



1 determination on the papers and without oral argument. Civ. L. R. 7.1(d)(1). For the  
2 reasons stated below, the Court **DENIES** MDLZ’s motion to stay.

### 3 4 **I. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 23(f) provides a mechanism for interlocutory appeal  
6 of a court’s order granting or denying class certification. Such appeals do “not stay  
7 proceedings in the district court unless the district court or the court of appeals so orders.”  
8 Fed. R. Civ. P. 23(f). “A stay is not a matter of right, even if irreparable injury might  
9 otherwise result.” *Nken v. Holder*, 556 U.S. 418, 433 (2009). The decision of whether to  
10 grant a stay is an “exercise of judicial discretion” and “the propriety of its issue is dependent  
11 upon the circumstances of the particular case.” *Id.* A court balances four factors in  
12 determining how to exercise its discretion: (1) whether the movant is likely to succeed on  
13 the merits; (2) whether the movant is likely to suffer irreparable harm in the absence of a  
14 stay; (3) whether the issuance of the stay would not substantially harm the non-moving  
15 party; and (4) whether a stay will serve the public interest. *Rainbow Bus. Sols. v. Merch.*  
16 *Servs., Inc.*, No. C 10-1993 CW, 2014 WL 1783945, at \*1 (N.D. Cal. May 5, 2014). The  
17 first two factors of the standard “are the most critical.” *Id.*

18 These four factors should be examined on a flexible “continuum,” which is  
19 “essentially the same as the ‘sliding scale’ approach” applied to requests for preliminary  
20 injunctions. *Leiva–Perez v. Holder*, 640 F.3d 962, 964–66 (9th Cir. 2011). Under this  
21 approach, “the elements . . . are balanced, so that a stronger showing of one element may  
22 offset a weaker showing of another.” *Id.* at 964.

### 23 24 **III. ANALYSIS**

#### 25 **A. Likelihood of Success on the Merits / Serious Legal Questions**

26 The first prong of the stay analysis requires the Court to determine whether Plaintiffs  
27 have demonstrated a likelihood of success on the merits. *Leiva–Perez*, 640 F.3d at 966.  
28 A party moving to stay the proceedings pending the resolution of a Rule 23(f) petition need

1 not demonstrate that it is more likely than not that it will win on the merits. *Id.* Instead  
2 “serious legal questions” raised in the petition can satisfy this first prong. *Id.* at 967–68.  
3 When relying on “serious legal questions,” the movant must not only show that a serious  
4 legal question exists, but also that the hardship balance tips sharply towards the movant.  
5 *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011); *see Leiva–Perez*,  
6 640 F.3d at 966 (applying the “serious questions” approach to a stay).

7 Here, MDLZ argues that its Rule 23(f) petition raises two serious legal questions:  
8 (1) whether Plaintiffs’ conjoint analysis “can measure price premium damages and  
9 therefore satisfy Plaintiffs’ burden of proving a class-wide damages model consistent with  
10 their theory of liability, as required under *Comcast Corp. v. Behrend*, 569 U.S. 27, 35  
11 (2013)”; and (2) whether “the claim that belVita biscuits are ‘nutritious’ is subject to  
12 common proof, or whether the healthiness of a given product cannot be assessed in  
13 isolation from a consumer’s diet as a whole.” (Mot. at 3–4, ECF No. 178.) For the  
14 following reasons, the Court finds that these issues do not qualify as a serious legal question  
15 required of a stay pending appeal.

### 16 17 **1. Whether the Conjoint Analysis Satisfies the *Comcast* Standard for** 18 **Damages**

19 MDLZ argues that the first issue presents a serious legal issue, citing several  
20 nonbinding cases including the unpublished opinion in *Zakaria v. Gerber Prod. Co.*, 755  
21 F. App’x 623, 624 (9th Cir. 2018), in which the Ninth Circuit affirmed the trial court’s  
22 rejection of a damages model based on conjoint analysis. As the Court explained at length  
23 in the March 8, 2021 Order,<sup>1</sup> Plaintiffs’ damages model satisfies the standard to test  
24 conjoint analysis for establishing price premium damages set out in *Hadley v. Kellogg*  
25 *Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. 2018). Namely, Plaintiffs’ damages model  
26 uses actual market prices and quantity of products sold during the relevant period, whereas  
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<sup>1</sup> (Order at 7–8, 25–27, ECF No. 172.)

1 the conjoint analysis rejected in *Zakaria* relied only on hypothetical data. MDLZ has not  
2 shown that a serious legal question calls into doubt the Court’s earlier conclusion finding  
3 Plaintiffs’ damages model suitable under *Comcast*, 569 U.S. at 35.

4 To the extent that MDLZ argues its challenge to Plaintiffs’ damages model is likely  
5 to succeed on appeal, the Court is not persuaded. The Ninth Circuit abides by “the premise  
6 that Rule 23(f) review should be a rare occurrence.” *Chamberlan v. Ford Motor Co.*, 402  
7 F.3d 952, 955 (9th Cir. 2005). To justify review, the court must find “the presence of a  
8 death knell situation for either party absent review”; “the presence of an unsettled and  
9 fundamental issue of law related to class actions”; and “manifest error in the district court’s  
10 certification decision.” Tellingly, the Ninth Circuit has already denied a Rule 23(f) petition  
11 in a mislabeling case raising a similar challenge to the price premium damages model using  
12 conjoint analysis. See *Krommenhock v. Post Foods, LLC*, No. 20-80083 (9th Cir. Jul. 21,  
13 2020), Order, ECF No. 5.<sup>2</sup> *Id.* The Court is not persuaded that the Ninth Circuit would  
14 reach a different conclusion in this case.

15 In sum, MDLZ has not presented a serious question of law nor shown that it will  
16 succeed on the merits as to whether Plaintiffs’ damages model satisfies *Comcast*.

## 18 2. Whether the “Nutritious” Claim is Subject to Common Proof

19 MDLZ argues that the claim that its belVita biscuits are nutritious is not subject to  
20 common proof, raising substantially the same arguments this Court rejected in certifying  
21 the class. The Court rejected MDLZ’s argument because, under the objective standard  
22 governing the class claims at issue, the question of whether MDLZ’s product labeling could  
23 have been materially misleading to a reasonable consumer “will not require the court to  
24 investigate class members.” (Order at 23–24 (citing *Hadley*, 324 F. Supp. 3d at 1115),  
25 ECF No. 172.) MDLZ challenges the Court’s ruling, relying on certain unreported  
26 decisions by several district courts finding that healthfulness of sugary products is not

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28 <sup>2</sup> For the relevant arguments raised in the rejected petition see Pet. for Permission to Appeal at 20–  
21, ECF No. 1.

1 subject to class-wide proof. These cases are not binding, and a mere disagreement with a  
2 court’s finding or holding “does not establish a serious legal question.” *See Adams v.*  
3 *Postmates, Inc.*, No. 19-3042 SBA, 2020 WL 1066980, at \*4 (N.D. Cal. Mar. 5, 2020)  
4 (declining to stay the action pending a Rule 23(f) appeal of the class certification). The  
5 Court does not find that MDLZ is likely to prevail on this issue on appeal, for the same  
6 reasons based on which the Court granted Plaintiffs’ class certification motion. (*See Order*  
7 *at 23–24, ECF No. 172.*)

8 Therefore, the first factor—whether MDLZ is likely to succeed on the merits—  
9 weighs against a stay.

#### 11 **B. Irreparable Harm / Balance of Hardships**

12 The second and third prongs of the stay analysis require the Court to consider,  
13 respectively, the likelihood of irreparable harm to MDLZ if the Court denies a stay, and  
14 injury to Plaintiffs should the Court grant a stay. To the extent that MDLZ relies on a  
15 “serious legal question” to satisfy the first prong of the stay analysis, MDLZ must show  
16 that the balance of harm tips sharply in its favor. *Cottrell*, 632 F.3d at 1132. Therefore,  
17 the Court will consider the second and third prongs together.

18 MDLZ argues that the costs and time to litigate this action constitute irreparable  
19 harm. “The cost of pretrial litigation may amount to irreparable harm if it is substantial,  
20 unrecoverable and wasteful but also may not be irreparable harm if pretrial litigation costs  
21 are inevitable regardless of the results of the appeal, manageable, or ‘avoidable by tailored  
22 procedures.’” *Victorino v. FCA US LLC*, No. 16CV1617-GPC(JLB), 2018 WL 3438773,  
23 at \*2 (S.D. Cal. July 17, 2018) (citing *Pena v. Taylor Farms Pacific, Inc.*, No. 13cv1282-  
24 KJM-AC, 2015 WL 5103157, at \*4 (E.D. Cal. Aug. 31, 2015)). Here, the pretrial litigation  
25 costs that MDLZ seeks to avoid would not be wasteful, given the low likelihood that  
26 MDLZ will prevail on appeal. *See supra* Part II.A. Besides, even if the Ninth Circuit were  
27 to grant MDLZ’s Rule 23(f) petition and reverse the class certification in MDLZ’s favor,  
28 some discovery would still be necessary to litigate Plaintiffs’ individual claims for damages

1 and injunction. *Cf. Mauss v. NuVasive, Inc.*, No. 13CV2005 JM (JLB), 2017 WL 4838826,  
2 at \*1 (S.D. Cal. Apr. 27, 2017) (“While individual damages are certainly less than class-  
3 wide damages, Defendants simply fail to explain how a denial of class certification will  
4 eliminate the necessity for discovery on Plaintiffs’ individual claims.”).

5 On the other hand, the delay in the proceedings that would result from a stay would  
6 burden Plaintiffs. The Ninth Circuit has not accepted MDLZ’s Petition, and there is no  
7 indication that it will accept it soon. Staying the action without knowing when the stay  
8 will be lifted would be unfair to Plaintiffs, in this action that is already more than three  
9 years old. *See Mauss*, 2017 WL 4838826, at \*1 (finding that “[t]he minimal harm identified  
10 by [the defendant] [did] not support a stay of the action, particularly where a stay would  
11 further delay resolution of [the] [p]laintiffs’ nearly four-year quest for relief”).

12 In sum, the Court is not persuaded that the balance of harm tips sharply in MDLZ’s  
13 favor. Thus, the second and third factors weigh against staying this action.

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15 **C. Public Interest**


16 Finally, this case has been pending since 2017, and the public has an interest in the  
17 efficient prosecution of consumer laws. The Court finds that public interests disfavor  
18 granting a stay of this action.

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20 **IV. CONCLUSION**

21 The Court finds that a stay of this action is not in the interests of justice. Defendant’s  
22 motion to stay (ECF No. 178) is **DENIED**.

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24 **IT IS SO ORDERED.**

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26 **DATED: April 5, 2021**

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**Hon. Cynthia Bashant**  
**United States District Judge**