FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JONATHAN RUSOFF; JOSEPH GAMBINO, *Plaintiffs - Appellees*, v. THE HAPPY GROUP, INC., *Defendant - Appellant*.	No. 24-7706 D.C. No. 4:21-cv-08084-AMO OPINION

Appeal from the United States District Court
for the Northern District of California
Araceli Martínez-Olguín, District Judge, Presiding

Argued and Submitted November 18, 2025
San Francisco, California

Filed August 17, 2026

Before: Danny J. Boggs, Daniel A. Bress, and Salvador Mendoza, Jr., Circuit Judges.[*]

Opinion by Judge Bress

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[*] The Honorable Danny J. Boggs, United States Circuit Judge for the Court of Appeals, Sixth Circuit, sitting by designation.

SUMMARY[**]

Class Action

The panel reversed the district court's class certification order in plaintiffs' action alleging that The Happy Group, a producer and distributor of eggs, violated various false advertising and deceptive advertising laws by advertising on its egg cartons that its hens are "free range" and "pasture raised on over 8 acres."

The district court found that plaintiffs' inability to demonstrate consumer deception on a class-wide basis "precludes a finding of predominance" under Fed. R. Civ. Pro. 23(b)(3), but nonetheless certified the class based on assertedly common questions of materiality and damages.

Plaintiffs' theory of liability was that pasture raised eggs had an objective definition under the Hen Welfare Standards, and accordingly, the "pasture raised" claim deceived consumers.

The panel first held that the district court did not abuse its discretion in excluding Dr. Morris's expert opinion, which sought to establish that a reasonable consumer would understand "pasture raised" to mean pasture raised in accordance with the American Humane Association and Humane Farm Animal Care standards. The district court correctly excluded Dr. Morris's opinion as unreliable because his methodology did not meet the standards

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

expected of an expert witness evaluating consumer understanding of egg industry standards.

The panel held that without Dr. Morris's excluded opinion, the district court correctly held that plaintiffs did not show that common questions of deception predominated under Rule 23(b)(3). Because plaintiffs did not demonstrate that there was a single or dominant industry standard for "pasture raised," and a reasonable consumer would perceive that representation in those terms, plaintiffs lacked common proof of deception.

However, the panel held that the district court erred in granting class certification based on the supposedly common issues of materiality and damages. The district court did not properly undertake the requisite analysis of weighing the common issues against the individualized issues to determine whether the common issues were, on balance, important enough to justify class-wide treatment despite the existence of individualized issues. Had the district court done so, it should have declined to certify the class. On this record, the lack of a classwide showing on deception cannot be overcome by supposedly common issues of materiality and damages that are unmoored from any classwide showing of actionable wrongdoing.

Accordingly, the panel reversed the district court's grant of class certification.

COUNSEL

Aubry Wand (argued), Wand Law Firm PC, Long Beach, California; Robert Abiri, Abiri Law PC, Rancho Santa Margarita, California; for Plaintiffs-Appellees.

Nicholas M. DePalma (argued) and Christian Schreiber, Venable LLP, Tysons, Virginia; Amit Rana and Antonia I. Stabile, Venable LLP, San Francisco, California; Rita Mansuryan, Venable LLP, Los Angeles, California; for Defendant-Appellant.

OPINION

BRESS, Circuit Judge:

This is a deceptive advertising class action concerning "pasture raised" labels on egg cartons. After excluding the opinion of plaintiffs' expert on egg industry standards, the district court found that plaintiffs' inability to demonstrate consumer deception on a class-wide basis "precludes a finding of predominance" under Federal Rule of Civil Procedure 23(b)(3). The court nonetheless certified the classes based on assertedly common questions of materiality and damages. Because plaintiffs did not meet the requirements of Rule 23(b)(3), we reverse the grant of class certification.

I

A

In grocery stores, eggs are often advertised based on the living conditions of the laying hens. For instance, eggs might be described as "organic," "cage free," "free range," or "pasture raised." The U.S. Department of Agriculture ("USDA") verifies egg producers' use of some of these terms. USDA distinguishes between eggs produced by caged hens and those produced by cage free hens. Within the "cage free" category, USDA defines two further subcategories: organic and free range. USDA considers the terms "free range," "pasture raised," and certain other similar terms to be synonymous for labeling purposes.

But USDA's standards are not the only standards out there. Nonprofits and private organizations, such as the American Humane Association ("AHA"), Humane Farm Animal Care ("HFAC"), and the Global Animal Partnership ("GAP"), issue their own standards for egg-producing conditions. Certain retailers, such as Whole Foods, do too. These standards are often accompanied by voluntary certification programs, which egg producers pay to participate in. Unlike the USDA, these certifying organizations differentiate between free-range and pasture-raised eggs. "Pasture raised" is considered the more stringent standard, so certified pasture-raised eggs tend to command a price premium in the market.

However, standards of the various certifying organizations—even in the same category—can differ. For instance, record evidence in this case indicates that HFAC's free range certification requires egg producers to provide at least 2 square feet of uncovered outdoor area per hen. AHA's free range certification, by contrast, requires producers to make approximately 22 square feet per hen available for potential use. If the pasture is rotated, however, only a quarter of that space (approximately 5.5 square feet) needs to be accessible to the hens at any one time.

The organizations' "pasture raised" standards also differ. AHA's pasture raised standard requires approximately 27 square feet of space per hen at a time with pasture rotation, while HFAC requires approximately 22 square feet per hen with rotation. GAP requires 5 square feet of space per hen with rotation, and 10 square feet without. Whole Foods's standards require only that the "outdoor area to which birds have access . . . be large enough to be sustained as grassland or rangeland." Requirements for other hen welfare metrics, such as shelter and vegetative cover, also vary between organizations.

B

The defendant in this case, The Happy Group ("Happy Egg"), produces and distributes eggs under the "Happy Egg" brand. Happy Egg's egg cartons advertise that its hens are "free range" and "pasture raised on over 8 acres." Happy Egg represents that these characterizations are accurate because its hens do have access to more than 8 acres of pasture. Still, plaintiffs Jonathan Rusoff and Joseph Gambino sued Happy Egg on behalf of two classes of consumers in California and New York, alleging that Happy Egg violated various false advertising and deceptive advertising laws.[1]

[1] Plaintiffs' California claims were brought under California's Consumer Legal Remedies Act ("CLRA"), Cal. Civil Code § 1750, *et seq.*, Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, *et seq.*, and California's Commercial Code (specifically, breach of express warranty and intentional misrepresentation), Cal. Com. Code §§ 2313–14. The New York claims were brought under New York's General Business Law ("GBL"), N.Y. Gen. Bus. Law §§ 349–50. The district court declined to certify plaintiffs' New York breach of warranty and

Plaintiffs do not allege that Happy Egg's hens were kept in cages. Instead, they claim that when Happy Egg represented that its laying hens were "pasture raised on over 8 acres," the company was deceptively representing that its eggs met the AHA and HFAC pasture raised certification requirements, which plaintiffs call the "Hen Welfare Standards."

Specifically, plaintiffs' theory is that AHA and HFAC's "pasture raised" standards are the dominant industry standards, and that consumers paid a price premium for Happy Egg products based on the company's implied compliance with these standards (even though Happy Egg did not identify either standard on its cartons). As plaintiffs explained to the district court,

> Plaintiffs' theory of liability is that pasture raised eggs have an objective definition under the Hen Welfare Standards (i.e., the industry standards), and accordingly, the Pasture Raised claim deceived consumers. Therefore, the salient analysis is whether the Hen Welfare Standards are the industry standard, and whether the reasonable consumer believes the Class Products are pasture raised eggs.

Rusoff v. Happy Grp., Inc., 2024 WL 5339463, at *12 (N.D. Cal. Sept. 27, 2024) (footnote omitted). Plaintiffs' expert, Dr. Craig Morris, accordingly opined that "the prevailing consumer expectation is that an egg producer making a free-

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intentional misrepresentation claims, so they are not at issue in this appeal.

range or pasture-raised claim is adhering to the commonly accepted standards pertaining to such claims as set by the AHA or HFAC."

Plaintiffs sought class certification under Rule 23(b)(3), which requires that "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). To obtain certification under this provision, plaintiffs not only must demonstrate that their suit meets the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a), but must also show predominance and superiority under Rule 23(b)(3). *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013). Under the relevant California and New York deceptive advertising laws, the test for deception is an objective one that asks whether a "reasonable consumer" would likely be deceived by the conduct at issue. *See Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 868 (9th Cir. 2025); *Montera v. Premier Nutrition Corp.*, 111 F.4th 1018, 1028 (9th Cir. 2024).

The parties conducted fact and expert discovery in connection with plaintiffs' class certification motion. Both lead plaintiffs were deposed. Plaintiff Rusoff testified that he did not know about the AHA or HFAC standards. He believed that "pasture raised" meant that hens would be raised using "traditional farming" methods and would be "able to roam the land and have a good diet," with "no pesticides, no hormones, . . . [and] no antibiotics." Rusoff also testified that if a product's packaging did not have a certified logo, he would not think that it was certified by AHA or HFAC.

Plaintiff Gambino testified that he thought “pasture raised” meant “fully raised outside” unless there is bad weather. He believed that “pasture” meant a “big, open field,” and did not know how many hens per acre were required under the AHA standard. Nothing on Happy Egg’s cartons made Gambino think that the eggs were AHA-certified, and he had not heard of HFAC.

Plaintiffs also offered the expert opinions of Dr. Craig Morris and Dr. J. Michael Dennis to establish that a reasonable consumer would understand “pasture raised” to mean pasture raised in accordance with the AHA and HFAC standards. Dr. Morris opined that the “free-range and pasture-raised standards promulgated by the AHA and HFAC . . . are the industry standard”—that is, “[t]he predominant standards for free-range and pasture-raised eggs.” Dr. Morris further opined that the “prevailing consumer expectation is that an egg producer using the free-range or pasture-raised claim is adhering to the commonly accepted standards pertaining to such claims.” Dr. Dennis served as plaintiffs’ survey expert. He sought to measure “the extent to which consumers understand” Happy Egg’s “pasture raised on over 8 acres” labeling “to convey that the Products either are or are not pasture raised eggs.”

Discovery raised questions about the reliability of Dr. Morris and Dr. Dennis’s methods and resulting conclusions. Although Dr. Morris has experience in food and agriculture marketing, he testified that he is “not an expert in egg standards” and “not an expert in the development of pasture-raised standards.” In his report, Dr. Morris nevertheless opined that “the free-range and pasture-raised standards promulgated by the AHA and HFAC are predominantly used and followed in the egg industry. In the absence of federal regulation, they are the industry standard.” In Dr. Morris’s opinion, "if an egg producer makes a free-range or pasture-raised claim, it should be consistent with at least one of these standards."

To support his opinions, Dr. Morris's report first discussed internal Happy Group documents and the testimony of Happy Group's CEO, Dan Arnsberger. According to Dr. Morris, "Happy Egg has followed and benefitted from the AHA standard" and "has been a beneficiary of the AHA and HFAC standards." To support his further opinion that "the prevailing consumer expectation is that an egg producer making a free-range or pasture-raised claim is adhering to" these standards, Dr. Morris "conducted online research, visited grocery stores 'in or around [his] neighborhood,' and took pictures of different egg products bearing a pasture raised label." *Rusoff*, 2024 WL 5339463, at *5. However, Dr. Morris performed this investigation in Seattle, rather than California or New York (where the class members resided), and he testified that he did not intend for his work to be representative of those two states. Further, as the district court noted, "there was no methodology for taking pictures of cartons in stores, no scientific basis for the days he chose to visit those stores, and [Dr. Morris] only selected cartons if they made a pasture-raised claim." *Id.* Dr. Morris emphasized that "this [was] not intended to be a comprehensive survey of all egg brands in the market," but rather, "a survey for my own personal purposes." *Id.*

Dr. Dennis's consumer survey had two parts—a consumer perception survey and a materiality survey. The consumer perception survey presented prospective consumers in California and New York with one of two options: a carton of Happy Egg's eggs with the label "pasture raised on over 8 acres" alongside a label saying "free range," and one without the label "pasture raised on over 8 acres."

The survey then asked consumers whether the packaging communicated that the eggs inside were "pasture-raised eggs," "free-range eggs," "none of these," or "don't know."

The results indicated that when survey respondents saw the first carton with both the "pasture raised" and "free range" labels, they concluded that the eggs were both pasture-raised and free-range. In contrast, when they saw the second carton with only a "free range" label, they concluded that the eggs were free-range, but not pasture-raised. As the district court observed, Dr. Dennis's survey did not address whether a reasonable consumer understood "pasture raised" as aligned with either the AHA or HFAC standards. Dr. Dennis's materiality survey presented consumers with the same two options and asked how likely they were to purchase each product. Survey respondents were 8.1 times more likely to state a preference for the eggs that included the "pasture raised on over 8 acres" representation.

Plaintiffs' theory of class-wide deception required both experts' opinions to work in tandem. Dr. Morris would show that "pasture raised" had a commonly understood meaning tied to the AHA and HFAC standards, while Dr. Dennis (through his consumer perception survey) would show that a reasonable consumer would understand Happy Egg's "pasture raised on over 8 acres" claim to mean that its eggs were pasture-raised.

C

Although the district court rejected key aspects of plaintiffs' showing, it still granted their motion for class certification. The court found that most of the necessary requirements for class certification under Rule 23 were met—namely, numerosity, adequacy, superiority, typicality, and commonality. But the court excluded Dr. Morris's opinions under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). It concluded that even though Dr. Morris was qualified, his methods for assessing what a reasonable consumer would understand—such as photographing egg cartons in stores near his home for his own "personal purposes"—were unreliable, as Dr. Morris's analysis "[did] not pass the standards that he would expect of his own survey consultant." *Rusoff*, 2024 WL 5339463 at *5.

As for Dr. Dennis's consumer-survey-based opinions, the district court found that because "Plaintiffs' theory depends on the existence of an industry standard[,] . . . even if Dr. Dennis's survey was properly designed to measure deception, it lacks the needed component from Dr. Morris, whose opinion as to industry standards has been stricken." *Id.* at *12. Consequently, the court concluded that "[b]ecause that industry standard anchors [plaintiffs'] theory of deception, the failure to provide survey evidence measuring deception by reference to that industry standard precludes a finding of predominance" under Rule 23(b)(3). *Id.*

However, the district court still certified the class under Rule 23(b)(3) after finding that materiality and damages were common questions that predominated. The district court noted that both California's and New York's deceptive advertising laws require an objective showing of materiality—whether "a reasonable [consumer] would attach importance" to the misrepresentation. *Id.* at *13. The court concluded that because "the record is sufficiently developed with ample common evidence of materiality," such as Dr. Dennis's materiality survey and internal statements by Happy Egg, "materiality is a common question that predominates." *Id.* The district court further found that common questions of damages predominated, as the plaintiffs demonstrated that class-wide "damages can be determined without excessive difficulty [under] their theory of liability." *Id.* at *15. Thus, the court certified California and New York classes under Rule 23(b)(3).

We granted Happy Egg's petition for leave to file an interlocutory appeal under Federal Rule of Civil Procedure 23(f). We also have jurisdiction to review the district court's *Daubert* ruling excluding Dr. Morris's opinions, because it "formed part of the class certification decision and affected whether [the classes] could be certified." *Moser v. Benefytt, Inc.*, 8 F.4th 872, 876 (9th Cir. 2021).

II

We review the "decision to certify a class and 'any particular underlying Rule 23 determination involving a discretionary determination' for an abuse of discretion." *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 663 (9th Cir. 2022) (en banc) (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010)). "[T]he district court abuses its discretion if it 'applies an incorrect legal rule or if its application of the correct legal rule is based on a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *White v. Symetra Assigned Benefits Serv. Co.*, 104 F.4th 1182, 1191 (9th Cir. 2024) (brackets omitted) (quoting *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 (9th Cir. 2014)). We review the exclusion of expert testimony for abuse of discretion. *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

A

We first conclude that the district court did not abuse its discretion in excluding Dr. Morris's expert opinion. "[B]efore 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." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018), *as amended* (Nov. 27, 2018) (citation omitted). As part of this rigorous inquiry, when "evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*." *Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 984 (9th Cir. 2020) (quoting *Sali*, 909 F.3d at 1006); *see also Lytle v. Nutramax Lab'ys, Inc.*, 114 F.4th 1011, 1023 (9th Cir. 2024); *Olean*, 31 F.4th at 665 n.7 (explaining that "[i]n a class proceeding, defendants may challenge the reliability of an expert's evidence under [*Daubert*]"); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). This *Daubert* analysis reflects an assessment of "the weight that evidence is given at the class certification stage," rather than operating as a strict bar to admissibility. *Sali*, 909 F.3d at 1006.

When applying the *Daubert* standard, "the district court judge must ensure that all admitted expert testimony is both relevant and reliable." *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (citing *Daubert*, 509 U.S. at 589). *Daubert*'s gatekeeping requirement is meant to ensure that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). *Daubert*'s gatekeeping requirement plays a central role in the class certification process: plaintiffs may not obtain class certification—nor may defendants block it—through the presentation of expert witnesses who lack reliability. To the extent plaintiffs argue that *Daubert* has no role to play at class certification, our precedents say otherwise.

In this case, the district court correctly excluded Dr. Morris's opinions as unreliable. Dr. Morris did not conduct a rigorous evaluation of how a reasonable consumer understands the term "pasture raised." Instead, his methodology consisted of online research and taking pictures of egg cartons in grocery stores near his home. Dr. Morris opined that his visits to nearby grocery stores (not in California or New York) "present[] a telling snapshot of the market, particularly from the perspective of a typical consumer shopping for eggs at the grocery store."

This analysis left much to be desired. As the district court observed, "Dr. Morris testified that there was no methodology for taking pictures of cartons in stores, no scientific basis for the days he chose to visit those stores, and [that he] only selected cartons if they made a pasture-raised claim." *Rusoff*, 2024 WL 5339463, at *5. In his report, Dr. Morris emphasized: "[t]o be clear, this is not intended to be a comprehensive survey of all egg brands in the market, although I could conduct such a survey or retain someone to do one for me." When he was asked at his deposition how he would run a survey to determine what "pasture raised" meant, Dr. Morris answered: "I'm confident that I could identify an agency to help do that work on my behalf. I know what I'm looking for in the survey. I'm not a survey expert." Indeed, Dr. Morris admitted that the informal survey he took "was intended to be a survey for my own personal purposes."

This methodology did not meet the standards expected of an expert witness evaluating consumer understanding of egg industry standards. While plaintiffs argue that Dr. Morris's opinion was primarily based on his industry experience and that the grocery store survey was only an "additional step" to bolster that opinion, Dr. Morris's report indicated that his conclusions about consumer expectations were based on his online research and grocery store visits, which he used to demonstrate consumer understanding of the alleged industry standards. Dr. Morris did not cite his professional experience in his discussion of egg standards—rather, he did so only when discussing commodity standard-setting more generally. Indeed, at his deposition, Dr. Morris admitted that he is "not an expert in egg standards." And Dr. Morris's review of internal Happy Egg documents and testimony only supported his conclusions with respect to how Happy Egg may have used the AHA and HFAC standards internally, not how consumers perceived or interacted with those standards.

Because "the trial court has discretion to decide how to test an expert's reliability as well as whether the testimony is reliable, based on 'the particular circumstances of the particular case,'" we decline to disturb the district court's exclusion of Dr. Morris's opinions. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010), *as amended* (Apr. 27, 2010) (quoting *Kumho Tire*, 526 U.S. at 150).

B

Without Dr. Morris's excluded opinion, we agree with the district court that plaintiffs did not show that common questions of deception predominate.

The predominance inquiry under Rule 23(b)(3) "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). "This requirement presupposes satisfaction of the commonality requirement of FRCP 23(a)(2), which itself tests the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Lytle*, 114 F.4th at 1023 (quotation omitted). 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,'" *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)), 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). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013). "Such an analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)).

By 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. *Ellis*, 657 F.3d at 982. As the Supreme Court has emphasized, Rule 23 "does not set forth a mere pleading standard," because "a party must not only 'be prepared to prove that there are *in fact*'" aggregation-enabling factors under Rule 23(a), but must also "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350). "[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 275 (2014). This must be done "by a preponderance of actual evidence." *Black Lives Matter*, 113 F.4th at 1258 (citing *White*, 104 F.4th at 1192). As a result, "[w]ith respect to the predominance inquiry specifically, a district court must evaluate 'the method or methods by which plaintiffs propose to use the class-wide evidence to prove' the common question in one stroke." *Lytle*, 114 F.4th at 1023 (quoting *Olean*, 31 F.4th at 666) (brackets omitted).

The district court correctly concluded that on the foundational issue of deception, plaintiffs failed to make the required showing. Under plaintiffs' theory of deception, reasonable consumers are deceived by Happy Egg's "pasture raised on over 8 acres" claim because it is inaccurate in light of the supposedly dominant AHA and HFAC industry standards. 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. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (Cal. Ct. App. 2003)).

But without Dr. Morris's (excluded) opinion, plaintiffs lack common proof connecting the allegedly dominant industry standards to consumer perceptions. Dr. Dennis's survey study by itself is insufficient, as it merely measured whether consumers think that "pasture raised on over 8 acres" means pasture raised—with no indication of what "pasture raised" means or how consumers understand the phrase. The district court properly recognized that "[b]ecause th[e] industry standard anchors [plaintiffs'] theory of deception, the failure to provide survey evidence measuring deception by reference to that industry standard precludes a finding of predominance." *Rusoff*, 2024 WL 5339463, at *12.

C

Plaintiffs appeared to assert at oral argument that it was not necessary for them to show that a reasonable consumer would have knowledge of the AHA and HFAC standards. That is contrary to how plaintiffs have consistently advanced their claims. Plaintiffs repeatedly defined their proposed class with reference to the industry standards. As Dr. Morris opined in his expert report, "the prevailing consumer expectation is that an egg producer making a free-range or pasture-raised claim is adhering to the commonly accepted standards pertaining to such claims as set by the AHA or HFAC."

But even if we accept plaintiffs' belated effort to clarify their theory, nothing changes. Their allegation here is not that the statement "pasture raised on over 8 acres" is factually false, but that it is deceptively misleading because Happy Egg failed to comply with the dominant industry standards for pasture-raised eggs. At minimum, given their theory of liability, plaintiffs must show that "pasture raised," to a reasonable consumer, not only signifies hen welfare conditions that would support a price premium, but also, conditions that are materially inconsistent with Happy Egg's practices. The problem is that without Dr. Morris's opinion, plaintiffs had no common proof on this point. To the extent plaintiffs claim they can obtain class certification merely by demonstrating that certain industry standards are dominant ones, they do not explain how that showing, standing alone, could support a cognizable theory of *consumer* deception.

Plaintiffs also respond that even if they may be unable to show on the merits that any individual consumer would have been deceived by the "pasture raised on over 8 acres" claim, the deception issue is governed by an objective "reasonable consumer" standard, which means that all claims by any plaintiff will necessarily rise and fall together. *See Noohi*, 146 F.4th at 868; *Montera*, 111 F.4th at 1028. Claims brought under consumer protection statutes like those of California and New York are indeed governed by a reasonable consumer standard. But in order to reach the reasonable consumer analysis, a plaintiff must first show, on a classwide basis, what deceptive marketing or false advertising a reasonable consumer could have been misled by. *See Williams v. Gerber Prods., Co.*, 552 F.3d 934, 936, 939 (9th Cir. 2008) (holding that a reasonable consumer could be deceived by packaging features that contained false suggestions about product content). Here, plaintiffs lack common proof as to what the deception was. Again, without Dr. Morris's opinion, plaintiffs have no classwide proof that "pasture raised" is materially inconsistent with Happy Egg's practices. We cannot say whether a reasonable consumer would have been deceived by false advertising or marketing if there is no common proof that something was misleading.

It is true that for purposes of Rule 23, "a district court is limited to resolving whether the evidence establishes that a common question is capable of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean*, 31 F.4th at 666–67 (emphasis omitted). And it is also true that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466. But even though the question here is "not whether plaintiffs have put forward evidence capable of sustaining a jury verdict," the plaintiffs must still have "shown enough to satisfy [Rule] 23." *Lytle*, 114 F.4th at 1028.

As a result, although we do not consider whether the evidence, taken as a whole, might persuade a reasonable jury that Happy Egg's representations are deceptive by some metric, we must assess whether the plaintiffs here could show, through classwide proof, a sufficient connection between their alleged industry standard and a reasonable consumer's expectations. It remains the case that "[u]nder California law, 'when the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class.'" *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1237 (9th Cir. 2024) (quoting *Mirkin v. Wasserman*, 858 P.2d 568, 575 (Cal. 1993) (italics omitted)). The issue here, however, is an antecedent one: namely, whether the "pasture raised" labeling is at odds with the industry standard, and whether a reasonable consumer would be deceived into thinking that "pasture raised" conveyed adherence to such a standard.

In that situation, the fact that the applicable legal standard for consumer deception is based on a "reasonable consumer" test does not mean that class action plaintiffs can avoid their obligation to demonstrate that "they will be able to prove their case through common proof at trial" under their industry-standards-based theory of the case. *Lytle*, 114 F.4th at 1024 (emphasis omitted). That would be at odds with the Supreme Court's direction that plaintiffs must present "evidentiary proof" of predominance to satisfy Rule 23. *Comcast*, 569 U.S. at 33. Where the theory of deception is tied to an industry standard, evidence must be brought forward showing that there is a commonly understood industry standard, and that a reasonable consumer would associate a given representation with that standard. *See Am. Honda Motor Co., Inc. v. Superior Ct.*, 199 Cal. App. 4th 1367, 1379 (2011). Here, because the plaintiffs did not demonstrate that there was a single or dominant industry standard for "pasture raised," and that a reasonable consumer would perceive that representation in those terms, plaintiffs lacked common proof of deception. *See Ebner*, 838 F.3d at 965 ("[T]he reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." (citation modified)).

D

Plaintiffs raise several other counterarguments, but we do not find them persuasive. First, plaintiffs argue that even if Dr. Morris's opinion was properly excluded, it should have been considered at the class certification stage regardless, as "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." *Sali*, 909 F.3d at 1004. But again, our cases clearly state that "in evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*." *Id.* at 1006. That is what the district court did here.

And in this case, the exclusion of Dr. Morris's opinion on reliability grounds leaves a fundamental gap in plaintiffs' Rule 23 showing; it is not merely a "formalistic evidentiary objection" that could be regarded as immaterial at the Rule 23 stage. *Id.* While plaintiffs argue that they "may be able to get Dr. Morris's opinion admitted" by "arguing for reconsideration" or having Dr. Morris "revise his opinion to be based on acceptable method[s] and data," these unelaborated ideas for future expert work do not permit us to affirm class certification on the present record.[2]

Second, plaintiffs argue that even without Dr. Morris's opinions, the district court should have found classwide proof of deception based on the testimony and report of Happy Egg's expert, Dr. Mench, as well as various documents in the record. But Dr. Mench's role was to criticize Dr. Morris's methodologies and findings. She did not opine that consumers associate "pasture raised" with any certification. To the contrary, her report states, among other things, that "there is no agreed-upon definition/characterization of terms like 'pastured' or 'pasture-raised.'"

Plaintiffs also cite statements from two trade organizations stating that "[e]gg producers commonly differentiate free-range and pasture-raised . . . through established non-governmental certification schemes." But while both documents indicate that the egg industry uses these terms, neither establishes what the industry standard is or what a reasonable consumer would understand the terms to mean. And before the district court, plaintiffs did not cite any other consumer survey, study, or internal document from Happy Egg that evaluates what the term "pasture raised" means across the egg industry. The only other evidence is

[2] After the district court granted class certification, the plaintiffs filed a motion for reconsideration as to the court's exclusion of Dr. Morris. The district court denied that motion without prejudice after staying proceedings pending this appeal. Regardless, there is no indication that plaintiffs sought to remedy the issues with Dr. Morris's opinions, nor have they explained to us how they would do so.

the deposition of named plaintiffs Rusoff and Gambino. But their testimony undermined plaintiffs' theory of liability, given that neither plaintiff had much idea about the AHA and HFAC standards.[3]

Finally, plaintiffs argue that even without survey evidence from Dr. Morris, they can still prevail on the merits, as California courts have rejected the idea 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." *See Colgan v. Leatherman Tool Grp.*, 38 Cal. Rptr. 3d 36, 48 (Cal. Ct. App. 2006), *as modified* (Jan. 31, 2006), *superseded by statute on other grounds*. But again, the issue is a narrower one—whether plaintiffs have presented enough evidence to demonstrate through classwide proof, "by a preponderance of actual evidence," *Black Lives Matter*, 113 F.4th at 1258, that "pasture raised" has some generally accepted meaning. With their key expert sidelined, plaintiffs could not satisfy this critical element.

III

Although the district court correctly concluded that plaintiffs failed to present enough common evidence to show that deception is capable of class-wide resolution, the court erred in granting class certification based on the supposedly common issues of materiality and damages.

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[3] In their answering brief, plaintiffs advance an alternative theory that the AHA seal was used on Happy Egg's cartons for a period of approximately one year. However, this argument was not raised in plaintiffs' motion for class certification, so it is waived. *See White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010) (per curiam) (noting that "arguments not raised before the district court are waived on appeal").

The Supreme Court has emphasized that "[t]he predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 577 U.S. at 453 (internal quotation marks omitted). This depends, in turn, on the role each issue plays in the case. As we have noted, "more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016), *abrogated on other grounds by Healy v. Milliman, Inc.*, 164 F.4th 701 (9th Cir. 2026). In other words, the district court must weigh the common issues against the individualized issues and determine whether the common issues are, on balance, important enough to justify class-wide treatment despite the existence of individualized issues. *See id.*

Here, the district court did not undertake this analysis. Had the court done so, it should have declined to certify the class—even assuming that its materiality and damages analyses were correct. As the plaintiffs concede, deception is a "central element" of their deceptive advertising claims under both California and New York law. That would appear self-evident. *See, e.g.*, *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771, 777–78 (9th Cir. 2024); *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015); *Montera*, 111 F.4th at 1028. Indeed, the logic of a *deceptive* advertising claim indicates that deception is a vital element: if Happy Egg's representations were material, but not deceptive, plaintiffs would have no viable case at all. Nor would there be damages in that event. This does not mean that a classwide showing of deception will always predominate over individualized issues of materiality and damages, which is not the situation here. Instead, on this record, the *lack* of a classwide showing on deception cannot be overcome by supposedly common issues of materiality and damages that are unmoored from any classwide showing of actionable wrongdoing.

As we have explained, "even if plaintiffs demonstrate that there are common questions of law or fact with respect to . . . other elements, this does not perforce establish that these questions predominate over individualized questions" more important to their claim. *White*, 104 F.4th at 1193–94. That is the situation here. Therefore, the district court erred in certifying the classes based on its materiality and damages findings alone.

The grant of class certification is

REVERSED.