, 13:17-25.)[3]

On April 28, 2021, the District Court granted in part Plaintiff's motion for class certification under Rule 23(b)(3). (Dkt. 129, Class Cert. Order.) It found, "Bailey's theory of liability . . . requires a comparison by consumers of the label and price of the Rite Aid gelcaps against the labels and prices of cheaper Rite Aid acetaminophen tablets placed near the gelcaps." (*Id.* at 5:17-19.) The District Court also determined that because Plaintiff's "theory of economic harm is predicated on consumers having been misled into thinking that the Rite Aid gelcaps are faster-acting than Rite Aid tablets by virtue of having compared the labels and prices of both products, only consumers who purchased Rite Aid gelcaps at brick-and-mortar Rite Aid stores could have suffered the economic injury alleged in the FAC." (*Id.* at 6:4-8.)

While acknowledging that the alleged misrepresentation comes from a comparison between the Rite Aid gelcaps product label and pricing against the Rite Aid tablets product label and pricing at brick-and-mortar stores, the District Court

[3] *See also* Dkt. 134, Reconsideration Order at 4 n. 4 ("The question of whether the proposed class members made the price and label comparison upon which Bailey's theory of liability depends relates not to exposure, but to whether Bailey showed likelihood of deception and reliance.")

erroneously held that it could infer uniform exposure to the challenged "rapid release" misrepresentation because the two products were within "eye-view" of each other. (*Id.* at 10:3-10.)[4]

REASONS FOR ALLOWING THE APPEAL

Rule 23(f) permits interlocutory review of a class certification order that is "manifestly erroneous" or where "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important to both the specific litigation and generally." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). Both reasons under Rule 23(f) support review here.

This petition implicates a fundamental legal issue regarding the elements of uniform exposure and class-wide materiality that virtually always are considered in false advertising class cases brought under the UCL, FAL, and CLRA, and raises questions of first impression with respect to their application where the alleged label misrepresentation is communicated to consumers only after a comparison with another particular product. The District Court committed manifest error by finding

[4] The District Court incorrectly concluded that Rite Aid did not dispute class-wide exposure to the alleged "rapid release" label misrepresentation simply because it acknowledged in oral argument that both Rite Aid gelcap and tablet products were in "general view" of each other on different shelves among many other pain relief products. Similarly, the District Court mistakenly believed that Rite Aid was not disputing that the predominance requirement was met with respect to Plaintiff's UCL and FAL claims because the District Court incorrectly believed that "reliance is not an element of a UCL and FAL claim." (Class Cert. Order at 22:14-18.) This was clear legal error.

that the predominance requirement was met without requiring Plaintiff to demonstrate, by a preponderance of the evidence, common proof of uniform exposure to the alleged misrepresentation and that materiality of the label phrase "rapid release" could be established on a class-wide basis using common proof. *See Olean Wholesale Grocery Coop., Inc., el al. v. Bumble Bee Foods LLC, et al.,* 993 F.3d 774, 784 (9th Cir. 2021).

Under Plaintiff's theory of liability, the "rapid release" label is deceptive or misleading only ***if*** a consumer compares the label and price of the Rite Aid gelcaps against the label and price of the Rite Aid tablets or caplets. While the District Court found that Plaintiff's theory required consumers to make this particular product comparison, it excused Plaintiff from demonstrating this essential fact with common proof in establishing uniform exposure and class-wide materiality as part of his UCL, FAL and CLRA claims.

I. The District Court Committed Manifest Error By Improperly Inferring Class-Wide Exposure to the Alleged Misrepresentation.

Class certification of UCL, FAL and CLRA claims are available "only to those class members who were ***actually*** exposed to the business practice at issue." *Berger v. Home Depot USA, Inc*., 741 F.3d 1061, 1068 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, —— U.S. ——, 137 S. Ct. 1702, 198 L.Ed.2d 132 (2017) (emphasis added). This Court has consistently held that

likelihood of deception[5] cannot be resolved with common evidence where not every class member was exposed to the ***same*** allegedly misleading conduct. *See Berger*, 741 F.3d at 1068-1069; *Mazza v. American Honda Motor Company, Inc.*, 666 F.3d 581, 596 (9th Cir. 2012); *see also Cabral v. Supple LLC*, 608 Fed.Appx. 482, 483 (9th Cir. 2015) ("In a case of this nature, one based upon alleged misrepresentations in advertising and the like, it is critical that the misrepresentation in question be made to all of the class members.").

In this case, Plaintiff's theory of deception required that consumers compare the labels and prices between Rite Aid gelcaps and Rite Aid tablets or caplets.[6] Nevertheless, Plaintiff's only evidence to show that consumers make this required product comparison was his own highly inconsistent testimony whereby he testified that he did not look at any other products or prices before purchasing the Rite Aid gelcaps, and then later conveniently rehabilitated his prior testimony. (Class Cert.

[5] "'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003).

[6] As the District Court acknowledged, because the phrase "rapid release" is a non-comparative, neutral statement, just viewing the "rapid release" label on the Rite Aid gelcaps alone would not in itself cause consumers to be deceived or misled into thinking it is a faster or quicker working acetaminophen product than the Rite Aid tablets or caplets. (Class Cert. Tr. at 15:2-10; 13:17-25.)

Order at 17:4-7.) Plaintiff submitted no evidence that a single other consumer made that same comparison. *See Zakaria v. Gerber Products Co.*, 15-cv-00200 JAK(Ex), 2016 WL 6662723, at *11 (C.D. Cal. March 23, 2016) ("The party seeking class certification has the burden to show that there was class-wide exposure to the alleged misrepresentations."); *see also Konik v. Time Warner Cable*, No. CV 07–763 SVW (RZx), 2010 WL 8471923, at *9 (C.D. Cal. Nov. 24, 2010) (finding class certification is improper absent evidence "that the challenged statements were actually false as applied to all (or even most) class members").

Plaintiff's advertising expert, Bruce Silverman, testified that at most consumers had an "opportunity to see" both products on the store shelving.[7] Silverman was unqualified to opine and, in fact, never opined on whether consumers were uniformly exposed to the alleged misrepresentation by making the requisite comparison because he made no examination of that issue.[8]

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[7] Having an opportunity and availing oneself of that opportunity, much less doing a label and price comparison of two specific products, are completely different things. From his visits to three Rite Aid stores near his home, Silverman opined that it was "very easy . . . to compare prices," ***without saying anything*** on the more pertinent issue of comparing label wording. (Silv. Report, ¶ 71.) The Court erroneously relied on this evidence as "common proof." (Class Cert. Order at 11:21-12:2.)

[8] Silverman did not examine how long consumers spent looking at pain relief products or how many product labels they reviewed, as this was not part of the scope of his assignment. (Dkt. 111-11, Silv. Dep. 25:1-11.) He did acknowledge, however, that when consumers became regular customers and knew what product they liked, they threw it in the cart without making any product comparison. (*Id.* at

In contrast, Rite Aid submitted a consumer survey, the purpose of which was to understand how consumers actually shop and what they look at and what influences their purchase, including what comparisons, if any, they make when purchasing the pain relief products at issue. (Butler Report, ¶¶ 23, 65-66, 85, 97-98, Table 6.) Among other things, the results of the survey showed that nearly 27% of past purchasers of the Rite Aid gelcaps said they did not consider ***any*** other brands or products. (*Id.* at ¶ 65, Table 6.) Of those past purchasers who did consider other brands or products, 26% made a comparison with Tylenol and very few mentioned comparisons with tablets or non-gelcap type products. (*Id.* at ¶ 66.) The balance of past purchasers made comparisons to other brand name products such as Advil, Motrin, and Aleve. (*Id.* at Ex. H; Butler Supp. Decl., ¶¶ 7-9, Ex. A.) Thus, this and Silverman's concessions about purchasers not making product comparisons was the only proof before the District Court at the class certification stage addressing the question of whether the necessary consumer product comparison between Rite Aid products of different formulations was actually uniformly made.

The District Court did not reference and apparently did not consider these survey results in issuing its class certification order. This may have been because it incorrectly believed the survey's comparison statistics were derived from responses

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26:7-15 ("[o]nce you are in essence, a customer, a regular customer, you tend to—if that's the product that you want, that you went in to buy, you've used it before, you go in, you find it on the shelf, you throw it in your cart, and off you go.").)

related to showing respondents images of Rite Aid gelcaps and other pain relief products on the store shelves, whichthe District Court erroneously believed did not permit survey respondents to make price and label comparisons. (Class Cert. Order at 13:3-14:5.) These criticisms about the images, however, had no relationship to the separate survey questions that asked 236 past purchasers about what product comparisons, if any, they made when buying Rite Aid gelcaps. (Butler Report, ¶¶ 64-65, Table 6, and Ex. D at p. 81 (Q11. and Q12.).)

More fundamentally, the District Court's criticism of the survey images was flat out wrong. The District Court apparently did not realize that in the survey, respondents were told to "take as much time as you would like to review the images" (Butler Report, ¶ 41), respondents were required to spend at least 5 seconds reviewing each image (*id.* at ¶ 42), and, most significantly, the survey format allowed the consumers to physically enlarge each image to better view the labels and prices if they wished to compare products, as well as for other needs. (*Id.* at Exhibit D (containing the actual survey utilized and pp 8-14, with instructions that say "Click to Enlarge" under each picture shown, and with pictures that fully show the pricing and questions to ensure that respondents "were able to see the images clearly."); Dkt. 133-1, Ex. 2, Butler Supp. Decl., ¶¶ 18-20.) This is significant because the District Court's perceived "flaws" that survey respondents could not see the prices of

products well enough to make a comparison, caused it to largely discredit the persuasiveness of the survey. (*See* Class Cert. Order at 13:21-14:5.)[9]

Despite the lack of evidence that consumers made the particular comparison between certain Rite Aid products, the District Court incorrectly assumed that because the gelcaps were within "eye-view" of the tablets, it could infer class-wide exposure regardless of how unlikely it was for consumers to make this required comparison.[10] Because uniform exposure to the same misrepresentation is a necessary element of a class claim under the UCL, FAL, and CLRA, courts have

[9] The District Court made similar unfounded criticisms of the Butler Survey's closed ended questions that asked past purchasers to identify reasons for why they bought the Rite Aid gelcaps. The District Court thought the survey's closed ended questions were flawed because it did not identify "rapid release" in the list of factors presented as one of the reasons for purchasing the Rite Aid gelcaps product. But as the Butler Supplemental Declaration explains, and as the Survey itself shows, the Survey's closed-ended and open-ended questions work together. Instead of picking particular features of the label (e.g., extra strength, rapid release, pain reliever, no aspirin) to include as factors that may have induced the purchase (in part, to avoid suggestiveness), the survey relied on more general product attributes such as "information on the label" or "the way the product works," and then asked follow-up questions designed to see if the phrase "rapid release" or other specific label terms or specific product attributes influenced those choices. (Butler Supp. Decl., ¶¶ 10-17; Butler Report, ¶¶ 37-39, 58-61, Ex. D.)

[10] For instance, in identifying the so-called "common proof" offered by Plaintiff, the District Court noted that Silverman "opines . . . that consumers who purchased Rite Aid gelcaps at brick-and-mortar Rite Aid stores were exposed to the prices and labels of Rite Aid gelcaps and Rite Aid and were misled into believing that the Rite Aid gelcaps are faster-acting than Rite Aid tablets ***after comparing*** the prices and labels of both products, ..." (Class Cert. Order at 9, n. 6 (emphasis added).) Yet Silverman merely assumed without evidence that consumers made this comparison.

denied certification unless it is "highly likely" the challenged misrepresentations were actually made to each member of the class. *Ehret*, 148 F. Supp. 3d at 900 ("In each of these cases, as well as the instant case, there is no evidence that it was 'highly likely' all members of the proposed class saw the allegedly misleading statements made in the advertisements.") (discussing cases); *see, e.g., Zakaria*, 2016 WL 6662723, at *8 (alleged misrepresentations on product label were not prominently displayed such that it could be inferred there was a "high likelihood" that consumers would have seen the misleading statement); *In Re Clorox Consumer Litigation*, 301 F.R. D. 436, 469 (N.D. Cal. 2014) (declining to certify a class where defendant produced evidence that not many consumers saw challenged advertisements and only 15% of consumers read allegedly misleading statement on back panels of product packages, and where television marketing campaign was not massive).

The District Court erroneously distinguished such authority, relying instead on an isolated statement from *Ehret v. Uber Technologies, Inc.*, 146 F. Supp. 3d 884, 895 (N.D. Cal. 2015), as support for it decision to infer class-wide exposure because this was a consumer labeling case. (Class Cert. Order at 10:5-10.) In *Ehret*, the court observed that in a typical false labeling case, courts have found that class-wide exposure can be inferred when the alleged misrepresentation is made ***on the face*** of the ***purchased*** product packaging because of the inherently high likelihood that all class members ***would see*** the challenged label statement in the process of buying the

product. *See Ehret*, 148 F. Supp. 3d at 895 ("[G]iven the inherently high likelihood that in the process of buying the product, the consumer would have seen the misleading statement on the product and thus been exposed to it, exposure on a class-wide basis may be deemed sufficient.")

This basis for inferring exposure is inapplicable in a case like this, where class-wide exposure to the ***misrepresentation*** (i.e., the product works faster) hinges on consumers comparing the labels and prices of two particular products, but only one of which they purchase (making it uncertain whether consumers even saw the other product, much less compared it to notice differences in the labels). *See Ehret*, 148 F. Supp. 3d at 895 ("[T]here is insufficient evidence that all customers during the class period were likely exposed to the misrepresentation.").

In analyzing predominance, the District Court committed clear legal error by not requiring Plaintiff to show class-wide reliance on the alleged label misrepresentation (i.e., that the gelcaps worked faster) as an element of his UCL and FAL claims.[11] (Class Cert. Order at 22:14-18 (stating that "reliance is not an element of a UCL and FAL claim").) *See Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020) ("In UCL cases, district court's must consider whether class

[11] The District Court's incorrect understanding that reliance is not an element of a UCL and FAL claim caused it to improperly find that Rite Aid was not disputing that the predominance requirement was met as to Plaintiff's UCL and FAL claims. (Class Cert. Order at 22:14-18.)

members were exposed to the defendant's alleged misrepresentations, but for a single, critical purpose: establishing reliance."); *Mazza*, 666 F.3d at 595-596 (discussing "reliance" as element of a UCL claim). Only after improperly granting certification, did the District Court subsequently acknowledge, "[a] person who was *never* exposed to a misleading statement *could not* have relied upon it and, accordingly, could not have a viable claim under the UCL, FAL, or CLRA." (Reconsideration Order at 3:10-18 (emphasis in original).)

That is the point here. Because seeing the alleged label misrepresentation and being able to rely on it turns on whether or not a consumer made the particular product comparison, those many class members who did not compare the label and prices of Rite Aid gelcaps against the label and prices of Rite Aid tablets or caplets, were never exposed to the alleged misrepresentation, could not have relied on it, and therefore suffered no injury.[12] *See Cabral*, 608 Fed. Appx. at 484 ("The record in this case does not meet that standard; it will not support a determination that ***all*** of the class members saw ***or otherwise received*** the misrepresentation . . . .") (emphasis added). Yet because the District Court incorrectly believed that reliance is not an element of a UCL or FAL claim, it did not require Plaintiff to show, in assessing uniform exposure, that class members made the product comparison. So even if

[12] At the class certification hearing, the District Court acknowledged that "the label under the FDA regs is in fact accurate." (Class Cert. Tr. at 15:2-10; 13:17-25.)

Plaintiff could prove that he was exposed to the alleged misrepresentation by making the particular visual comparison between certain Rite Aid products, that same question would still be wide open for every other class member and require individualized proof of their respective actions.

Instead, the District Court erroneously considered common proof of in-store product placement as sufficient to infer class-wide exposure without also requiring common proof of alleged consumer comparison. It found that the product placement "enabled" consumers to make the comparison.[13] Neither Plaintiff nor the District Court cited any authority that would allow a court, in the face of evidence showing the contrary, to assume ***all*** class members made the specific product comparison (i.e., assume facts essential to Plaintiff's liability theory and elements of the claims) merely because the in-store product placement enabled them to do so. Rather, this Court has required ***actual*** exposure to the alleged misrepresentation. *See Berger*,

[13] The District Court stated "[t]he common evidence to which Bailey points, which the Court finds to be more persuasive than the Butler survey for the reasons discussed above, is capable of sustaining a jury finding that all consumers who purchased Rite Aid gelcaps at Rite Aid brick-and-mortar stores were exposed to the "rapid release" statement and the price of Rite Aid gelcaps and to the prices and non-"rapid release" labels of Rite Aid tablets (***which enabled*** consumers to make the comparison upon which Bailey's theory of liability depends), and that a reasonable consumer would find the "rapid release" statement at issue to be material when purchasing Rite Aid gelcaps." (Class Cert. Order at 23:5-12 (emphasis added).) If there is no common proof that consumers made the required product comparison (as opposed to merely being able to make it), then under Plaintiff's theory, there is no consistent misrepresentation that gives rise to a class claim.

741 F.3d at 1068; *Mazza*, 666 F.3d at 596 (there should be "little doubt that almost every class member had been exposed to defendants' misleading statements"). To certify a class based on misrepresentation, a plaintiff must prove the alleged misrepresentation was uniformly made to all members of the proposed class. *Mazza*, 666 F.3d at 595. The District Court failed to apply this rule and committed manifest error in doing so.

II. The District Court Committed Manifest Error By Finding Materiality of the Label Phrase "Rapid Release" Could be Shown Through Class-Wide Proof.

"If the misrepresentation or omission is not material as to all class members, the issue of reliance would vary from consumer to consumer and the class should not be certified." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011) (internal quotation omitted). On the question of class-wide materiality, the District Court largely relied on Silverman's opinion based solely on his general experience that the phrase "rapid release" is material. (Class Cert. Order at 9:24-25, 15:7-15; Reconsideration Order at 4:8-5:7.)

Rather than demonstrate that consumers would understand the phrase "rapid release" as indicating faster relief, Silverman's report confirms the Butler Survey's finding that, if anything, consumers view the words "rapid release" to mean fast release. (*See* Silv. Report, ¶ 53 ("In my experience, consumers would very likely focus on the word 'Rapid' in the term 'Rapid Release' which they would readily

understand to mean 'fast'.").) Indeed, Silverman's belief is that ***if*** consumers compare the label and price of the Rite Aid gelcaps against the label and price of the Rite Aid tablets or caplets, then they would believe that the gelcaps product works faster because it is labeled "rapid release" and priced slightly higher. (Silv. Report, ¶¶ 31, 32, 61; Silv. Dep. at 16:2-24, 37:10-12.) Based on this premise, Silverman then summarily concludes, without pointing to any reliable evidence that consumers make the needed comparison, that the "rapid release" label statement is "highly material to reasonable consumers." (Silv. Report, ¶ 32.)

The District Court refused to acknowledge any parts of the Butler Survey[14] and failed to critically consider Silverman's opinion or reasoning. Likewise, while the District Court acknowledged that Plaintiff's liability theory required a comparison of certain Rite Aid products, it failed to have Plaintiff demonstrate that consumers made that particular comparison for purposes of showing class-wide materiality, even though Silverman acknowledged that it was this comparison that causes consumers to interpret the phrase "rapid release" as meaning faster release. Yet none of the reasons the District Court cited for finding materiality showed that consumers view "rapid release" as a comparative term. Given that Plaintiff's theory

[14] Specific to the question of materiality, the Butler Survey found that the vast majority of consumers (a net 89.1%) either did not notice the phrase "rapid release" on the product label, or if noticed, did not interpret this statement to mean that the product works faster or quicker than some other acetaminophen product. (Butler Report, ¶¶ 14, 68, Table 7.)

of liability requires consumers to make a particular product comparison for the label phrase "rapid release" to mean faster release, the District Court erred in finding that a material misrepresentation could be shown class-wide, without first requiring common proof that consumers consistently made the required product comparison—proof that Silverman never even sought to obtain and was lacking. (Silv. Dep. at 48:7-16.) *See Jones v. ConAgra Foods, Inc.*, No. C 12–01633 CRB, 2014 WL 2702726, at *15-16 (N.D. Cal. June 13 2014) (refusing to certify a consumer class allegedly deceived by "all natural" labeling when plaintiffs provided a conclusory declaration from their marketing expert, Caswell, who did not survey any customers to assess whether the challenged statements were material to their purchasing decisions as opposed to or in addition to price, promotions, retail positioning, taste, texture or brand recognition, and therefore whose testimony did not demonstrate that the challenged label "is necessarily 'material' to reasonable consumers.'"). Contrasted with the Butler Survey's findings that most consumers do not make this particular product comparison, certification should have been denied for failure to show class-wide materiality, if not uniform exposure. *See In re 5-Hour Energy Mktg. & Sales Prac. Litig.*, No. ML 13-2438-PSG-(PLAx), 2017 WL 2559615, at *9 (C.D. Cal. June 7, 2017) (finding individual issues predominated over common issues, in part, because the plaintiffs' evidence of class-wide materiality was insufficient and contradicted by consumer survey evidence offered by the defendant

that suggested the challenged statements "are not material to most or even a substantial portion of the class.").

CONCLUSION

For all the foregoing reasons, Rite Aid respectfully requests that the Court grant this Petition and allow the appeal to correct manifest errors made by the District Court.

Dated: June 9, 2021

FOLEY & LARDNER LLP

s/ Jaikaran Singh
Jaikaran Singh

Attorneys for Defendant-Petitioner Rite Aid Corporation

CERTIFICATE OF COMPLIANCE

This Petition complies with Circuit Rules 5-2(b) and 32-3 because the Petition's word count of 5518, divided by 280 (19.70) does not exceed 20 pages, excluding the portions identified in Fed. R. App. P. 5(b)(1)(E) and 32(f). This Petition complies with the size and typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14 point Times New Roman font.

Dated: June 9, 2021

FOLEY & LARDNER LLP

s/ Jaikaran Singh
Jaikaran Singh

Attorneys for Defendant-Petitioner Rite Aid Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS BAILEY,

Plaintiff,

v.

RITE AID CORPORATION,

Defendant.

CASE NO. 4:18-cv-06926 YGR

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR CLASS CERTIFICATION; ORDER RE: MOTIONS TO SEAL

Re: Dkt. Nos. 92, 95, 96, 107, 115

Plaintiff Thomas Bailey brings this proposed class action against defendant Rite Aid Corporation ("Rite Aid") for state-law claims arising out of Rite Aid's marketing of its over-the-counter acetaminophen gelcaps ("Rite Aid gelcaps") as "rapid release." Now pending is Bailey's motion for class certification under Rule 23(b)(3) and Rule 23(b)(2).

Having carefully considered the pleadings and the parties' briefs, the argument presented at the hearing held on April 6, 2021, and for the reasons set forth below, the Court **GRANTS** the motion for certification of a Rule 23(b)(3) class and **DENIES WITHOUT PREJUDICE** the motion for certification of a Rule 23(b)(2) class.[1]

I. MOTIONS TO SEAL

As a preliminary matter, both sides have submitted administrative motions to seal documents or portions of documents offered in support of their class certification briefing. *See* Docket Nos. 92, 95, 107, 115. While the standard for sealing documents in connection with class certification does not require "compelling reasons" as set forth in *Pintos v. Pacific Creditors*

[1] Bailey filed a motion to remove an incorrectly-filed document. *See* Docket No. 96. The Court **GRANTS** the motion.

Ass'n, 605 F.3d 665, 678 (9th Cir. 2010), the Court nevertheless finds that the sealing requests here are overbroad and good cause has not been established to seal certain documents to the extent requested. The Court has considered the basis offered for sealing, as well as the significance to the Court's decision of the portions sought to be sealed, in determining which portions to cite or quote in its order herein. The motions to seal are granted only insofar as they are not necessary to the Court's analysis.

Therefore, to the extent that the Court has quoted or recited in this opinion the contents of any specific portion of a document or material subject to a motion to seal, the Court **DENIES** the motion to seal that information for lack of good cause. The motions to seal, Docket Nos. 92, 95, 107, 115, are otherwise **GRANTED** for good cause shown.

II. BACKGROUND

In the First Amended Complaint ("FAC"), Bailey alleges as follows.

Rite Aid produces, manufactures, markets, distributes, and sells a generic version of certain over-the-counter drugs under the Rite Aid brand, including the Rite Aid gelcaps. Rite Aid "misled and continues to mislead consumers about the nature, quality, and effectiveness" of the Rite Aid gelcaps through its labeling. FAC ¶ 7. As shown on the package of the Rite Aid gelcaps, the term "'rapid release' does not actually mean that the drug works faster for consumers than non-rapid release products," as studies show that "traditional, non-rapid release acetaminophen products can be equally effective in the same, if not faster, time period than its Rite Aid rapid release products." *Id.* ¶¶ 9-11. Rite Aid nevertheless charges a premium for its rapid release gelcaps, and it markets the Rite Aid gelcaps with "false, misleading, unfair, deceptive labeling and marketing in an effort to dupe consumers into purchasing these gelcaps for prices that exceed their true value." *Id.*

Bailey purchased a bottle of Rite Aid gelcaps, 100-count, in mid-2018 at a Rite Aid store in Alameda County, California, for a price that was higher than Rite Aid's acetaminophen tablets in the same count, which were not labeled as "rapid release." *Id.* ¶¶ 73-78. He purchased the Rite Aid gelcaps "over other Rite Aid brand and other acetaminophen products solely because they were labeled as rapid release and he was seeking 'faster' relief." *Id.* Rite Aid's labeling misled Bailey into believing that the Rite Aid gelcaps he purchased would provide faster relief than other,

cheaper Rite Aid acetaminophen products. *Id.* Had Bailey known that the Rite Aid gelcaps did not act any faster than traditional, cheaper Rite Aid products, he would not have been willing to pay the premium that he paid for the Rite Aid gelcaps. *Id.* ¶ 71. Instead, "he would have purchased a cheaper, just as effective and just as fast acting acetaminophen product." *Id.* ¶ 78. "The cost of the [Rite Aid gelcaps] exceeded the value of the product and [p]laintiff Bailey did not receive the benefit of the bargain." *Id.* ¶ 79.

In the FAC, Bailey asserts claims for: (1) violations of the False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500; (2) violations of the Unfair Competition Law[2] ("UCL"), Cal. Bus. & Prof. Code § 17200; (3) violations of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1761; and (4) unjust enrichment.[3] He seeks an award of actual damages; restitution; prospective injunctive relief; attorneys' fees and costs; and pre- and post-judgment interest. FAC at 31, Prayer for Relief.

III. LEGAL STANDARD

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotations omitted). "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." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). The "rigorous analysis" that a court must conduct "requires 'judging the persuasiveness of the evidence presented' for and against certification." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, No. 19-56514, __ F.3d __ , 2021 WL 1257845, at *4 (9th Cir. Apr. 6,

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[2] Although Bailey asserts claims under the unfair, unlawful, and fraudulent prongs of the UCL in the FAC, when opposing Rite Aid's motion under Rule 12(b)(6), Bailey proceeded only under the fraudulent prong. Accordingly, the fraudulent prong is the only prong that survived Rite Aid's motion to dismiss.

[3] On September 9, 2019, the Court granted in part and denied in part Rite Aid's motion to dismiss. Docket No. 60. Specifically, the Court granted the motion to dismiss, with leave to amend, with respect to Bailey's warranty claims and standalone claim for declaratory relief, and it otherwise denied the motion. *Id.* Bailey did not file an amended complaint to cure the defects that the Court identified with respect to the warranty claims and claim for declaratory relief. Accordingly, the referenced claims in the FAC are the only ones at issue.

2021) (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)). "Courts must resolve all factual and legal disputes relevant to class certification, even if doing so overlaps with the merits." *Id.* (citation omitted). The party moving for certification has the burden to show, by a preponderance of the evidence, that the requirements of Rule 23 are satisfied. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-50 (2011).

The party moving for certification first must show that the four requirements of Rule 23(a) are met. Specifically, Rule 23(a) requires a showing that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

The party moving for certification must then show that the class can be certified based on at least one of the grounds in Rule 23(b). *See* Fed. R. Civ. P. 23(b). As relevant here, certification under Rule (b)(3) is appropriate only if "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Certification under Rule 23(b)(2) is appropriate only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The class certification analysis "may entail some overlap with the merits of the plaintiff's underlying claim." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 465-66 (2013) (internal quotation marks omitted). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.*

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IV. DISCUSSION

Before analyzing whether the requirements for certification under Rule 23 are satisfied here, the Court first provides a brief overview of Bailey's theory of liability and the scope of the class he seeks to certify.

All of the claims at issue in this action, which are for violations of the UCL, FAL, CLRA, and for unjust enrichment, are predicated on the theory that Rite Aid misleads consumers into believing, incorrectly, that Rite Aid gelcaps, which are labeled as "rapid release," are faster-acting than cheaper Rite Aid acetaminophen tablets, which are *not* labeled as "rapid release." FAC ¶¶ 13-14. As Bailey confirmed at oral argument, this theory relies on evidence that Rite Aid placed the "rapid release" gelcaps within eye-view of the "other, cheaper acetaminophen products, such as the traditional Rite Aid tablets," which are not labeled as "rapid release" and which are priced lower than the Rite Aid gelcaps, to suggest to consumers that the "rapid release" gelcaps "would provide faster relief." *Id.* ¶¶ 15, 77. Bailey contends that the "rapid release" statement on the Rite Aid gelcaps' label is misleading because consumers will compare the Rite Aid gelcaps' label and price to those of the cheaper, Rite Aid tablets that are placed nearby and conclude, incorrectly, that the "rapid release" gelcaps, which are more expensive, are faster-acting than the cheaper non-"rapid release" tablets. Bailey's theory of liability, therefore, requires a comparison by consumers of the label and price of the Rite Aid gelcaps against the labels and prices of cheaper Rite Aid acetaminophen tablets placed near the gelcaps. As Bailey conceded at oral argument, that price and label comparison could occur only at brick-and-mortar Rite Aid stores.[4]

Bailey alleges that Rite Aid's alleged misrepresentation of the Rite Aid gelcaps as faster-acting than the cheaper Rite Aid tablets enables it to price and sell the Rite Aid gelcaps at an amount that "exceed[s] their true value." *Id.* ¶¶ 13-14. Bailey alleges that consumers of the "rapid release" Rite Aid gelcaps would not have paid a premium for this product had they known that

[4] The Court notes that the FAC includes for context purposes references to Johnson & Johnson's marketing campaign for Tylenol® Rapid Release Gelcaps, which Bailey alleges Rite Aid has leveraged. *See, e.g.*, FAC ¶¶ 40, 51-53, 57-62, 9-13. At oral argument, Bailey clarified that his theory of liability does not depend on Johnson & Johnson's marketing campaign for Tylenol products.

they would not work any faster than the Rite Aid tablets. *Id.* ¶¶ 50, 78. The difference in price between what consumers actually paid and what consumers would have paid for the Rite Aid gelcaps had they known that this product would not work any faster than the cheaper, Rite Aid tablets is the economic injury suffered by consumers. *Id.* Because this theory of economic harm is predicated on consumers having been misled into thinking that the Rite Aid gelcaps are faster-acting than Rite Aid tablets by virtue of having compared the labels and prices of both products, only consumers who purchased Rite Aid gelcaps at brick-and-mortar Rite Aid stores could have suffered the economic injury alleged in the FAC.

In his class certification motion, Bailey defines the proposed class he seeks to certify under Rules 23(b)(3) and 23(b)(2) as follows:

> All persons who purchased the Class Rapid Release Gelcaps in the State of California within the applicable statute of limitations established by the State of California through the final disposition of this action.[5]

Docket No. 98-3 at 10. This proposed class includes *every* consumer who purchased Rite Aid gelcaps in California during the class period.

Bailey conceded during the hearing held on April 6, 2021, that only consumers who purchased the Rite Aid gelcaps at Rite Aid brick-and-mortar stores would be able to make the price and label comparison upon which his theory of liability depends. Accordingly, Bailey agreed that his proposed class can be narrowed to include only consumers who made in-store purchases of Rite Aid gelcaps.

The Court's analysis as to whether the requirements of Rule 23 are satisfied, below, is based on the revised and more limited class definition that Bailey proposed at oral argument.

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[5] Bailey represents that this proposed class is subject to the exclusions set forth in paragraph 85 of the FAC, which provides: "Excluded from the proposed Class is: (a) any Judge or Magistrate presiding over this action and members of their families; (b) Rite Aid and any entity in which it has a controlling interest or which has a controlling interest in it; (c) the officers and directors of Rite Aid; (e) Rite Aid's legal representatives, assigns, and successors; and (f) all persons who properly execute and file a timely request for exclusion from the Class." FAC ¶ 85.

A. Rule 23(a)

1. Numerosity

The requirement of numerosity is that the class be so numerous that joinder of all members individually would be impracticable. Fed. R. Civ. P. 23(a)(1). "Although there is no exact number, some courts have held that numerosity may be presumed when the class comprises forty or more members." *See Krzesniak v. Cendant Corp.*, No. 05–05156, 2007 WL 1795703, at *7 (N.D. Cal. June 20, 2007).

Here, Bailey argues that this requirement is satisfied because "Rite Aid's sales data indicates that from 2014 through 2019 it sold over 600,000 units of Class Rapid Release Gelcaps in the state of California, generating over $4 million in sales," suggesting that there are more than forty people who purchased the Rite Aid gelcaps in-store during the class period. Docket No. 98-3 at 11.

Rite Aid does not dispute that Bailey's showing satisfies the numerosity requirement. Accordingly, the Court finds that the numerosity requirement is met.

2. Commonality

Commonality requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy this requirement, the common question must be of "such nature that it is capable of class-wide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Dukes*, 564 U.S. at 350. "[F]or purposes of Rule 23(a)(2)[,] even a single common question will do." *Id.* at 359 (internal quotations and brackets omitted).

> The requirements of Rule 23(a)(2) have "been construed permissively," and "[a]ll questions of fact and law need not be common to satisfy the rule." However, it is insufficient to merely allege any common question, for example, "Were Plaintiffs passed over for promotion?" Instead, they must pose a question that "will produce a common answer to the crucial question why was I disfavored."

Ellis, 657 F.3d at 981 (quoting *Dukes*, 564 U.S. at 350).

Here, Bailey argues that the commonality requirement is met because two questions, which are integral to his claims under the UCL, FAL, and CLRA, can be resolved with common proof,

namely (1) the question of whether the "rapid release" statement was likely to deceive a reasonable consumer, which is an element of his claims under the UCL and FAL; and (2) whether the "rapid release" statement was material, which is an element of his claim under the CLRA.

The Court analyzes each of these questions in turn and concludes that both are susceptible to resolution with common proof. Accordingly, the commonality requirement is met.

i. UCL and FAL and Likelihood of Deception

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17500. The language of these statutes is "'broad' and 'sweeping' to 'protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 985 (9th Cir. 2015) (quoting *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 320 (2011)).

"[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary *only* to show that members of the public are likely to be deceived." *Stearns*, 655 F.3d at 1020 (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009)) (emphasis added). This standard is objective, as it is governed by whether a "reasonable consumer" is likely to be deceived. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) ("[T]he false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer.") (citation omitted). "'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). Because the UCL and FAL limit available remedies to injunctive relief, including restitution, a plaintiff suing under the UCL or FAL need not show actual falsity of the alleged misrepresentations or reliance by the plaintiff. *See Pulaski & Middleman*, 802 F.3d at 986 (holding that the inquiry for a UCL and FAL claim does not require proof of deception, reliance, and injury) (citation and internal quotation marks omitted). This

contrasts with a common law claim for damages based on fraud, for which actual falsity, reliance, and injury are required elements. *Id.*

Even though a claim under the UCL and FAL turns on whether a "reasonable consumer" is likely to be deceived, "the question of likely deception does not automatically translate into a class-wide question." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker,* 137 S. Ct. 1702 (2017). For example, the Ninth Circuit has held that likelihood of deception cannot be resolved with common evidence where it is not the case that every member of the proposed class was exposed to the same allegedly misleading conduct. *See Mazza*, 666 F.3d at 596 (holding that "[i]n the absence of [a] massive advertising campaign" "where there was little doubt that almost every class member had been exposed to defendants' misleading statements," "the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading").

Here, Bailey argues that the question of whether a reasonable consumer is likely to be deceived by the alleged misleading conduct at issue can be resolved with common proof based on (1) evidence showing that consumers who purchased the Rite Aid gelcaps at brick-and-mortar Rite Aid stores were uniformly exposed to the "rapid release" statement on the label of the Rite Aid gelcaps and to the lower prices and non-"rapid release" labels of the Rite Aid tablets, as Rite Aid's policies require that Rite Aid gelcaps be placed within eye-view of the Rite Aid tablets at brick-and-mortar Rite Aid stores, *see, e.g.*, Roush Dep., Ex. 7-16; (2) the opinions of Bailey's advertising expert, Bruce Silverman, who opines (a) that consumers who purchased Rite Aid gelcaps at brick-and-mortar Rite Aid stores were exposed to the prices and labels of Rite Aid gelcaps and Rite Aid tablets and were misled into believing that the Rite Aid gelcaps are faster-acting than Rite Aid tablets after comparing the prices and labels of both products, and (b) that the "rapid release" label is material to consumers[6]; and (3) the testimony of Jennifer Roush, who is

[6] Silverman opines that consumers of analgesics want faster relief for their pain and tend to believe that more expensive products are inherently better than less expensive ones. As such, consumers exposed to the "rapid release" statement, as well as to the prices and non-"rapid release" labels of the cheaper Rite Aid tablets are likely to be misled into believing that the Rite

Rite Aid's Rule 30(b)(6) designee, that the average consumer would prefer a "faster solution" to a headache, Rousch Dep. Tr. at 107-08.

Rite Aid does not meaningfully dispute that consumers at Rite Aid stores were exposed to the "rapid release" statement on the Rite Aid gelcaps' label, as well as to the labels and prices of Rite Aid tablets.[7] [8] Accordingly, the Court can infer class-wide exposure to the allegedly misleading conduct at issue. *See Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 895 (N.D. Cal. 2015) (noting that in "numerous cases involving claims of false-advertising, class-wide exposure has been inferred" where the alleged misrepresentation is on the packaging of the item being sold or where there is a high likelihood that "in the process of buying the product" the consumer would have been exposed to the allegedly deceptive conduct) (collecting cases).

Rite Aid also does not dispute that its Rule 30(b)(6) designee testified that the average consumer would prefer a "faster solution" to a headache.

Rite Aid argues, however, that the Court cannot rely on Silverman's opinions to conclude that the question of likelihood of deception is susceptible to resolution with common proof for two reasons, neither of which is persuasive.[9]

Aid gelcaps are faster-acting than the Rite Aid tablets. Docket No. 92-6 ¶¶ 45-75.

[7] At the hearing held on April 6, 2021, Rite Aid did not dispute that Rite Aid gelcaps are placed within eye-view of the prices and labels of Rite Aid tablets at Rite Aid brick-and-mortar stores. Rite Aid argued only that the Rite Aid gelcaps are not placed adjacent to the Rite Aid tablets. However, Bailey's theory of liability at this juncture does not depend on the Rite Aid gelcaps and the Rite Aid tablets being placed immediately next to each other; it depends, instead, on both products being placed in close proximity to each other such that they both are within eye-view of the consumer. Because exposure is undisputed, the cases upon which Rite Aid relies for the proposition that likelihood of deception cannot be resolved with common proof where there is no class-wide exposure are inapposite.

[8] The survey conducted by Rite Aid's expert, Sarah Butler, is consistent with Bailey's representation that consumers at Rite Aid brick-and-mortar stores were exposed to both the "rapid release" statement on the Rite Aid gelcaps' label and to the prices and labels of Rite Aid tablets. *See* Docket No. 109-5 ¶ 12 & Exhibit G (stating that images shown to survey respondents depict Rite Aid gelcaps "as this product appears in actual stores," where the images show the Rite Aid gelcaps placed within eye-view of the Rite Aid tablets).

[9] Rite Aid also argues that the "rapid release" statement is not actually false, because nothing in the statement "rapid release" suggests any comparison between the Rite Aid gelcaps and Rite Aid tablets or any other product; instead, according to Rite Aid, the statement speaks to the speed with which the gelcaps dissolve relative to the Food and Drug Administration's USP standards for "immediate release" dissolution. Docket No. 107-4 at 7. Rite Aid contends that,

First, Rite Aid argues that Silverman's opinions have no meaningful support, because they are based primarily on his work experience in the advertising industry, and because he did not conduct a survey of Rite Aid gelcaps consumers. The Court finds that Rite Aid's attacks on the reliability and persuasiveness of Silverman's opinions fall flat. Silverman represents, and Rite Aid does not dispute, that he has five decades of experience in the "marketing-communication industry," which includes work that is directly relevant to the industry at issue here. *See* Docket No. 92-6 ¶¶ 5, 11-27. Second, an expert who offers testimony on the question of whether a reasonable consumer is likely to be deceived by an allegedly misleading statement, or whether a reasonable consumer would find such a statement to be material, is not required to conduct a consumer survey if his or her testimony is otherwise reliable. *See Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1115 (N.D. Cal. 2018) (Koh, J.) (holding that an expert need not conduct a consumer survey to reliably opine on likelihood of deception and materiality); *see also Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 681-82 (2006) (noting that California courts have "reject[ed] [the] view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is likely to be misled by a representation" under the FAL, CLRA, or UCL) (citation and internal quotation marks omitted). The Court finds that Silverman's failure to conduct a consumer survey does not negatively impact the reliability or persuasiveness of his opinions. In addition to his extensive industry experience, Silverman has interviewed thousands of consumers over the course of his career and has observed thousands of focus group sessions, including about products sold at mass merchandisers, such as drug stores and supermarkets. Docket No. 92-6 ¶¶ 26-27. Additionally, Silverman visited several Rite Aid stores to examine the placement of Rite Aid gelcaps and determine whether such placement relative to Rite Aid tablets would impact consumers' reaction to the "rapid release" statement at

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under that standard, an acetaminophen product is considered to be "immediate release" or "rapidly dissolving" if it dissolves 80% in thirty minutes or less. *Id.* Because the Rite Aid gelcaps meet and exceed this standard then, according to Rite Aid, the "rapid release" statement accurately indicates that the gelcaps are fast in dissolving according to such standards. Because Rite Aid points to no evidence showing that consumers of Rite Aid gelcaps were uniformly aware of the FDA's standards for immediate dissolution and uniformly interpreted the "rapid release" statement at issue in light of such standards, the Court finds that Rite Aid's arguments are irrelevant to the resolution of the present motion.

issue. *Id.* ¶¶ 67-72. Accordingly, the Court finds that Silverman's experience allows him to reliably and persuasively opine as to the issues of likelihood of deception and materiality.

Second, Rite Aid argues that Silverman's opinions that the "rapid release" statement is likely to deceive and is material to a reasonable consumer are undermined by a survey conducted by its expert, Sarah Butler, which, according to Rite Aid, shows that the "rapid release" statement was not interpreted by consumers as Bailey and Silverman posit, and that the statement is not material in consumers' purchasing decisions. After carefully reviewing the Butler survey, Docket No. 109-5, the Court finds that it suffers from significant flaws that detract from its persuasiveness as evidence that the issue of likelihood of deception cannot be resolved with common proof.

For example, one aspect of the survey involved asking past consumers of Rite Aid gelcaps to select from among twenty-three reasons for why they purchased the product. None of the twenty-three options was "rapid release." Further, none of the twenty-three options described attributes that are consistent with Bailey's theory of liability, such as "faster-acting" or "works faster." *See id.* ¶¶ 58-60. According to Rite Aid, the responses to this closed-ended question show that only a small percentage of consumers provided responses that are consistent with consumers believing that Rite Aid gelcaps work "faster" or "quicker" as Bailey alleges, and for that reason, Rite Aid argues that the survey shows that the question of likelihood of deception cannot be resolved with common proof. *See id.* ¶¶ 58-64.

The Court is not persuaded that, based on the responses to this closed-ended question, it can conclude that the question of likelihood of deception cannot be resolved with common proof. The persuasiveness of the survey is negatively impacted by the fact that the twenty-three possible responses did not include an option that allowed consumers to select a response that is consistent with Bailey's theory of liability. The omission of such an option likely resulted in fewer consumers providing responses to this question that could give rise to an inference that consumers purchased the Rite Aid gelcaps because of the "rapid release" statement or because they believed that the gelcaps were faster-acting than another product. *See* Federal Judicial Center, Reference Manual on Scientific Evidence 392 (3d ed. 2011) ("The response alternatives in a closed-ended

question may remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily.").[10]

As another example, the Butler survey purports to have presented to survey respondents, prior to asking them questions, with images of Rite Aid gelcaps "as this product appears in actual stores." *Id.* ¶ 12. Two of the three images that were presented to respondents show the Rite Aid gelcaps "on the shelf with other products in view[.]"[11] *Id.* ¶ 12 & Exhibit G. The Court finds that these two images likely did not permit survey respondents to make the price and label comparison between Rite Aid gelcaps and Rite Aid tablets that is the basis of Bailey's theory of liability. The first image depicts the top two shelves of the pain-relief section; the top shelf contains some Rite Aid and Tylenol gelcaps, and the shelf immediately below contains Rite Aid and Tylenol tablets. *See id.* This image shows the prices of the Rite Aid and Tylenol gelcaps, but it does *not* show the prices of the Rite Aid and Tylenol tablets. *Id.* Accordingly, this image would not permit a survey respondent to compare the prices and labels of the Rite Aid gelcaps with those of the Rite Aid tablets. The second image shows all six shelves of the pain-relief section, which contain many pain relief products, including ones that are irrelevant to this litigation, such as Advil and Motrin products. *Id.* Because this image depicts six shelves' worth of products, it is very difficult, if not impossible, to discern the prices of any of the products depicted, as the font of the prices is too small. Accordingly, this image also does not permit a survey respondent to make the price and label comparison between Rite Aid gelcaps and Rite Aid tablets upon which Bailey's theory of liability depends.

All of the survey responses that Rite Aid contends are relevant to the present motion, including responses to the question that asked respondents what they understood the term "rapid

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[10] Other closed-ended questions in the survey suffer from the same flaw and responses to them are unpersuasive for the same reasons discussed above. For example, one of the closed-ended questions asked respondents to select attributes from a list that they believed were indicated by the Rite Aid gelcaps' packaging. Docket No. 109-5 ¶ 69. While the options included "is fast release" and "is rapid release," none of the options included responses that connote a comparison with another product, such as "is fast*er* acting" or "works fast*er*" or "dissolves fast*er*." *Id.*

[11] The third image shows the label of Rite Aid gelcaps.

release" to mean,[12] *see* Docket No. 109-5 ¶¶ 69-74, appear to be predicated on these flawed images. Because of the flaws described above, the persuasiveness of the Butler survey is diminished and outweighed by the common evidence to which Bailey points, which supports the proposition that the question of whether a reasonable consumer was likely to be deceived by Rite Aid's alleged misleading conduct *can* be resolved with common proof.

In light of the foregoing, the Court concludes that Bailey has met his burden to show that the question of whether a reasonable consumer is likely to be deceived by Rite Aid's alleged conduct can be resolved with common evidence on a class-wide basis.

ii. CLRA and Materiality

The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. The requirements for stating a claim under the CLRA differ from those for a claim under the UCL and FAL because a CLRA plaintiff can obtain damages, as well as equitable relief and other remedies. Cal. Civ. Code § 1780(a). CLRA plaintiffs must "show not only that a defendant's conduct was deceptive but that the deception caused them harm." *Stearns,* 655 F.3d at 1022 (citing *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009)). In other words, "[a] CLRA claim warrants an analysis different from a UCL [and FAL] claim because the CLRA requires each class member to have an actual injury caused by the unlawful practice." *Id.* (citation omitted). That said, "[c]ausation, on a classwide basis, may be established by materiality. If the trial court finds that material misrepresentations have been made *to the entire class*, an inference of reliance arises as to the class." *Id.* (quoting *In re Vioxx Class*

[12] Rite Aid argues, based on the Butler survey results, that likelihood of deception cannot be resolved with common proof because consumers do not have a common definition of "rapid release." This argument fails for two reasons. First, because of the methodological flaws discussed above, the Court is not persuaded by the Butler survey's conclusion that consumers did not have a common understanding of the term "rapid release" and therefore are not likely to have been deceived by the statement in the manner that Bailey alleges. Second, Rite Aid points to no controlling authority showing that a plaintiff must establish at the class certification stage that consumers have a uniform interpretation of the term that gives rise to the alleged deception. Courts in this district routinely hold to the contrary. *See, e.g.*, *Pettit v. Procter & Gamble Co.*, No. 15-CV-02150-RS, 2017 WL 3310692, at *3 (N.D. Cal. Aug. 3, 2017) (rejecting argument that a plaintiff must show at the class certification stage that all proposed class members have the same interpretation of the term that was allegedly misleading); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 612 (N.D. Cal. 2018) (same).

Cases, 180 Cal. App. 4th at 129) (emphasis added). "A misrepresentation is judged to be 'material' if a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Kwikset*, 51 Cal. 4th at 332 (citation omitted). To establish materiality, a plaintiff is not required to show that the challenged statement is the "sole or even the decisive cause" influencing the class members' decisions to buy the challenged products. *Id.* at 327.

Here, Bailey argues that the question of materiality is capable of resolution with common proof based on (1) Silverman's opinions that the "rapid release" statement would have been material to a reasonable consumer because consumers want fast relief and that statement was placed on the front of the Rite Aid gelcaps' package, which is generally reserved for attributes that are deemed to be the most important to consumers, Docket No. 92-6 ¶¶ 37-39; (2) the testimony of Rite Aid's corporate representative that the average consumer would prefer a "faster solution" to a headache, Roush Dep. Tr. at 107-108; and (3) the proposed conjoint analysis by his economic experts, Colin Weir and Steven Gaskin, which seeks to determine the value that consumers attributed to the "rapid release" statement and will, therefore, serve as an indicia of materiality.

Rite Aid makes two arguments to try to show that Bailey has not met his burden to establish that materiality is capable of resolution with common proof.

First, Rite Aid argues that Silverman's opinions are unsupported based on the same arguments discussed above, which the Court has considered and rejected.

Second, Rite Aid argues that the Butler survey shows that consumers do not purchase Rite Aid gelcaps because of the "rapid release" label and, therefore, the Butler survey shows that the statement at issue was not material to a reasonable consumer. The Court finds that the persuasiveness of the Butler survey on the question of whether materiality can or cannot be resolved with common proof is negatively impacted by the flaws discussed above, and that its persuasiveness is outweighed by the common evidence to which Bailey points, which is sufficient to support a jury finding that the "rapid release" statement is material to a reasonable consumer. As noted, Bailey's common evidence includes Silverman's opinion that the "rapid release" statement would be of importance to reasonable consumer, which the Court finds to be reliable

and persuasive for the reasons described in more detail above; the undisputed testimony of Rite Aid's Rule 30(b)(6) designee that the average consumer would prefer a "faster solution" to a headache; and (3) the conjoint analysis proposed by Gaskin and Weir, which is capable, for the reasons discussed in more detail below, of reliably calculating the value (or "premium") that consumers paid as a result of the "rapid release" statement.

Accordingly, the Court finds that Bailey has met his burden to show that the question of whether a reasonable consumer would have found the "rapid release" statement to be material is capable of resolution with common evidence.

3. Typicality

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Stearns*, 655 F.3d at 1019. "The typicality requirement looks to whether the claims of the class representatives [are] typical of those of the class, and [is] satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id.* (citation omitted). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal citation and quotation marks omitted). Typicality may be lacking "if 'there is a danger that absent class members will suffer [because] their representative is preoccupied with defenses unique to it.'" *Id.* (citation omitted).

Bailey argues that this requirement is satisfied because he testified that he was deceived by Rite Aid into believing that the Rite Aid gelcaps would work faster than the Rite Aid tablets; because he paid a price premium for the Rite Aid gelcaps; and because he would not have paid such a premium if he had known that the Rite Aid gelcaps would not act faster than the Rite Aid tablets. Docket No. 98-3 at 13.

Rite Aid argues that Bailey has not met the typicality requirement for two reasons.

First, Rite Aid contends that Bailey's experience in purchasing the Rite Aid gelcaps does not match his theory of liability because he testified that he did not compare the Rite Aid gelcaps with the Rite Aid tablets or with any other product before deciding to purchase them; he simply

read the "rapid release" language on the label and decided that the Rite Aid gelcaps would provide him with "fast" relief. *See* Bailey Dep. Tr. at 46, 51. The Court is not persuaded that Bailey's testimony demonstrates that his purchasing experience was not typical of that of the proposed class members. While in some portions of his deposition Bailey testified that he did not look at any other products or prices before deciding to purchase the Rite Aid gelcaps, Bailey rehabilitated his testimony in other portions of the deposition as to that issue. *See* Bailey Dep. Tr. at 45-48, 55-60. Accordingly, based on the totality of Bailey's testimony, the Court cannot conclude that his experience purchasing Rite Aid gelcaps prevents him from satisfying the typicality requirement.

Second, Rite Aid argues that Bailey did not suffer an injury of the type alleged in the FAC, because, according to Rite Aid, his "injury" ultimately arises from the fact that the Rite Aid gelcaps did not contain enough acetaminophen to relieve his pain for an extended time period, and did not arise, as Bailey alleges in the FAC, from the speed with which the gelcaps dissolved. Bailey testified that, before purchasing the Rite Aid gelcaps, he wanted something to "keep the pain away for a long period of time." *Id.* at 56. He purchased the Rite Aid gelcaps at a Rite Aid store after looking at the "rapid release" label on the product box. *Id.* at 46, 51. He took the Rite Aid gelcaps but did not experience pain relief after approximately two hours. *Id.* at 24. After he concluded that the Rite Aid gelcaps had not worked as he had expected them to work, he purchased a "slow release" Tylenol arthritis product, *id.* at 22, 35, 55-58, 24, 27, which Rite Aid represents exceeds the acetaminophen content of the Rite Aid gelcaps by 150 milligrams. Rite Aid, therefore, argues that Bailey's "dissatisfaction" with the Rite Aid gelcaps stems from the gelcaps having insufficient acetaminophen content, as opposed to not having a fast-enough release. As such, Rite Aid argues that Bailey was not injured by the allegedly misleading conduct at issue in this action.

The Court also is not persuaded by this argument, because it misapprehends the nature of the injury that Bailey alleges in the complaint, which is *economic* in nature. Bailey's testimony that he did not experience any pain relief after taking the Rite Aid gelcaps, even after waiting approximately two hours for them to have an effect, does not mean that did not suffer any *economic* injury as he alleges in the FAC. Indeed, Bailey's testimony is not inconsistent with his

allegations that he overpaid for Rite Aid gelcaps based on his belief, albeit a mistaken one, that they would be faster-acting than Rite Aid tablets. Bailey's testimony, in fact, supports his allegations that he suffered injury because he testified that he purchased the Rite Aid gelcaps and paid more for them than he otherwise would have been willing to pay if they had been labeled in a non-misleading way. Whether the Rite Aid gelcaps and the Rite Aid tablets would have been "functionally equivalent" in not being capable of relieving his pain does not negate the fact that Bailey suffered economic injury as a result of the alleged mislabeling of the Rite Aid gelcaps. *See Kwikset*, 51 Cal. 4th at 330 (holding in a product mislabeling action that, where a consumer "paid more than he or she actually valued the product," the consumer suffered "economic injury [that] affords the consumer standing to sue" and further holding that "[t]his economic harm—the loss of real dollars from a consumer's pocket—is the same whether or not a court might objectively view the products as functionally equivalent.").

That being said, Bailey's testimony raises questions as to whether he has Article III standing to seek *prospective* injunctive relief.[13] To have Article III standing to seek "injunctive relief, which is a prospective remedy, the threat of injury must be 'actual and imminent, not conjectural or hypothetical.'" *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (citation omitted). "Where standing is premised entirely on the threat of repeated injury, a plaintiff must show a sufficient likelihood that he will again be wronged in a similar way." *Id.* (internal citations and quotation marks omitted).

Here, as will be discussed in more detail below, Bailey seeks certification of the proposed class under Rule 23(b)(2), with respect to which he seeks the following prospective injunctive relief (1) an order requiring Rite Aid to adequately represent the true nature, quality, and capability of the Rite Aid gelcaps; (2) an order (a) issuing a nationwide recall of the Rite Aid

[13] Nothing in Bailey's deposition testimony or the parties' briefs suggests that Bailey lacks Article III standing to seek other equitable relief, such as restitution. "The False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants asserting claims under those statutes." *Colgan*, 135 Cal. App. 4th at 694. The "restitution remedy" provided under the FAL, UCL, and CLRA is "identical" and should be "construed in the same manner," namely as the return of the money or property that was unlawfully acquired by the defendant by unlawful means. *Id.* at 695-96 (citation omitted).

gelcaps to address product labeling and packaging; (b) issuing warnings or notices to consumers and the class members concerning the true nature, quality, and capability of the Rite Aid gelcaps; and (c) immediately discontinuing any false, misleading, unfair, or deceptive advertising, marketing, or other representations described in the FAC. *See* Docket No. 98-3 at 24-25.

Bailey's testimony suggests that there is no likelihood that he will purchase the Rite Aid gelcaps in the future. Bailey testified that, after he determined that the Rite Aid gelcaps he purchased "did not work," he then purchased a Tylenol extended-release acetaminophen product for arthritis. Bailey Dep. Tr. at 80, 58, 99. He explained that he purchased the Tylenol product instead of Rite Aid gelcaps or tablets because the Rite Aid gelcaps had not worked and because he "trusted" the Tylenol product, which he has continued to take as of the date of his deposition. *Id.*

If it is the case, as Bailey's testimony suggests, that there is no likelihood that he will purchase Rite Aid gelcaps in the future, then he would lack Article III standing to seek the prospective injunctive relief he seeks. As a result, his claims and defenses would not be typical of those of the proposed injunctive relief class under Rule 23(b)(2).

In sum, the Court finds that, on this record, Bailey has satisfied the typicality requirement, except with respect to his request to seek prospective injunctive relief on behalf of a Rule 23(b)(2) class. In any renewed motion for class certification, Bailey may seek to establish that he has Article III standing to seek prospective injunctive relief and that his claims and defenses are typical of those of proposed members of a Rule 23(b)(2) class.

4. Adequacy of Representation

The requirement of adequate representation requires a showing that the representative parties "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requires inquiry into whether the plaintiff and its counsel have any conflicts of interest with other class members, and whether the plaintiff and its counsel will prosecute the action vigorously on behalf of the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Bailey argues that he and his counsel satisfy this requirement because "his interests are fully aligned with those of the class, sharing a commonality of predicate facts, claims, and damages." Docket No. 98-3 at 14. He further argues that his counsel have no conflicts of interest

with any proposed class members, and that he and his counsel are capable and willing to prosecute this action vigorously on behalf of the proposed class. *Id.*

The Court has no concerns regarding the adequacy of counsel and finds the adequacy-of-representation requirement satisfied with respect to them.

Rite Aid argues that Bailey is not an adequate representative for the proposed class because his claims and defenses are not typical of those of the proposed class members. The Court's view on this topic aligns with that set forth in the section on typicality.

B. Rule 23(b)

1. Rule 23(b)(3)

Under Rule 23(b)(3), a plaintiff must show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

Rule 23(b)(3) requires the Court to determine whether "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). The "predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49 (5th ed. 2012)). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 (3d ed. 2005)).

A plaintiff must show that the predominance requirement is satisfied "by a preponderance of the evidence[.]" *Olean*, __ F.3d __ , 2021 WL 1257845, at *4. "The preponderance standard . . . flows from the Supreme Court's emphasis that the evidence used to satisfy predominance be 'sufficient to *sustain a jury finding* as to [liability] if it were introduced in each [plaintiff's] individual action.'" *Id.* (quoting *Tyson Foods*, 577 U.S. at 459) (emphasis in the original). "Establishing predominance, therefore, goes beyond determining whether the evidence would be admissible in an individual action. Instead, a 'rigorous analysis' of predominance requires 'judging the persuasiveness of the evidence presented' for and against certification.'" *Id.* (citation omitted); *see also Ellis*, 657 F.3d at 982 (holding that the district court erred in finding that the predominance requirement was met because, "[i]nstead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible").

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc., v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011).

As noted above, the claims at issue are under the UCL, FAL, and CLRA, and a claim for unjust enrichment.

i. UCL, FAL, and CLRA

Bailey argues that common questions predominate over individual ones with respect to his claims under the UCL, FAL, and CLRA, because the questions that the Court has determined are capable of class-wide resolution with common proof, namely whether the "rapid release" statement was material to, and likely to deceive, a reasonable consumer, predominate over individual questions.

The Court agrees. Courts routinely hold that if a plaintiff shows by a preponderance of the evidence that the questions of materiality and likelihood of deception can be resolved with common evidence based on the objective reasonable consumer standard, then common questions predominate over individual ones with respect to claims under the UCL, CLRA, and FAL. *See, e.g., Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012) ("This objective

test renders claims under the UCL, FAL, and CLRA ideal for class certification because they will not require the court to investigate class members' individual interaction with the product."); *Johns v. Bayer Corp.*, 280 F.R.D. 551, 557 (S.D. Cal. 2012) (same). These courts reason that materiality and likelihood of deception are the essential or central elements of a claim under the CLRA, UCL, and FAL, respectively, and when these elements can be resolved with common proof, they predominate over any remaining issues, even those that must be resolved on an individual basis. *See id.*

Rite Aid argues that the cases in which courts have certified UCL, FAL, and CLRA classes after concluding that materiality and likelihood of deception can be resolved with common proof are distinguishable. According to Rite Aid, in those cases. the plaintiff showed that it was entitled to a presumption of reliance, but here, the Butler survey "overwhelms" Bailey's evidence with respect to whether materiality can be resolved with common proof, and this prevents Bailey from invoking a presumption of reliance. Docket No. 107-4 at 18-19.

As a threshold matter, Rite Aid does not appear to dispute that the predominance requirement is met with respect to Bailey's claims under the UCL and FAL. Rite Aid's argument, which is about whether reliance can be presumed, is relevant to the question of whether Bailey has satisfied the predominance requirement *with respect to his CLRA claim only*, as reliance is not an element of a UCL and FAL claim. As discussed above, a plaintiff asserting a claim under either the UCL or FAL must show *only* that the question of likelihood of deception can be established with common proof in order to establish that common questions predominate over individual ones with respect to such claims. *See Stearns*, 655 F.3d at 1020 ("[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.") (quoting *In re Tobacco II Cases*, 46 Cal. 4th at 298). Bailey has done so here, for the reasons discussed above. In the absence of any actual dispute, the Court finds that Bailey has satisfied the predominance requirement with respect to his claims under the UCL and FAL.

As to the CLRA claim, the Court is not persuaded by Rite Aid's argument that Bailey has not shown that he is entitled to a presumption of reliance. As noted, a court may presume class-

wide reliance where the plaintiff shows that common proof is capable of resolving the question of whether material representations were made to the proposed class. *See In re Vioxx Class Cases*, 180 Cal. App. 4th at 129 ("If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class.") (emphasis added). For the reasons discussed in more detail above, Bailey has made that showing here. The common evidence to which Bailey points, which the Court finds to be more persuasive than the Butler survey for the reasons discussed above, is capable of sustaining a jury finding that all consumers who purchased Rite Aid gelcaps at Rite Aid brick-and-mortar stores were exposed to the "rapid release" statement and the price of Rite Aid gelcaps and to the prices and non-"rapid release" labels of Rite Aid tablets (which enabled consumers to make the comparison upon which Bailey's theory of liability depends), and that a reasonable consumer would find the "rapid release" statement at issue to be material when purchasing Rite Aid gelcaps. This is sufficient to invoke the presumption of reliance with respect to Bailey's CLRA claim. The Court finds, therefore, that Bailey has met his burden to show that common questions predominate over individual ones with respect to his CLRA claim.

In sum, the Court finds that the predominance requirement is satisfied with respect to the UCL, FAL, and CLRA claims.

ii. Unjust Enrichment

During the hearing held on April 6, 2021, in response to questions asked by the Court with respect to his claim for unjust enrichment, Bailey indicated that, at this juncture, he no longer seeks class certification with respect to this claim. Accordingly, Bailey's motion for class certification is **DENIED WITHOUT PREJUDICE** with respect to his unjust enrichment claim.

iii. Damages

A plaintiff seeking certification under Rule 23(b)(3) must show that damages are capable of measurement on a class-wide basis, and such calculations "need not be exact." *Comcast*, 569 U.S. at 35. Under *Comcast*, a plaintiff must show that its proposed damages model is consistent with its theory of liability in the case. *Id.* "[T]he mere fact that there might be differences in

damage calculations [across individual members of a class] is not sufficient to defeat class certification." *Pulaski & Middleman*, 802 F.3d at 987 (quoting *Stearns*, 655 F.3d at 1026).

The damages and restitution owed to a plaintiff pursuant to the CLRA, and UCL and FAL, respectively, is based on the difference between the price the consumer paid and the price a consumer would have been willing to pay for the product had it been labeled accurately. *Id.* at 988-89. In other words, "the focus is on the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information." *Id.* (citing *Kwikset*, 51 Cal. App. 4th at 329).

Bailey's proposed damages model is comprised of two components. The first component will purportedly measure the price premium that can be attributed to the "rapid release" statement on the box of the Rite Aid gelcaps. Docket No. 92-11 ¶¶ 11, 14. Steven Gaskin, Bailey's survey expert, has designed but not yet executed[14] a choice-based conjoint analysis that purports to be capable of measuring this price premium, which is "the difference in market value of the Class Products with the misrepresentation compared to the market value of the Class Products without the misrepresentation." *Id.* ¶ 10. In other words, the conjoint analysis is intended to measure the economic losses that a consumer who was deceived by the misrepresentations at issue would have suffered on average. According to Gaskin,

> *The general idea behind conjoint analysis is that the market value for a particular product is driven by features or descriptions of features embodied in that product.* Customers are shown product profiles made up of varying features and asked, as part of a series of "choice tasks," to indicate their preferred product profile. At no point are respondents asked to indicate directly how much they would pay; rather, the analysis is based on choices respondents make among alternatives[.]

Id. ¶ 16 (emphasis supplied). The proposed conjoint analysis involves asking 500 consumers nationwide to choose between different sets of product attributes, aggregating the responses, and

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[14] A plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are capable of determination on a class-wide basis with common proof. *See Hadley*, 324 F. Supp. 3d at 1103 (holding that proposed conjoint analysis that had not yet been executed was sufficient to show that damages can be calculated on a class-wide basis with common proof). A plaintiff need only show that "damages are *capable* of measurement" on a class-wide basis. *Comcast*, 569 U.S. at 34 (emphasis supplied).

then using regressions to isolate the value that consumers attach to the attribute in question, namely "rapid release." *Id.* ¶¶ 17, 20-21, 43, 52.

The second component of the damages model will purportedly estimate the total class-wide damages. Colin Weir, Bailey's economics expert, opines he can calculate class-wide damages by taking the price premium determined by Gaskin's proposed conjoint analysis and then multiplying it by the number of Rite Aid gelcaps actually sold during the relevant time period. Docket No. 95-4 ¶ 52.

Rite Aid argues that Gaskin and Weir's model does not establish that damages are capable of determination on a class-wide basis for several reasons, none of which persuades.

First, Rite Aid argues that the proposed damages model does not satisfy *Comcast*'s requirement that a damages model be consistent with the theory of liability in the case. Specifically, Rite Aid argues that the damages model here would result in a premium that reflects only the average preferences of those proposed to be surveyed and would not take into account whether proposed class members were actually injured as a result of having compared the prices and labels of Rite Aid gelcaps and Rite Aid tablets.

In *Comcast*, the plaintiffs proposed four theories of measuring antitrust impact (i.e., antitrust injury in the form of economic losses suffered by the alleged anticompetitive conduct at issue). 569 U.S. at 31. The district court accepted only one of those theories as "capable of classwide proof," which purported to measure damages resulting from "reduced overbuilder competition," and it granted plaintiffs' motion for class certification in part on the ground that plaintiffs' damages model had shown that damages could be measured on a class-wide basis. *Id.* The Supreme Court reversed, holding that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to th[e] theory" of liability at issue in the case. *Id.* at 35. The Supreme Court held that the district court erred in concluding that plaintiffs had met their burden of showing that damages could be measured on a class-wide basis, because the only evidence that plaintiffs proffered was a damages model that "failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action [was] premised," namely the "reduced overbuilder competition" theory. *Id.* at 35-36 (noting that

the regression model, improperly, "assumed the validity of *all four* theories of antitrust impact initially advanced by respondents" and was not limited to the single theory of antitrust impact that the district court had accepted) (emphasis supplied).

The first aspect of the proposed model here, the choice-based conjoint survey to be performed by Gaskin, does not run afoul of *Comcast*. That survey seeks to measure the premium that consumers paid, on average, as a result of the allegedly misleading conduct at issue and is therefore directly tied to the theory of liability in the case. In mislabeling cases where the injury suffered by consumers was in the form of an overpayment resulting from the alleged misrepresentation at issue, such as here, courts routinely hold that choice-based conjoint models that are designed to measure the amount of overpayment satisfy *Comcast*'s requirements. *See, e.g., Zakaria v. Gerber Prod. Co.*, No. LACV1500200JAKEX, 2017 WL 9512587, at *17 (C.D. Cal. Aug. 9, 2017), *aff'd*, 755 F. App'x 623 (9th Cir. 2018) (holding that a conjoint analysis that purported to measure consumers' overpayment caused by alleged misrepresentations was "distinguishable" from the damages model rejected in *Comcast* because the conjoint analysis was consistent with the theory of lability that mislabeling caused consumers to suffer economic losses in the form of overpayment); *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (holding that, to comply with *Comcast*, "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability").

The second aspect of the damages model, the one that measures class-wide damages, is also tailored to Bailey's theory of liability, because it seeks to multiply the premium to be determined by Gaskin by the number of products sold to members of the proposed class.[15] As such, it measures "only those damages attributable to" Bailey's theory of liability and is therefore consistent with *Comcast*. *Comcast*, 569 U.S. at 35.

Rite Aid's argument that the damages model at issue includes purchases made by consumers who suffered no injury lacks merit. The only evidence to which Rite Aid points to

[15] Only the products sold to the members of the narrower class proposed by Bailey during oral argument, namely consumers who purchased Rite Aid gelcaps in Rite Aid brick-and-mortar stores, would be included in this calculation.

support this argument is the Butler survey, which Rite Aid contends shows that a significant portion of consumers were not deceived as alleged in the FAC and were, therefore, not injured.

Rite Aid's argument "reflects a merits dispute about the scope of [its] liability, and is not appropriate for resolution at the class certification stage of this proceeding." *See Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016). The Court's task at the class certification stage is to "ensure that the class is not 'defined so broadly as to include a great number of members who for some reason *could not have been harmed* by the defendant's allegedly unlawful conduct.'" *Id.* at 1138 (citation omitted) (emphasis supplied). A proposed class is not overbroad where it is "reasonably co-extensive with Plaintiff's chosen theory of liability." *Id.* at 1137-38. Here, the proposed class, as narrowed during oral argument, includes *only* those consumers who *could have been harmed* by Rite Aid's alleged misconduct, because it includes only consumers who purchased Rite Aid gelcaps at brick-and-mortar stores, (1) all of whom, according to the evidence discussed above, were exposed to the "rapid release" statement at issue and to the prices and labels of both the Rite Aid gelcaps and Rite Aid tablets, and (2) all of whom, according to Silverman, were likely misled into believing that the Rite Aid gelcaps were faster-acting than Rite Aid tablets and likely found the "rapid release" statement to be material. Thus, the proposed class here is co-extensive with Bailey's theory of liability. *See id.* (holding that a proposed class is "reasonably co-extensive" with the plaintiff's theory of liability if it includes *only* consumers who "could . . . have been harmed by [the defendant's] allegedly unlawful conduct"). The proposed class is, therefore, not overbroad. *Cf. id.* (noting that a proposed class is overbroad where it includes "large numbers of class members who *were never exposed* to the challenged conduct to begin with" and therefore "could *not* have been harmed" by the alleged misconduct) (citing *Mazza*, 666 F.3d at 596) (emphasis added).

Accordingly, the Court finds that the proposed damages model does not run afoul of *Comcast*.

Rite Aid next argues that the proposed damages model is not capable of reliably determining the premium that proposed class members purportedly paid as a result of the "rapid release" statement because it only measures survey respondents' willingness to pay (i.e., demand)

but it does not take into account supply-side factors. The Court disagrees. Bailey has shown, and Rite Aid does not dispute, that the proposed damages model employs actual prices and quantities of past sales (based on actual sales data), which inherently reflect *both* demand and supply factors. *See* Docket No. 92-11 ¶ 26. Courts routinely hold that conjoint analyses that employ actual sales data reflecting prices and quantities of items actually sold in the past adequately account for supply-side factors. *See, e.g.*, *Hadley*, 324 F. Supp. 3d at 1105-06 (holding that courts routinely find that a proposed conjoint analysis adequately accounts for supply-side factors where it utilizes actual sales data, including actual prices and quantities of past sales) (collecting cases); *Krommenhock v. Post Foods, LLC*., 334 F.R.D. 552, 576 (N.D. Cal. 2020) (Orrick, J.) (same). Rite Aid has not shown that a different conclusion is warranted here; it cites no controlling authority that supports the proposition that a conjoint analysis that employs actual sales data, such as the one at issue here, fails to properly take into account supply-side factors.

Relying on *Zakaria v. Gerber Prod. Co.*, 755 F. App'x 623, 624 (9th Cir. 2018), Rite Aid next contends that the proposed damages model must be rejected because it fails to reflect market realities. Rite Aid argues that, for example, the survey aspect of the model describes pill counts that do not exist in the real world (i.e., the survey proposes a product choice with a 500-pill count even though the highest pill count available in the market is 225), and presents survey respondents with unrealistic product choices (e.g., one product is described as both rapid release and extended release even though, in the marketplace, the same product cannot have both a rapid and slow release). This argument is unavailing. First, *Zakaria* is an unpublished Ninth Circuit memorandum and therefore has no precedential force. Second, in that case, the Ninth Circuit held that the district court did not abuse its discretion in concluding that the conjoint analysis there "was inadequate for measuring class-wide damages" on the basis that the model failed to "reflect supply-side considerations and marketplace realities that would affect product pricing." *Id.* A review of the district court's opinion shows that its rejection of the conjoint analysis was predicated on its acceptance of the defendant's argument that the model "only evaluated consumers' subjective willingness to pay as an abstract concept" and ignored supply-side factors. *See Zakaria*, 2017 WL 9512587, at *18-19. For the reasons discussed above, the conjoint analysis

here *does* account for supply-side factors and, therefore, does not suffer from the flaws that justified the rejection of the model in *Zakaria*.

Further, to the extent that the survey questions that Gaskin has proposed contain typographical errors or other inaccuracies as to consumers' shopping experiences, such errors would not warrant denying Bailey's motion for class certification. *See Hadley*, 324 F. Supp. 3d at 1107–08 (rejecting the argument that the proposed conjoint analysis' purported failure to "adequately mimic real-life shopping experience[s]" precluded the certification of a Rule 23(b)(3) class and holding that any such inaccuracies only affect the weight to be accorded to the conjoint analysis).

For these reasons, the Court concludes that Bailey has met his burden to show that his proposed damages model comports with *Comcast* and that damages are capable of measurement on a class-wide basis.

b. Superiority

Rule 23(b)(3) requires a court to consider whether a class action would be a superior method of litigating the claims of the proposed class members by taking into account (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).

Bailey argues that a class action is superior to other available methods of litigating the claims of the proposed class members because (1) the damages for each proposed class member are not significant; (2) no other cases have been brought against Rite Aid for the same conduct at issue here; (3) concentrating the claims in this forum would be desirable; and (4) judicial economy would be promoted and the litigation of the claims would be made more efficient and practical.

Rite Aid does not dispute that Bailey's showing satisfies the superiority requirement. The Court agrees and finds that this requirement is met.

2. Rule 23(b)(2)

Rule 23(b)(2) permits certification of a class where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001).

Bailey argues that certification of the proposed class under Rule 23(b)(2) is appropriate because Rite Aid continues to use the "rapid release" statement on the label of the Rite Aid gelcaps and continues to mislead consumers as alleged in the FAC. For the proposed class he seeks to certify under Rule 23(b)(2), Bailey seeks (1) an order requiring Rite Aid to adequately represent the true nature, quality, and capability of the Rite Aid gelcaps; (2) an order (a) issuing a nationwide recall of the Rite Aid gelcaps to address product labeling and packaging; (b) issuing warnings or notices to consumers and the class members concerning the true nature, quality, and capability of the Rite Aid gelcaps; and (c) immediately discontinuing any false, misleading, unfair, or deceptive advertising, marketing, or other representations described in the FAC.

Rite Aid argues that Bailey cannot obtain certification under Rule 23(b)(2) because the monetary relief that Bailey seeks is "not incidental" to the injunctive relief he requests.

Here, Bailey does not seek to obtain monetary relief for the proposed members of the Rule 23(b)(2) class; instead, consistent with the language of Rule 23(b)(2), the relief he seeks for this proposed class is limited to the prospective injunctive relief described above. Bailey is not precluded from seeking certification of a Rule 23(b)(2) class for injunctive relief merely because he also seeks certification of a Rule 23(b)(3) class for damages and restitution. Indeed, "Ninth Circuit precedent indicates that the court can separately certify an injunctive relief class and if appropriate, also certify a Rule 23(b)(3) damages class." *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 573 (C.D. Cal. 2014) (rejecting the argument that "the court can certify a Rule 23(b)(2) class only if the monetary relief sought is purely incidental to the injunctive relief").

The Court finds, however, that Bailey has not shown that certification under Rule 23(b)(2) would be appropriate because he has not shown that he can satisfy the typicality and adequacy-of-representation requirements under Rule 23(a) in light of his deposition testimony, which suggests that he may not have standing under Article III to seek prospective injunctive relief.

For the foregoing reasons, the Court **DENIES WITHOUT PREJUDICE** Bailey's motion for certification under Rule 23(b)(2).

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Bailey's motion for class certification under Rule 23(b)(3) with respect to his claims under the UCL, FAL, and CLRA. While granting the motion, the Court reaffirms that this is not a resolution on the merits and had a properly conducted survey reached the same results as were presented, the result may have been different. The Court otherwise **DENIES WITHOUT PREJUDICE** his motion for class certification.

This order terminates Docket Numbers 92, 95, 96, 107, 115.

IT IS SO ORDERED.

Dated: April 28, 2021

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS BAILEY,

Plaintiff,

v.

RITE AID CORPORATION,

Defendant.

CASE NO. 4:18-cv-06926 YGR

ORDER DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

Re: Dkt. No. 133

In this class action against defendant Rite Aid Corporation ("Rite Aid") for state-law claims arising out of Rite Aid's marketing of its over-the-counter acetaminophen gelcaps ("Rite Aid gelcaps") as "rapid release," now pending is Rite Aid's motion for leave to file a motion for reconsideration of the Court's order granting in part and denying in part Bailey's motion for class certification, dated April 28, 2021, Docket No. 129.

Having carefully considered the pleadings and the papers submitted, and for the reasons set forth below, the Court **DENIES** the motion for leave to file a motion for reconsideration, and it also **DENIES** Rite Aid's proposed motion for reconsideration.

I. LEGAL STANDARD

Under Federal Rule of Civil Procedure 54(b), a court may revise any interlocutory order in its discretion. *Berman v. Freedom Fin. Network, LLC,* No. 18-CV-01060-YGR, 2020 WL 6684838, at *1 (N.D. Cal. Nov. 12, 2020). "However, reconsideration of a prior ruling is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Id.* (quoting *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is

an intervening change in controlling law." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

Under Civil Local Rule 7-9(b), a party moving for leave to file a motion for reconsideration "must specifically show reasonable diligence in bringing the motion," and one of the following:

> (1) That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought; or
>
> (2) The emergence of new material facts or a change of law occurring after the time of such order; or
>
> (3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

Civil L.R. 7-9(b). "No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered. Any party who violates this restriction shall be subject to appropriate sanctions." Civil L.R. 7-9(c).

II. DISCUSSION

Rite Aid's request for reconsideration is predicated on the theory that the Court "misapprehended a key component of Rite Aid's argument regarding the lack of uniform class-wide exposure[.]" Docket No. 133-1 at 2. According to Rite Aid, Bailey failed to show that the members of the proposed class were exposed to Rite Aid's allegedly deceptive conduct. Rite Aid contends that exposure "is dependent upon class members seeing and comparing the Rite Aid acetaminophen gelcap product label and pricing with the Rite Aid acetaminophen tablet or caplet product labels and pricing," but Bailey "failed to put on any evidence showing that consumers made the product comparison" at issue. *Id.* Rite Aid further argues that it "produced evidence in the form of a consumer survey" showing that "there is a high likelihood that significant numbers

of consumers do not make the product comparison on which Plaintiff's deception theory is predicated and upon which the Court granted certification." *Id.* at 3.

In other words, Rite Aid's reconsideration request is based on a purported manifest failure by the Court to consider material facts or dispositive legal arguments. The Court is not persuaded.

In the context of mislabeling actions, the essential element of a claim under the Unfair Competition Law ("UCL") and the False Advertising Law ("FAL") is likelihood of deception[1], and the essential element of a Consumer Legal Remedies Act ("CLRA") claim is reliance[2]. Exposure to the allegedly misleading statement is a precondition for finding likelihood of deception and reliance; in other words, without exposure, there can be no likelihood of deception, and there can be no reliance. A person who was *never* exposed to a misleading statement *could not* have been deceived and *could not* have relied upon it and, accordingly, could not have a viable claim under the UCL, FAL, or CLRA. *See Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966, 980 (2009) (holding that California law does not "authorize an award . . . on behalf of a consumer who was *never exposed in any way* to an allegedly wrongful business practice") (emphasis added); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) ("California courts have recognized that *Tobacco II* does not allow 'a consumer who was *never exposed* to an alleged false or misleading advertising . . . campaign' to recover damages under California's UCL.") (quoting *Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 632 (2010)) (emphasis added).

In its order of April 28, 2021, the Court found that there was no meaningful dispute that the members of the proposed class (as narrowed during oral argument) were exposed to the labels and prices of Rite Aid gelcaps[3] and tablets because such prices and labels were placed within eye-view of consumers as a result of Rite Aid's product-placement policies. This is enough for the

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[1] *See In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) ("[T]o state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, 'it is necessary only to show that members of the public are likely to be deceived.'") (citation omitted).

[2] *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011) ("'[P]laintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm.'") (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009)).

[3] The label of the Rite Aid gelcaps contains the "rapid release" statement that is allegedly misleading.

Court to find that the proposed class members were exposed to the allegedly misleading conduct.[4] Rite Aid does not argue in its proposed motion for reconsideration that the labels and prices of the Rite Aid gelcaps and tablets were *not* within eye-view of consumers. Instead, Rite Aid argues it was not enough for Bailey to have shown that the labels and prices of Rite Aid gelcaps and tablets were within eye-view of consumers, because Bailey was required, but failed, to *also* show that the proposed class members who were exposed to these prices and labels were likely to have compared them and, thereby, to have been deceived by them and to have relied upon them.

This argument is unavailing. As the Court discussed in its order of April 28, 2021, Bailey *did* present, and the Court *did* credit, evidence showing likelihood of consumer deception and reliance based on the price and label comparison at issue, the bulk of which was in the form of the opinions of Bailey's advertising expert, Bruce Silverman, which the Court found to be persuasive. *See, e.g.*, Docket No. 129 at 9 (relying on Silverman's opinions to find "that consumers who purchased Rite Aid gelcaps at brick-and-mortar Rite Aid stores were exposed to the prices and

[4] Rite Aid appears to contend that Bailey cannot establish exposure by showing that the proposed class members were exposed to the prices and labels of both the Rite Aid gelcaps and tablets, without more. Rite Aid has cited no authority that compels that conclusion. Courts find that exposure exists where a court reasonably can infer that the class members would be able to see the misrepresentation at issue. *See Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 488 (N.D. Cal. 2011) (holding that, where the alleged misrepresentations are on the package of a product or on a product label, "it is reasonable to infer that they were communicated to all class members because they were shown at the point of purchase"); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("Because the alleged misrepresentations appeared on the actual packages of the products purchased, there is no concern that the class includes individuals who were not exposed to the misrepresentation."); *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 895 (N.D. Cal. 2015) (noting that "in numerous cases involving claims of false-advertising, class-wide exposure has been inferred because the alleged misrepresentation is on the packaging of the item being sold. In such a case, given the inherently high likelihood that in the process of buying the product, the consumer would have seen the misleading statement on the product thus been exposed to it, exposure on a classwide basis may be deemed sufficient.") (citations omitted). By contrast, courts find that the exposure requirement is *not* met where class members could not, under *any circumstances*, have seen or heard the misrepresentation at issue, such as where, for example, the label containing the misrepresentation was never affixed to the product purchased by the class members, *Pfizer Inc. v. Superior Ct.*, 182 Cal. App. 4th 622, 632 (2010); or the misrepresentations were made in advertising campaigns that were very limited and were unlikely to have reached every class member, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (citations omitted). The court reaffirms its finding in its order of April 28, 2021, that Bailey met his burden to show exposure to the allegedly misleading conduct. The question of whether the proposed class members made the price and label comparison upon which Bailey's theory of liability depends relates not to exposure, but to whether Bailey showed likelihood of deception and reliance.

labels of Rite Aid gelcaps and Rite Aid tablets and were misled into believing that the Rite Aid gelcaps are faster acting than Rite Aid tablets *after comparing* the prices and labels of both products"); *id.* at 15 (relying on "Silverman's opinions that the 'rapid release' statement would have been material to a reasonable consumer because consumers want fast relief and that statement was placed on the front of the Rite Aid gelcaps' package, which is generally reserved for attributes that are deemed to be the most important to consumers"). Rite Aid ignores this aspect of the Court's order.

Rite Aid's argument that Bailey has presented no evidence of the comparison at issue is predicated on its attacks of Silverman's opinions and on its reliance on the Butler survey, which the Court analyzed at length in its order of April 28, 2021. Rite Aid improperly repeats in its proposed motion for reconsideration the arguments it made in its opposition to Bailey's class certification motion, which the Court rejected in its April 28, 2021, order, namely (1) that the Court cannot rely on Silverman's opinions because "Mr. Silverman is totally unqualified to opine on" whether consumers made the comparison at issue, *compare* Docket No. 133-1 at 5 (arguing in motion for reconsideration that Silverman is unqualified to opine on whether consumers made the product and price comparison), *with* Docket No. 129 at 11-12 (rejecting in April 28, 2021, order "Rite Aid's attacks on the reliability and persuasiveness" of Silverman's opinions); and (2) that the Butler survey showed that consumers are unlikely to have made the comparison at issue, *compare* Docket No. 133-1 at 6-7 (arguing in motion for reconsideration that the Butler survey showed that "the necessary product comparison actually was unlikely to have taken place"), *with* Docket No. 129 at 12-14 (finding in April 28, 2021, order that the persuasiveness of the Butler survey and its results is outweighed by the evidence presented by Bailey because "[a]ll of the survey responses that Rite Aid contends are relevant to the present motion" are predicated on "flawed images" that did not permit survey respondents to make the price and label comparison at

issue).[5] The Court rejects Rite Aid's invitation to revisit its analysis and findings with respect to the persuasiveness of Silverman's opinions and the Butler survey.

Rite Aid also contends that the Court should grant its proposed motion for reconsideration because Bailey's criticisms of the Butler survey "were made in Plaintiff's reply memo and in expert reply declarations to which Ms. Butler never had a chance to respond." Docket No. 133-1 at 9 n.11. This argument, which Rite Aid makes for the first time in its proposed motion for reconsideration, is unavailing. By failing to file objections within seven days to any reply evidence Bailey purportedly filed, Rite Aid waived any such objections. *See* Civil L.R. 7-3(d) (providing that "[i]f new evidence has been submitted in the reply, the opposing party may file *within 7 days after the reply is filed* and serve an Objection to Reply Evidence") (emphasis added).

Finally, in its proposed motion for reconsideration, Rite Aid makes new arguments and cites authorities that it did not previously cite in its opposition to Bailey's class certification motion. *See, e.g.*, Docket No. 133-1 at 6 n.6 (arguing for the first time that the product and price comparison at issue would not be "as simple" as Bailey contends, because the pill counts of Rite Aid gelcaps and Rite Aid tablets are "often quite different"); Docket No. 133-1 at 8-9 (citing for the first time *In Re Clorox Consumer Litigation*, 301 F.R.D. 436, 469 (N.D. Cal. 2014)). The Court declines to consider these new arguments and authorities at this juncture.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** Rite Aid's motion for leave to file a motion for reconsideration, as well as its proposed motion for reconsideration.

This order terminates Docket Number 133.

IT IS SO ORDERED.

Dated: May 26, 2021

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

[5] Rite Aid contends that the Court "found certain problems" with only certain "closed ended questions" in the Butler survey. Docket No. 133-1 at 4 n.4. That is incorrect. The Court found flaws with respect to "*[a]ll* of the survey responses that Rite Aid contends are relevant to the present motion." *See* Docket No. 129 at 12-24 (emphasis added).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Description of Document(s) *(required for all documents)***:**

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Signature s/ Jaikaran Singh **Date** June 9, 2021
*(use "*s/[typed name]*" to sign electronically-filed documents)*