No. 26-6769

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Allison Barton, on behalf of herself and all others similarly situated,
Plaintiff-Respondent,

v.

The Procter & Gamble Company, *Defendant-Petitioner*.

BRIEF OF AMICI CURIAE THE CONSUMER BRANDS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE PERSONAL CARE PRODUCTS COUNCIL, THE CONSUMER HEALTHCARE PRODUCTS ASSOCIATION, AND THE CENTER FOR BABY AND ADULT HYGIENE PRODUCTS IN SUPPORT OF DEFENDANT-PETITIONER AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a) of the Federal Rules of Appellate Procedure, Amici Curiae the Consumer Brands Association, the National Association of Manufacturers, the Personal Care Products Council, the Consumer Healthcare Products Association, and the Center for Baby and Adult Hygiene Products hereby state that none of them has any parent corporation, and that no publicly held company owns 10 percent or more of the stock of any of the amici.

Dated: October 20, 2026

Respectfully submitted,

/s/ J. Kathleen "Katie" Bond
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INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), the Consumer Brands Association, the National Association of Manufacturers, the Personal Care Products Council, the Consumer Healthcare Products Association, and the Center for Baby and Adult Hygiene Products file this Amicus Curiae brief pursuant to a motion for leave submitted simultaneously herewith.

The Consumer Brands Association is a trade association that represents and has as its members manufacturers of consumer packaged goods from across the United States. CBA champions an industry whose products Americans depend on every day, including packaged food and beverage products as well as personal care and household cleaning. Its membership plays a vital role in powering the Nation's economy: just last year this industry contributed $2.5 trillion to the U.S. gross domestic product and supported more than 20 million American jobs.

The National Association of Manufacturers is the largest manufacturing association in the U.S., representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs 13 million men and women, contributes $3.0 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing

community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S.

The Personal Care Products Council is a national trade association representing the cosmetics and personal care products industry. Founded in 1894, it dedicated to promoting product safety, quality, and innovation, serving as a unifying voice that champions science-based policies and responsible practices to support health, well-being, and economic growth. The association's members are some of the most beloved and trusted brands in beauty and personal care today, providing millions of consumers with the diverse products they use every day—from sunscreens, toothpaste, and shampoo to moisturizer, makeup, and fragrance.

The Consumer Healthcare Products Association is the leading voice fighting to ensure that Americans have access to over-the-counter medications, dietary supplements, and OTC medical devices they can count on to be reliable, save money and time, and deliver new and better ways to get and stay healthy. CHPA supports responsible consumer healthcare companies in meeting evolving consumer demand for more products without sacrificing safety and quality. Its efforts are driven by the overriding goal of helping people pursue happier, healthier lives through responsible self-care.

The Center for Baby and Adult Hygiene Products fosters and advocates for the personal absorbent hygiene products industry in North America by promoting

and supporting the safety, sustainability, and integrity of the products among industry stakeholders, including consumers, media, policymakers, and nongovernmental organizations. As the leading industry voice for manufacturers of these products, BAHP provides critical compliance tools, advances policy solutions, and promotes consumer education on the safety and efficacy of period products, disposable diapers, and adult incontinence products.

Amici Curiae seek to draw the Court's attention to the need for district courts to appropriately address, as early as possible in litigation, false advertising cases where the challenged advertising claims bear no relationship to either the harms alleged or the plaintiff's theory of injury. Delaying decisions in these cases until summary judgment needlessly expends judicial resources and has real financial consequences for companies that spend millions of dollars defending and settling such lawsuits—ultimately making products more expensive for consumers. Amici and their members are concerned that if the district court's ruling is not overturned, it would lead to the further proliferation of abusive class filings cloaked in the name of consumer protection.

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel contributed money intended to fund this brief.

SUMMARY OF ARGUMENT

Plaintiff has challenged five advertising representations as misleading because of the alleged presence of lead in tampons. None of the representations, however, references lead in any way. Without some claim that actually references the quality of the product complained of, Plaintiff should not have been permitted to proceed past the pleadings stage—much less to have been successful at the class certification stage. At the pleadings stage, Plaintiff lacked any basis to argue that a reasonable consumer would have been deceived, and at the certification stage, she lacked common proof as to the meaning of the advertising or that the amount of lead alleged represented a potential harm to consumers.

Further, the fact that the advertising representations do not themselves reference lead fatally undermines Plaintiff's full-refund theory of damages. When a plaintiff challenges advertising that bears no relationship to the harm alleged, there is no way to measure the value added to a product by specific representations. Accordingly, a plaintiff must show that the product provided no value, and so seek a full refund. But nearly all products provide *some* value, and the products in question here are no different.

ARGUMENT

In this lawsuit, the Plaintiff alleges that the packaging of certain tampons sold by Procter & Gamble misleads consumers into believing that the products are free of lead, which she alleges is not the case. In September 2026, the district court certified a class of purchasers of the tampons. Plaintiff's Complaint compares the alleged lead content of the tampons to the Maximum Allowable Dose Level for lead established by California's Proposition 65, but does not provide any information regarding how much lead may actually be absorbed by a consumer through ordinary use of the tampons. 2d Am. Compl. [Dkt. 30], at ¶¶ 46–74 (Mar. 10, 2025). Further—and more central to Plaintiff's allegations that the packaging of the tampons is deceptive—none of the representations Plaintiff identifies actually mentions lead. Those representations are:

- "#1 U.S. Gynecologist Recommended Tampon Brand"
- "Free of Perfume"
- "Free of Elemental Chlorine Bleaching"
- "Tampon Free of Dyes"
- "Clinically Tested Gentle to Skin"

Id. at ¶ 61. Although none of these representations refers to lead, Plaintiff alleges that they deceptively suggest that the tampons are "free from potentially harmful elements and ingredients." *Id.* at ¶ 62.

In this way, Plaintiff's lawsuit fits into a group of putative class action lawsuits (and demands) that have become ever more common in recent years. These lawsuits are primarily concerned with allegations of trace substances in consumer products, although in many instances the substances are alleged to be present at exceedingly low levels for which scant evidence exists of potential harm. Because lawsuits on trace substances are less lucrative than false advertising lawsuits, however, plaintiffs' lawyers have initiated the practice of styling any such lawsuit or demand as an issue of false advertising—alleging that essentially any advertising representations whatsoever promise that a product will be free of all trace substances at any detectable level.

False advertising plaintiffs should be required, as early as possible in the litigation, to defend the allegation that the representations challenged in fact relate to the specific harms alleged. At the motion to dismiss stage, that means making plausible allegations that members of the class could have been deceived by the representations to have false beliefs about those harms. At the certification stage, that means showing by common proof that members of the class were in fact deceived. Neither happened in this case, and a class was certified without establishing that the members of the class were in fact deceived *about lead* by the representations on the package.

Allowing cases where no reasonable consumer would be misled to survive dismissal and be certified undermines the Supreme Court's admonition against *in terrorem* litigation and ultimately harms real consumers. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (cautioning against "the risk of 'in terrorem' settlements that class actions entail"). That is because, as a practical matter, merely having to litigate a putative class action "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

I. The Plaintiff Must Show Common Proof that the Advertising Conveyed Safety and that the Amount of Lead Could Be Harmful

Complaints that rest on alleged trace substances are unique (and uniquely open to abuse by plaintiffs), requiring the careful gatekeeping that arises with not only motions to dismiss but also class certification. One of the questions the petitioner asks this Court to consider is "Whether the district court erred by certifying a class even though Plaintiff did not proffer any evidence that the challenged statements affirmatively deceived anyone and so lacked 'common proof that something was misleading.'" Petition for Permission to Appeal at 8 [Dkt. 4.1 at 14] (Oct. 13, 2026) (citing *Rusoff v. Happy Grp., Inc.*, 187 F.4th 1182, 1195 (9th Cir. 2026)).

As described below, lower courts have identified bases that must exist to render allegations of deception plausible in cases on alleged trace substances. Specifically, courts have held that plaintiffs must allege that (1) the advertising claims at issue plausibly convey that a product is safe or healthy, and (2) the substance, at the alleged exposure level, could plausibly be harmful to human health.

Here, in considering whether common proof of deception has been advanced, the analysis should take a similar approach where what constitutes deception remains the same regardless of the stage of a case—meaning the analysis can and should "'overlap with the merits of the plaintiff's underlying claim.'" *Rusoff*, 187 F. 4th at 1193 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011))). The Plaintiff, thus, should be required to show common proof that (1) the advertising claims at issue conveyed that the Tampax tampons are safe, and (2) any lead in the tampons could be harmful at the exposure level alleged.

A. False Advertising Cases that Rest on Alleged Trace Substances Present Unique Challenges

"[C]laims under the California consumer-protection statutes are governed by the 'reasonable consumer' test." *Bodenburg v. Apple Inc.*, 146 F.4th 761, 769 (9th Cir. 2025) (quoting *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019) (quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008))). "Under this standard, plaintiffs must 'show that "members of the public are

likely to be deceived"' by the defendant's business practices." *Id.* (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (quoting *Bank of the W. v. Super. Ct.*, 2 Cal. 4th 1254, 1267 (1992))). Additionally, to satisfy Fed. R. Civ. P. 9(b), a plaintiff asserting fraud-based claims "must set forth what is false or misleading about [the defendant's] statement[s], and why [they are] false." *Id.* at 771 (quoting *Becerra*, 945 F.3d at 1228 (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994))).

In cases that rest on alleged trace substances, the advertising is rarely about the substance at issue in any straightforward way. In fact, the advertising typically makes no mention of the substance. *See, e.g.*, Compl., *Scott v. Riviana Foods, Inc.*, No. 25-cv-735 (E.D. Cal. June 17, 2025) (claims like "100% Whole Grain" and "Kosher" are deceptive where rice allegedly contained heavy metals); Compl., *Bruno v. BlueTriton Brands, Inc.*, No. 24-cv-1563 (C.D. Cal. Jan. 26, 2024) ("100% Mountain Spring Water" is deceptive where bottled water allegedly contained microplastics); Compl., *Hussain v. Burger King*, No. 22-cv-2258 (N.D. Cal. Apr. 11, 2022) (claims like "All the flavors you crave without the ingredients you don't" are deceptive where food packaging allegedly contained PFAS); *but see, e.g.*, Compl., *Clark v. Meyer Corp., U.S.*, No. 23-cv-581 (Cal. Sup. Ct. Feb. 8, 2023) ("PFOA Free" is deceptive where cookware allegedly contained PFOA); Compl., *Rivera v.*

Knix Wear, No. 22-cv-2137 (N.D. Cal. Apr. 4, 2022) ("100% free from PFAS" is deceptive where period underwear allegedly contained PFAS).

Making these cases even more unique is that the theories espoused as to how a substance might, potentially, be harmful tend to be based on emerging areas of research and testing that are open to significant debate. *See, e.g.*, *Bullard v. Costco Wholesale Corp.*, No. 24-cv-3714, 2025 WL 1397509 (N.D. Cal. May 14, 2025), *reconsideration denied*, 2025 WL 2145074 (N.D. Cal. July 29, 2025) ("Some of the materials cited by the parties suggest a growing scientific concern that various PFAS chemicals . . . are becoming more and more ubiquitous in the environment, including in drinking water sources. The degree to which that presents a public health hazard, and whether and when it will be appropriate to impose liability on makers of particular products in which those chemicals are detected may become an evolving area of law.").

Several prior rulings nevertheless provide a roadmap to address such cases both at the dismissal and class certification stages.

B. Lower Court Decisions Offer a Roadmap for Ensuring Courts Are Not Burdened with Speculative Advertising Cases

As this Court recently explained, "plaintiffs wishing to proceed through a class action must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Rusoff*, 187 F. 4th at 1193 (citing *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 275 (2014)). "This must be done 'by a

preponderance of actual evidence.'" *Id.* (quoting *Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249, 1258 (9th Cir. 2024)).

Further, "[b]y the time a lawsuit gets to the class certification stage, the inquiry does not turn on mere allegations, but rather on the 'persuasiveness' of the classwide proof that plaintiffs bring to bear to show that common issues predominate and can be adjudged through classwide resolution." *Id.* (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)).

In cases on alleged trace substances, in assessing whether deception has been plausibly alleged, several decisions on motions to dismiss have focused on one or both of two critical issues: (1) whether the advertising claims at issue plausibly convey that a product is safe or healthy, and (2) whether the substance at issue, at the level of exposure alleged, could plausibly be harmful to human health. Where those two issues are rightfully being considered at the motion to dismiss stage, it is even more urgent that they are considered when the plaintiff must show that common issues as to both what the advertising conveyed and what the harm might be predominate and could be adjudged through classwide resolution.

As an example of such a motion to dismiss decision, in *Erickson v. Kimberly-Clark Corp.*, the court first scrutinized the advertising claims at issue, which were for baby wipes. *Id.*, No. 24-cv-7032, 2025 WL 2105830 (N.D. Cal. July 28, 2025). The plaintiff argued that "reasonable consumers would assume" that the claim

"plant-based" means the wipes are "free of PFAS, since such chemicals are 'non-natural.'" *Id.* at *3. For several reasons, including that the claim itself included a disclosure that the wipes were "70% +" plant-based by weight, the court held that the plaintiffs had "not plausibly alleged the term 'plant-based' misleads consumers into thinking the product is free from trace amounts of PFAS." *Id.*

The plaintiff also argued that the "combination of representations that the baby wipes are 'gentle,' 'simply clean,' 'hypo-allergenic,' 'dermatologically tested,' 'alcohol free,' and 'paraben free,' would lead a reasonable consumer to believe the product is 'free of harmful toxins like PFAS chemicals.'" *Id.* (internal citation omitted). The court found that "this theory of misrepresentation only survives if the amount of PFAS present in the baby wipes is harmful or toxic." *Id.*

The plaintiff alleged that testing of a "randomly selected, representative sample" of the wipes "found PFAS present in the amount of 305 parts per trillion." *Id.* at *4. The plaintiff further alleged that such levels were toxic where the "Environmental Protection Agency had set levels of exposure 'for PFOA at .004 parts per trillion,' and 'for PFOS at .02 parts per trillion.'" *Id.* (internal citation omitted). The court held that the plaintiffs failed to allege potential harm with "plausibility" where plaintiffs never alleged "the presence of PFOS or PFOA in the tested baby wipes" and "offer[ed] no basis for asserting that these levels apply to a completely different product, which is used on the skin rather than consumed." *Id.*

Like *Erickson*, in other dismissal decisions involving alleged trace substances, courts have also carefully parsed the claims at issue to determine if a message about health or safety is conveyed. For instance, in a case involving alleged heavy metals in spices, the court found that the claim "The Taste You Trust" failed to be a "representation of the product's health" where "[i]f anything, it may be a statement describing the product's 'Taste,' not the product's health or safety." *Balistreri v. McCormick & Co., Inc*., No. 22-cv-349, 2023 WL 5988600, at *10 (N.D. Cal. Sept. 13, 2023).

As another example, in a case involving infant formula, the plaintiff argued that claims like "vitamin C for immune support" and "brain building DHA" "speak[] directly to the quality and nutritional benefits" thereby "contradict[ing] the inclusion" of heavy metals. *Lopez v. Mead Johnson Nutrition Co*., No. 24-cv-3573, 2026 WL 788492, at *6 (N.D. Cal. Mar. 20, 2026). The court found that the plaintiff "fail[ed] to plausibly explain why a reasonable consumer would understand the challenged statements to make promises about the absence of heavy metals, when none of the statements concern those substances." *Id.*; *see also Castillo v. Prime Hydration LLC*, 748 F. Supp. 3d 757, 771 (N.D. Cal. 2024) ("[E]ven if a reasonable consumer were to believe that emphasizing vitamins and electrolytes indicates that the Sports Drink contains healthy and natural ingredients," and therefore no PFAS, "this belief would be dispelled by the artificial ingredients listed on the label").

As in *Erickson*, other courts in similar cases have also scrutinized whether the plaintiff has plausibly alleged that the substance, at the alleged exposure level, could plausibly be harmful to human health. For instance, two such cases involved tampons and PFAS. In one case, the plaintiffs "allege[d] that their testing detected PFAS levels of 30 parts per million" in certain components, "with higher concentrations in the aggregate." *Bounthon v. Procter & Gamble Co.*, No. 23-cv-765, 2024 WL 4495501, at *9 (N.D. Cal. Oct. 15, 2024). The court observed, "Even if taken as true, Plaintiffs have failed to plausibly allege that these levels are harmful." *Id.* The court then noted that, although plaintiffs pointed to a California law on PFAS in consumer products as showing harm, that law applies only to products with intentionally added PFAS or PFAS "at or above 100 parts per million." *Id.* The court found that the California law, as well as other sources the plaintiffs identified, "undercut the plausibility of their claims of the harmfulness of certain PFAS levels." *Id.*

In the second case on tampons and PFAS, the court found allegations as to PFAS being harmful implausible where the "complaints [in the case] are silent as to the amount of organic fluorine detected and whether that amount is negligible or significant." *Lowe v. Edgewell Pers. Care Co.*, 711 F. Supp. 3d 1097, 1105 (N.D. Cal. 2024); *cf. Slowinski v. BlueTriton Brands, Inc.*, 744 F. Supp. 3d 867, 873 (N.D. Ill. 2024) ("No reasonable consumer would think that a bottle of water wasn't a

bottle of water because it contained infinitesimally small amounts of microplastics. No reasonable consumer would think that '100% Natural Spring Water' is a guarantee at the molecular level . . . No reasonable consumer would feel duped because the label didn't say 99.9999999999% spring water (or whatever the number would be).")

As these courts found, assessing whether an alleged trace substance might be harmful necessarily encompasses assessing the exposure level.

Focusing on the level of exposure also aligns with *In re Plum Baby Food Litig.*, which involved heavy metals and perchlorate allegedly found in baby food. No. 24-2766, 2025 WL 1200700, at *1 (9th Cir. Apr. 25, 2025). This Court affirmed a motion for summary judgment in favor of the baby food maker after holding that "a party's allegations of an unreasonable safety hazard must describe more than merely 'conjectural and hypothetical' injuries." *Id.* (quoting *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1028 (9th Cir. 2017) (quoting *Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009))). This Court further observed, "Heavy metals and perchlorate are found in a wide range of crops and food products because they are present in soil, air, and water, and *Plaintiffs fail to allege that Plum's products contain any specific level of these substances*." *Id.* (emphasis added).

C. A Similar Standard Should Be Applied Here

The "predominance inquiry is a 'demanding' one, requiring district courts to conduct a 'rigorous analysis' to determine whether the claims are suitable for class treatment under Rule 23(b)(3)." *Rusoff v. Happy Grp., Inc.*, 187 F.4th 1182, 1193 (9th Cir. 2026) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013)).

In *Rusoff*, in assessing whether the plaintiffs had offered common proof of deception, this Court began by assessing the deception allegation itself. According to this Court, "Under plaintiffs' theory of deception, reasonable consumers [were] deceived by [an egg seller's] 'pasture raised on over 8 acres' claim because it is inaccurate in light of the supposedly dominant [American Humane Association] and [Humane Farm Animal Care] industry standards." *Id.* at 1193–1194. This Court next determined as follows:

> Plaintiffs' theory therefore requires two components: (1) proof that there is an industry standard for the term "pasture raised," and (2) proof "that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled" by the term "pasture raised," believing it to mean the relevant industry standards. *Id.* at 1194 (citing *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App.4th 496 (2003)).

After holding that "plaintiffs lack common proof as to what the deception was," this Court affirmed the grant of summary judgment in favor of the defendant. *Id.* at 1195.

Here, the Plaintiff has identified five advertising claims. Under her theory of deception, these claims "mislead consumers to believe that the tampons are free of an 'potentially harmful elements,' including lead." Dkt. 39, at 7.

As discussed above, in dismissal rulings in similar cases, district courts have found that plaintiffs relying on such a theory must allege that (1) the advertising claims at issue plausibly convey that a product is safe or healthy, and (2) the substance, at the alleged exposure level, could plausibly be harmful to human health. This Court should consolidate those decisions by holding that, at the certification stage, the Plaintiff must show common proof that (1) the advertising claims at issue convey that a product is safe or healthy, and (2) the substance, at the alleged exposure level, could plausibly be harmful to human health.

In addition to being consistent with *Rusoff* and other case law, such requirements would also prevent absurd outcomes. Without such requirements, the mere presence of any substance subject to any suspicion of safety issues at any exposure level could become the basis for a deception suit based on all manner of advertising claims that may or may not convey a message about health or safety. Any alleged trace of substances like heavy metals, PFAS, or microplastics that are present in an industrialized society could, as the plaintiff would have it here, be laid at the feet of consumer product sellers who never made any claim in the first place about either the absence of the substance, which may be naturally occurring, or its safety.

Businesses will be placed in an impossible situation if at the dismissal or certification stage, courts cast aside any reasonable conception of what might convey a message about substances that may, or may not, someday be shown to be unsafe. As *Rusoff* acknowledges the predominance inquiry, in particular, is a demanding one precisely because class actions are "onerous and costly for defendants, who may feel 'pressured into settling questionable claims' to avoid even a 'small chance of a devastating loss.'" *Rusoff*, 187 F.4th at 1193 (quoting *Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249, 1258 (9th Cir. 2024) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011))).

II. The Plaintiff Must Provide Common Proof of Damages—Particularly When She Pursues a Full Refund

"'[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to'" the plaintiff's theory of liability. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (quoting *Comcast Corp.*, 569 U.S. at 35). As Judge Clifton wrote in dissent at the beginning of this year, "*Lambert* does not authorize punting the issue down the road," but requires a district court to seriously examine flaws in the damages model upon which class certification is based. *Falcone v. Nestle USA, Inc.*, No. 24-7707, 2026 WL 74510, at *4 (9th Cir. Jan. 9, 2026) (Clifton, J., diss.) (discussing *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017), *rev'd on other grounds*, 586 U.S. 188 (2019)).

To the extent a plaintiff pursues a case based alleged trace substances, she should be required, as early as possible, to show that the class suffered damages *because of the advertising representations*. Ordinarily, this means introducing expert testimony aimed at showing the specific value that was added to the product by means of each representation, and arguing that the class is owed a refund of the value added by the allegedly deceptive representations. *See, e.g.*, *Zeiger v. WellPet LLC*, 526 F. Supp. 3d 652, 675 (N.D. Cal. 2021) (evaluating testimony calculating the value of particular challenged claims and specific omissions as ranging from 1.9 percent to 46.2 percent of the purchase price).

Here, Plaintiff seeks a full refund—she alleges in her Complaint that she "would not have purchased the Products" if she "had known the truth" about them. 2d Am. Compl. [Dkt. 30], at ¶ 73 (Mar. 10, 2025). This does not relieve her of the obligation to show that a full refund is owed because of the specific advertising representations challenged. Instead, she must show that the representations are so egregious that, had they not been made, no one would have purchased the products: she has to show that, without the representations, the products have "no or only a de minimis value." *Lambert*, 870 F.3d at 1183.

A district court, in order to fulfill its gatekeeping function, must be prepared to demand common proof that products have "no or only a de minimis value" at the class certification stage. This means that, as Judge Clifton recognized, it is

inappropriate to permit a plaintiff to proceed past the certification stage without showing the existence that a particular model of damages is "'supportable on evidence that could be introduced at trial.'" *Falcone*, No. 24-7707, 2026 WL 74510, at *4 (Clifton, J., diss.) (quoting *Lambert*, 870 F.3d at 1184).

For certain types of products, when district courts have considered what is required to show that a product provides "no or only a de minimis value," clear lines have emerged. For example, courts typically find that both human and pet foods provide some value where they provide enjoyment and nutrition—even if the advertising claims are ultimately found to be unsubstantiated. *See, e.g.*, *Zeiger*, 526 F. Supp. 3d at 675; *Alvarez v. NBTY, Inc.*, 331 F.R.D. 416, 426 (S.D. Cal. 2019); *LeGrand v. Abbott Lab'ys*, No. 22-cv-5815, 2025 WL 2323352, at *11 (N.D. Cal. Aug. 12, 2025); *Khasin v. R. C. Bigelow, Inc.*, No. 12-cv-2204, 2016 WL 1213767, at *3 (N.D. Cal. Mar. 29, 2016).

The lines are less clear in other types of cases, however. One frequently cited case from a state appellate court provides a vivid illustration: in a case challenging advertising for an anti-inflammatory drug, the court found a full refund inappropriate where the evidence showed that some patients would continue to take the drug if it were prescribed, even after they were apprised of the "increased risk of death" the plaintiffs alleged existed. *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 133–34 (2009); *see also Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 870

(9th Cir. 2025) (discussing *Vioxx* and describing "the key" to the decision as the fact that the class "was shown to include a substantial number of individuals for whom the allegedly deceptive statements would not have affected their purchase decision and so were not material").

For products such as those at issue here, however, there is significantly less case law to dissuade enterprising plaintiffs' lawyers. Like the food cases, it would appear that users of the products obtained value by using the products. And Plaintiff presented evidence at the certification stage showing that a sizeable number of people would continue to use the products even after being apprised of Plaintiff's allegations. Petition for Permission to Appeal at 15 [Dkt. 4.1 at 21], (Oct. 13, 2026). These are not, simply put, products that "had zero value due to being dangerous in a way that, for instance, a device that dangerously explodes might." *Zeiger*, 526 F. Supp. 3d at 675.

Amici submit that this is not enough to certify a class because (1) the advertising representations do not have anything to do with the lead content Plaintiff alleges, and (2) Plaintiff's own evidence shows that consumers' purchasing decisions vary and were not motivated by Plaintiff's implausible interpretation of the advertising representations. The lawsuit began not with consumer deception but with testing by Plaintiff's counsel—who then subsequently went looking for advertising claims to challenge. Finding no claims to challenge that actually mention lead,

Plaintiff challenged a variety of other claims instead. That she was able to proceed this far on the basis of such thin allegations is a failure of the district court to perform its gatekeeping function both with respect to its scrutiny of the deception allegations and its scrutiny of Plaintiff's theory of damages. Amici respectfully request that the Court send a strong signal to district courts in this Circuit that they must diligently perform their duty to weed out such ill-conceived complaints, preferably as early in the litigation as possible.

CONCLUSION

For the foregoing reasons, Amici Curiae the Consumer Brands Association, the National Association of Manufacturers, the Personal Care Products Council, the Consumer Healthcare Products Association, and the Center for Baby and Adult Hygiene Products urge the Court to grant the petition for permission to appeal and hold that the lower court improperly certified the class in this lawsuit.

Dated: October 20, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-3 and Federal Rule of Appellate Procedure 29(a)(5). This brief uses a proportional typeface and 14-point font, and contains 5,117 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that, on October 20, 2026, I caused the foregoing to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and caused a copy of the foregoing to be electronically served on the following:

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