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# [***Tawfilis v. Allergan, Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P5M-HTW1-F04C-T34G-00000-00&context=)

United States District Court for the Central District of California

June 26, 2017, Decided; June 26, 2017, Filed

CASE NO. 8:15-cv-00307-JLS-JCG

**Reporter**

2017 U.S. Dist. LEXIS 122974 \*

ADEL TAWFILIS, DDS d/b/a CARMEL VALLEY CENTER FOR ORAL AND MAXILLOFACIAL SURGERY and HAMID A. TOWHIDIAN, M.D., individually and on behalf of all others similarly situated, Plaintiffs, vs. ALLERGAN, INC., Defendant.

**Prior History:** [*Tawfilis v. Allergan, Inc., 157 F. Supp. 3d 853, 2015 U.S. Dist. LEXIS 174848 (C.D. Cal., Oct. 20, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HW9-C2D1-F04C-T3CS-00000-00&context=)

**Core Terms**

***Antitrust***, purchasers, damages, class member, methodology, reliable, class certification, classwide, Reply, regression, planning document, cases, admissible, expert report, class action, Plaintiffs', yardstick, list price, switching, requirements, calculating, projections, but-for, generic, expert testimony, overcharge, documents, adequacy, rebates, named plaintiff

**Counsel:** **[\*1]**For Adel Tawfilis, DDS, individually and on behalf of all others similarly situated doing business as Carmel Valley Center for Oral and Maxillofacial Surgery, Plaintiff: Ralph B Kalfayan, LEAD ATTORNEY, Phillip Edmond Stephan, Sarah Brooke Abshear, Krause Kalfayan Benink and Slavens LLP, San Diego, CA; Roy Arie Katriel, The Katriel Law Firm, La Jolla, CA.

For Hamid A. Towhidian, M.D., Plaintiff: Roy Arie Katriel, The Katriel Law Firm, La Jolla, CA.

For Allergan, Inc., Defendant: Alfred C Pfeiffer, Jr, LEAD ATTORNEY, Latham and Watkins LLP, San Francisco, CA; Bryan A Merryman, LEAD ATTORNEY, White and Case LLP, Los Angeles, CA; Amanda M Murphy, Christine K Newman, Jack E Pace, III, PRO HAC VICE, White and Case LLP, New York, NY; J Mark Gidley, PRO HAC VICE, White and Case LLP, Washington, DC; Kevin C Adam, PRO HAC VICE, White and Case LLP, Boston, MA.

**Judges:** JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE.

**Opinion by:** JOSEPHINE L. STATON

**Opinion**

**ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S DAUBERT MOTION, (2) DENYING WITHOUT PREJUDICE PLAINTIFFS' DAUBERT MOTION, AND (3) GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (Docs. 119, 140, 171)**

Before the Court is a Motion for Class Certification filed**[\*2]** by Plaintiffs Drs. Adel Tawfilis and Hamid A. Towhidian. (Mot., Doc. 119; Mem., Doc. 127.) Defendant Allergan, Inc. opposed the Motion (Opp'n, Doc. 152), and Plaintiffs replied (Reply, Doc. 177). Also before the Court are two *Daubert* Motions: one by Allergan relating to Dr. Mangum's methodologies for demonstrating ***antitrust*** impact and calculating classwide damages (Mot., Doc. 140; Mem., Doc. 161; Opp'n, Doc. 211; Reply, Doc. 214) and another filed by Plaintiffs to exclude Dr. Susan Walker's Declaration (Mot., Doc. 171; Mem., Doc. 188; Opp'n, Doc. 209; Reply, Doc. 221). After carefully reviewing the extensive briefing and holding oral argument, the Court GRANTS IN PART and DENIES IN PART Allergan's *Daubert* Motion, DENIES WITHOUT PREJUDICE Plaintiffs' *Daubert* Motion, and GRANTS Plaintiffs' Motion for Class Certification.

**I. BACKGROUND**

As recounted thoroughly in the Court's Order denying Allergan's Motion to Dismiss and denying Plaintiffs' Motion for Partial Judgment on the Pleadings, this putative class action concerns an allegedly anticompetitive exclusive licensing agreement between Defendant Allergan, Inc. and Korean-based competitor Medytox, Inc. (First Amended Complaint, "FAC" ¶ 1,**[\*3]** Doc. 28.)

To summarize, botulinum neuromodulators like Allergan's Botox are made from the acutely lethal toxin botulism. (*Id.* ¶¶ 10-12.) Sale of these products in the United States is heavily ***regulated***, creating high barriers to entry. (*Id.* ¶¶ 13, 17, 21.) Specifically, federal ***regulations*** require that (1) any albumin in botulinum neuromodulators come from FDA-approved establishments, (2) consumers purchase botulinum neuromodulators from a supplier in the United States (although the product can be manufactured abroad), and (3) manufacturing facilities meet the FDA's CGMP standards. (*Id.*) The FDA's requirement that any albumin come from FDA-approved human blood supply establishments has essentially precluded the sale of Medytox and other foreign manufacturers' injectable neurotoxin products in the United States. (*Id.* ¶¶ 31-32.) Medytox, however, developed a new albumin-free botulinum neuromodulator, which is sold under the name "Innotox" in Korea. (*Id.* ¶¶ 13, 26, 32.)

On September 25, 2013, Allergan entered into a licensing agreement with Medytox granting Allergan the exclusive right to commercialize both the liquid and lyophilized form of this new product outside of Korea and Japan.**[\*4]** (*Id.* ¶¶ 1, 33, 36.) In return, Medytox received [TEXT REDACTED BY THE COURT]. (Allergan-Medytox Agreement [TEXT REDACTED BY THE COURT], Exh. 1, Doc. 64.) This agreement, Plaintiffs allege, violated the *per se* rule under *Section 1* of the *Sherman Act* against horizontal agreements allocating geographic markets, which was established in [*United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D970-003B-S3X4-00000-00&context=), and reaffirmed in [*Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4B90-003B-409V-00000-00&context=). (FAC ¶¶ 76-85.) In the alternative, Plaintiffs argue that this agreement constitutes an impermissible restraint on trade under the rule of reason. (*Id.* ¶¶ 86-94.) Plaintiffs also bring claims under *Section 2 of the Sherman Act*, [*California's Cartwright Act*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-2YX1-DYB7-W1M8-00000-00&context=), and California's Unfair Competition Law. (*Id.* ¶¶ 76-113.)

On October 20, 2015, the Court denied Allergan's Motion to Dismiss, and, on May 31, 2016, the Court denied Plaintiffs' Motion for Partial Judgment on the Pleadings. (MTD Order, Doc. 45; MJP Order, Doc. 113.) Plaintiffs have now filed this Motion for Class Certification, seeking to certify both a *Rule 23(b)(2)* injunctive class and a *Rule 23(b)(3)* damages class. (Mot.) Plaintiffs propose to define both classes as:

All purchasers within the United States who purchased Botox Cosmetic directly from Defendant Allergan, Inc. during the Class Period. Excluded from the class definition**[\*5]** are all judicial officers assigned to this case, as well as their staff and immediate relatives. The class definition also excludes all employees, agents, or officers of Defendant Allergan, Inc., and all federal, state, and local government employees.

(Class Mem. at *i*.) The proposed class period for the damages class is April 1, 2015 through the date of the order granting class certification. (*Id.*) The class period for the injunctive class extends further back to September 25, 2013. (*Id.*)

In seeking damages, Plaintiffs contend that direct purchasers of Botox in the United States overpaid for the product because, absent the Allergan-Medytox Agreement, Medytox would have begun selling Innotox by "mid-2015." (Talbott Decl. ¶ 49, Exh. 10, Doc. 127.) In contrast, Allergan argues that, even assuming that the agreement violates the ***antitrust*** laws, it did not harm United States purchasers because Innotox would not have entered the market that early.

**II. LEGAL STANDARD**

*Rule 23(a)* "requires a party seeking class certification to satisfy four requirements: numerosity, commonality, typicality, and adequacy of representation." [*Wang v. Chinese Daily News, Inc., 737 F.3d 538, 542 (9th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:598H-7Y31-F04K-V070-00000-00&context=) (citing [*Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 347, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=). Besides satisfying *Rule 23(a)*'s requirements, a proposed class must also fulfill**[\*6]** the conditions for at least one of the three types of class actions enumerated in *Rule 23(b)*. [*Wang, 737 F.3d at 542*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:598H-7Y31-F04K-V070-00000-00&context=). In this action, Plaintiffs seek class certification under both *Rule 23(b)(2)* and *(b)(3)*. (Mem. at *i*.) *Rule 23(b)(2)* authorizes maintenance of a class action 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)*. *Rule 23(b)(3)*, in turn, authorizes classwide relief if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*.

"*Rule 23* does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." [*Dukes, 564 U.S. at 350*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=). This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." [*Id. at 351*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=).

Whether expert testimony**[\*7]** is admissible is determined under [*Federal Rule of Evidence 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=), [*Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=), and [*Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W30-2X60-004C-000J-00000-00&context=). [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) provides that expert testimony is admissible if (1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert has reliably applied the principles and methods to the facts of the case. [*Fed. R. Evid. 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=); *see also* [*City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1043 (9th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C3X-78K1-F04K-V01D-00000-00&context=).

Through the *Daubert* line of cases, the Supreme Court has made clear that [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) imposes a "gatekeeping" obligation on the district court to ensure that proposed expert testimony is relevant and reliable. [*United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YKT-G240-0038-X19X-00000-00&context=). Testimony is "relevant" if the knowledge underlying it has a "valid connection to the pertinent inquiry." [*City of Pomona, 750 F.3d at 1044*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C3X-78K1-F04K-V01D-00000-00&context=). An expert's opinion rests on a "reliable foundation" if it is rooted "in the knowledge and experience of the relevant discipline." [*Id. at 1043-44*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C3X-78K1-F04K-V01D-00000-00&context=). "*Daubert*'s general holding — setting forth the trial judge's general gatekeeping obligation — applies not only to testimony based on scientific knowledge, but also to testimony**[\*8]** based on technical and other specialized knowledge." [*United States v. Alatorre, 222 F.3d 1098, 1101 (9th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4106-8RW0-0038-X2DD-00000-00&context=) (citations omitted). The test for reliability is flexible and depends on the discipline involved. [*Kumho, 526 U.S. at 141*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W30-2X60-004C-000J-00000-00&context=).

The proponent of the expert carries the burden of proving admissibility. [*Lust By & Through Lust v. Merrell Dow Pharm., Inc., 89 F.3d 594, 598 (9th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1PR0-006F-M4T4-00000-00&context=). Expert testimony is admissible if the aforementioned requirements are met by a preponderance of the evidence. [*Daubert, 509 U.S. at 593 n.10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=) (discussing applicability of [*Federal Rule of Evidence 104(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-11WJ-00000-00&context=) to expert testimony and citing [*Bourjaily v. United States, 483 U.S. 171, 175-76, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H510-003B-44MP-00000-00&context=), for preponderance standard). A district court possesses "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." [*Kumho Tire Co., 526 U.S. at 152*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W30-2X60-004C-000J-00000-00&context=). Furthermore, the exclusion of expert testimony is "the exception rather than the rule." *See* [*Fed. R. Evid. 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) advisory committee note to 2000 amendment.

In *Ellis v. Costco Wholesale Corporation*, the Ninth Circuit clarified the interaction between the standard for admitting scientific and technical evidence under *Daubert* and scrutinizing the propriety of class certification under *Rule 23*. *See* [*657 F.3d 970, 982 (9th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:836D-Y8G1-652R-82V2-00000-00&context=). A court should first apply *Daubert* "to exclude junk science that does not meet [*Federal Rule of Evidence 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=)'s reliability standards by making a preliminary determination that the expert's testimony is reliable." *Id.* Because *Daubert* focuses on the "scientific reliability**[\*9]** and relevance" of the proffered evidence, an "expert's 'inference or assertion must be derived by the scientific method' to be admissible." *Id.* (quoting [*Kumho Tire Co., 526 U.S. at 145*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W30-2X60-004C-000J-00000-00&context=)). If a court has determined that the evidence is admissible under *Daubert*, a court must conduct the "rigorous analysis" mandated by *Dukes* to determine whether the strictures of *Rule 23* have been satisfied. *Id.*

**III. DISCUSSION**

Because Allergan and Plaintiffs have filed *Daubert* Motions to exclude the testimony of Drs. Robert Mangum and Susan Walker, the Court will first address these Motions before examining whether Plaintiffs have satisfied the prerequisites for class certification under *Rule 23*.

**A. Allergan's*Daubert*Motion on the Expert Report of Dr. Robert Mangum**

Dr. Mangum proffers three different methodologies for calculating classwide damages. The first methodology uses an internal planning document created by Allergan that projects the price for Botox would [TEXT REDACTED BY THE COURT] based on the assumption, among others, that Medytox's competing product would enter the American market. The second methodology is a "yardstick" approach that compares the United States market with the South Korean market, the only country where Botox competes against**[\*10]** Medytox's product. Both methodologies satisfy the requirements of *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) and are therefore admissible.

Dr. Mangum's third methodology estimates the impact of Innotox's entry into the American market on the price of Botox through a regression analysis. Although regression analyses have been admitted elsewhere under the *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) standards, Dr. Mangum has only loosely described how he would create a regression analysis here. Although, as a concept, regression analyses are based on reliable principles and methods, without an actual regression model tailored to the facts of the case, the Court cannot confirm that he has applied these principles and methods reliably.

**1. Damages Based on Allergan's Planning Document**

Dr. Mangum's first method for assessing classwide damages is based on an internal Allergan planning document from 2013 that projects that the price for Botox would [TEXT REDACTED BY THE COURT]. (Mangum Expert Report ¶ 86, Exh. 1, Doc. 127-9.) According to Dr. Mangum, this document indicates that Allergan planned [TEXT REDACTED BY THE COURT] while Medytox threatened to enter the United States market. (*Id.*) After Allergan and Medytox entered their exclusive licensing agreement,**[\*11]** Allergan changed its forecasts to include the annual price increases that actually occurred from 2014 to the present. (*Id.*) Based on this information, the classwide damages are the difference between the actual prices of Botox (which increased from 2014 to the present) and the price of Botox [TEXT REDACTED BY THE COURT]. (*See id.*)

Allergan asserts that Dr. Mangum's approach is unreliable for three reasons: (1) he blindly relied on the internal planning document without doing any independent analysis of the assumptions it contained; (2) he failed to consider indications of planned price increases found in other Allergan documents that contradict his conclusion; and (3) he failed to control for any other economic factors that may provide alternative reasons for Allergan's price increases. (Mem. at 9-10, Doc. 161.) Allergan argues that, by uncritically relying on the internal planning document, Dr. Mangum has overlooked that many of the assumptions and projections in the document have proven to be inaccurate. (*Id.* at 12.) Allergan also points to other Allergan documents that show that it planned to increase the price of Botox months before entering the agreement with Medytox, while it still considered**[\*12]** Medytox a potential market entrant. (*Id.* at 13.)

Contrary to Allergan's characterizations, Dr. Mangum does not appear to have overlooked any assumptions or documents in his analysis. Dr. Mangum explains in his Reply Report that, when Allergan first decided to raise its prices in January 2014, only one of the assumptions in its planning document had been conclusively proven "wrong." (Mangum Reply Report ¶ 51, Exh. 1, Doc. 193-2.) That assumption was Medytox's entry into the United States market in 2017. (*Id.*) After entering into its agreement with Medytox, Allergan knew no such entry would occur. (*Id.*) Because none of Allergan's other assumptions underlying its projections had changed, Dr. Mangum concludes that Allergan's January 2014 price increase was motivated specifically by the Allergan Medytox Agreement. (*Id.*)

Allergan argues that because the assumptions in its planning document were later proven false, its projections are unreliable and cannot be the basis for reliable expert testimony. (Reply at 11.) However, Dr. Mangum is not relying on the ultimate correctness of the planning document's assumptions to calculate damages. Rather, he obtains price data from other sources. Thus, this is**[\*13]** unlike the situation in *ZF Meritor, LLC v. Eaton Corp.*, where the expert's analysis was based on projected, rather than actual, financial data. [*696 F.3d 254, 292 (3d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:56P1-2KG1-F04K-K1YW-00000-00&context=). Instead, Dr. Mangum uses the planning document to explain why prices began increasing in 2014 after they had remained stable for several years. Dr. Mangum assumes that the planning document reflects how Allergan would have behaved under a hypothetical set of circumstances that Allergan created. (*See* Mangum Reply Report ¶ 51, Exh. 1 ("My analysis does not rely upon the projection to determine exactly how entry would have occurred in the but-for world, but rather the projection is part of an investigation to understand how Allergan would respond to Medytox entering the U.S. market as a third-party competitor.").) It is not unreasonable to assume that (1) when a large pharmaceutical company expends time and resources to create a planning document, that planning document accurately reflects how the company intends to act under a hypothetical scenario; and (2) when that hypothetical scenario does not arise, the company may act differently.

Dr. Mangum also explains why he did not incorporate other Allergan documents or additional economic variables**[\*14]** into his analysis. With respect to other Allergan documents, Dr. Mangum explains that those documents did not model an environment in which Innotox would enter the American market on its own, independently of Allergan. (*Id.* ¶ 50.) Considering when these documents were drafted, Dr. Mangum concludes that they were likely related to a market accounting conducted in preparation for the Allergan Medytox Agreement. (*Id.*) As for adding other economic factors into his analysis, Dr. Mangum explains that, as a rational market actor, Allergan would have already incorporated relevant economic factors into its projections. (*Id.* ¶¶ 52-54, 55.)

Taken as a whole, Dr. Mangum's methodology appears sufficiently reliable to be admissible under *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=). There is no dispute about Dr. Mangum's qualifications as an expert, and his expertise and knowledge in economic analysis would help a jury determine damages in this case. (Mangum Expert Report ¶¶ 1-3, Exh. 1.) His damages methodology is based on actual Botox price data obtained from Allergan as well as Allergan's own planning documents. He explains his methodology, the principles upon which it is based, and how he has applied that methodology in his**[\*15]** expert report. Thus, this is not a situation, such as in *Cholakyan v. Mercedes-Benz, USA, LLC*, where an expert merely parrots the opinions and conclusions of another. [*281 F.R.D. 534, 544, 546-47 (C.D. Cal. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5594-GHC1-F04C-T1MB-00000-00&context=). Allergan's planning document is but a piece in Dr. Mangum's damages calculation methodology, rather than the entirety of his analysis.

To the extent Allergan believes that Dr. Mangum should have conducted additional independent analyses, considered other documents, or controlled for other economic factors, it should raise these issues on cross-examination. *See* [*Daubert, 509 U.S. at 596*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDR0-003B-R3R6-00000-00&context=) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.") The jury can then decide how much weight to give Dr. Mangum's testimony.

Accordingly, the Court finds Dr. Mangum's first damages methodology admissible under *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=).

**2. Damages Based on South Korean Market**

Dr. Mangum's second method for assessing classwide damages is a "yardstick" approach that calculates damages based on the price of Botox in South Korea before and after Innotox entered the South Korean market. (Mangum Expert Report ¶ 88, Exh. 1.) According to**[\*16]** Dr. Mangum, after Innotox entered the South Korean market in 2014, Botox's price decreased by [TEXT REDACTED BY THE COURT] percent. (*Id.*) Dr. Mangum opines that this price decrease can be used to estimate Innotox's effect on the price of Botox if the rival neuromodulator had entered the United States market. (*Id.*) This methodology, Dr. Mangum notes, likely underestimates the decrease in price that would occur in the United States because the South Korean market is more competitive than its American counterpart. (*Id.*)

Allergan first protests that this second methodology is "inconsistent" with Dr. Mangum's first methodology. (Mangum Mem. at 15-16.) Specifically, Allergan notes that under Dr. Mangum's first methodology, Dr. Mangum assumes that the price of Botox would remain stable after Innotox enters the market, but under the second methodology, he concludes that the price of Botox would decline after Innotox enters the American market. (*Id.*) This inconsistency alone is insufficient to render either methodology unreliable. *Cf.* [*Rebel Oil Co., Inc. v. Atlantic Richfield Co., 146 F.3d 1088, 1097 (9th Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T0T-2YN0-0038-X3PR-00000-00&context=) (citation omitted) ("The test [for the admission of expert testimony] under *Daubert* is not the correctness of the expert's conclusions but the soundness of his**[\*17]** methodology.").

Allergan next argues that Dr. Mangum fails to control for any economic factors that might influence the price of Botox in South Korea. (Mangum Mem. at 16.) In particular, Allergan notes that there are eight neurotoxin products approved for dermatological use in South Korea, while only three have been approved in the United States. (*Id.* at 17.) Moreover, the South Korean market is divided into "premium" and "local" tiers, with Botox occupying the former tier and Innotox occupying the latter. (*Id.*) Allergan also criticizes Dr. Mangum's lack of knowledge about the number of neurotoxin products available in South Korea, and his failure to account for the entry of Nabota, another neurotoxin product, two months before Innotox was launched. (*Id.*)

However, the "yardstick" methodology Dr. Mangum employs has been accepted in other ***antitrust*** cases. *See, e.g.,* [*In re Rubber Chemicals* ***Antitrust*** *Litig., 232 F.R.D. 346, 354 (N.D. Cal. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J5M-D350-TVSH-3389-00000-00&context=); [*In re Wellbutrin, No. 04-5525, 2008 U.S. Dist. LEXIS 36719, 2008 WL 1946848, at \*8-9 (E.D. Pa. May 2, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SFH-KDH0-TXFR-P2YG-00000-00&context=). The approach "is especially useful in cases where the pre-conspiracy prices are unreliable predictors of future prices — that is, in cases where the before-and-after approach is unavailing." IIA Phillip E. Areeda et al., ***Antitrust*** Law ¶ 395b3 (3d ed. 2007). Yet, "[i]t is also necessary that the yardstick market be as comparable as possible**[\*18]** in all respects," *id.*, and "[c]ases employing [the yardstick] approach have recognized that product, firm, and market comparability are all relevant factors in the selection of a proper yardstick," [*In re Prograf* ***Antitrust*** *Litig., No. 1:11-md-02242-RWZ, 2014 U.S. Dist. LEXIS 180899, 2014 WL 7641156, at \*3 (D. Mass. Dec. 23, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4M-DJ21-F04D-D00K-00000-00&context=) (quoting [*Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199, 1206 (1st Cir. 1987))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9RN0-001B-K496-00000-00&context=).

Here, South Korea is the only market where Innotox and Botox have actually competed against each other. (Mangum Reply Report ¶ 58, Exh. 1.) Dr. Mangum therefore cannot be faulted for selecting the only potential yardstick available for his analysis. Although this does not excuse Dr. Mangum from confirming that South Korea can serve as a reliable yardstick, Dr. Mangum has conducted the necessary analyses to ensure the yardstick's reliability. Dr. Mangum has compared certain economic factors between the South Korean and American markets, such as their GDP per capita and growth rate. (*Id.* ¶ 56.) Dr. Mangum has also considered the greater number of competitors in South Korea and concluded that this difference makes his damages calculation conservative. (Mangum Expert Report ¶ 88, Exh. 1.) As Dr. Mangum observes, basic economic theory instructs that the effect of additional competition on price decreases as the market becomes less concentrated.**[\*19]** (*Id.* ¶ 88 n.155.) As for the entry of Nabota into the South Korean market, Dr. Mangum concludes that its price impact is minimal given that Nabota is "not a differentiated product" like Innotox. (Mangum Reply Report ¶ 57, Exh. 1.) Further, to the extent products are differentiated into high and low tiers, Nabota's status as a lower tier product would further diminish any price impact it might have. (*Id.*)

Dr. Mangum's yardstick methodology, therefore, is a reliable methodology for calculating damages and is admissible under *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=). Arguments about what factors an expert should have controlled for in conducting a yardstick analysis generally go to the weight, rather than the admissibility, of the expert's testimony. *See* [*In re Prograf, 2014 U.S. Dist. LEXIS 180899, 2014 WL 7641156, at \* 3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4M-DJ21-F04D-D00K-00000-00&context=) (citing 1 Am. Bar Ass'n, ***Antitrust*** Law Developments 786 (7th ed. 2012)). To the extent Allergan believes that Dr. Mangum's methodology fails to adequately account for certain events in the South Korean market or other economic factors, those issues are properly raised on cross-examination.

**3. Regression Analysis**

Dr. Mangum's final method for assessing classwide damages is a regression analysis based on several variables that could theoretically influence the price**[\*20]** of Botox. (Mangum Expert Report ¶¶ 91-94, Exh. 1.) Because Dr. Mangum has not yet conducted an actual regression analysis, his expert report details instead how he intends to conduct such an analysis, including what variables could be incorporated into his model and how he should be able to obtain the necessary data. (*See id.* ¶¶ 94-98.)

Plaintiffs are correct in asserting that they need only propose a valid method for calculating classwide damages, not perform an actual calculation of damages. *See* [*Leyva v. Medline Indus. Inc., 716 F.3d 510, 513-14 (9th Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58HM-8J91-F04K-V0G3-00000-00&context=). But Dr. Mangum's proposal is too vague to assess under *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=). Dr. Mangum has identified the dependent variable in his proposed regression as the price of Botox. (Mangum Expert Report ¶ 94, Exh. 1.) As for the independent variables in his proposed model, Dr. Mangum broadly lists examples of what those variables could be—for example, GDP, national income, disposable income, product type, ***regulatory*** constraints, and inflation. (*Id.* ¶ 95.) He then states that the data for those variables should be available from Allergan, third parties, or publicly available sources. (*Id.*)

[*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) requires not only that an expert's testimony be "the product of reliable principles and methods" but that he "reliably**[\*21]** appl[y] the principles and methods to the facts of the case." [*Fed. R. Evid. 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=). Where an expert has not even created his proposed regression model and speaks vaguely about what variables "could be" included and where the necessary data "should be" found, the Court is left without a means of confirming the reliable application of the expert's proposed methodology. *See* [*In re ConAgra Foods, Inc., 302 F.R.D. 537, 552 (C.D. Cal. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CYC-5MF1-F04C-T1PN-00000-00&context=) (striking an expert's declaration even though his methodologies "may very well be capable of calculating damages" because "[t]he court is thus left with only [the expert's] assurance that he can build a model to calculate damages"). At least one district court has admitted a proposed regression model at class certification where the expert "identified the types of data required for [her] method, . . . explained how the required data for implementing the method was common to all class members, and . . . demonstrated that [her] model ha[d] been estimated using real-world data similar to the data available or likely to become available" in that case. [*In re Cathode Ray Tube (CRT)* ***Antitrust*** *Litigation, No. MDL 1917, 2013 U.S. Dist. LEXIS 137945, 2013 WL 5429718, at \*21-23 (N.D. Cal. Jun. 20, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59FD-NN61-JCNB-3006-00000-00&context=). Still, the regression proposed in the instant case is too hypothetical to draw firm conclusions about its reliability. Dr. Mangum has neither specified the independent variables that his model will use nor**[\*22]** shown that he will succeed in obtaining the data necessary to make the model function. Although the Court recognizes that Dr. Mangum cannot build a complete regression model because he is still awaiting certain data in discovery (Mangum Reply Report ¶ 61, Exh. 1), that does not justify relaxing the standard of admissibility set forth in *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=).

Therefore, Dr. Mangum's proposed regression fails to satisfy the standards for admissibility under *Daubert* and [*Rule 702*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-120S-00000-00&context=) and must be excluded for purposes of this Motion for Class Certification.[[1]](#footnote-0)1

**4. Conclusion**

For the foregoing reasons, the Court admits Dr. Mangum's first two methodologies for calculating damages, which are based on Allergan's internal planning document and comparisons to the South Korean market. The Court will exclude for purposes of this class certification motion Dr. Mangum's proposed regression methodology for failure to present an actual regression model that could be used to calculate classwide damages.

**B. Plaintiffs' *Daubert*Motion on the Expert Report of Dr. Susan Walker**

Plaintiffs have filed their own *Daubert* Motion to exclude the testimony of Defendant's expert, Dr. Susan Walker. (Walker Mot.) At oral argument, Plaintiffs**[\*23]** submitted that the Court need not resolve their *Daubert* Motion if the Court does not believe that it would affect class certification. Walker's testimony relates to when Innotox could have realistically entered the United States market. Because her testimony does not affect whether Plaintiffs can demonstrate causal harm through common proof, the Court does not find her testimony particularly pertinent to this Motion. *See* [*Kleen Prods. LLC v. Int'l Paper Co., 831 F.3d 919, 931 (7th Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KCV-K6D1-F04K-R281-00000-00&context=) ("Defendants' experts' reports will be important . . . at the merits stage, but the fact that class certification decisions must be supported by evidence does not mean that certification is possible only for a party who can demonstrate that it will win on the merits."). Accordingly, the Court DENIES WITHOUT PREJUDICE Plaintiffs' Motion to Strike or Exclude Dr. Susan Walker's testimony.

**C. *Rule 23(a)* Requirements**

Allergan challenges whether Plaintiffs have satisfied *Rule 23(a)*'s numerosity, typicality, and adequacy requirements. (*See generally* Class Cert. Opp'n.) The Court will address these requirements as well as commonality in turn.

**1. Numerosity**

*Rule 23(a)*'s numerosity requirement is met if "the class is so large that joinder of all members is impracticable." [*Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T7M-D1S0-0038-X3SM-00000-00&context=) (quoting *Fed. R. Civ. P. 23(a)(1)*). "Plaintiffs need not state**[\*24]** the exact number of potential class members, nor is there a bright-line minimum threshold requirement." [*Nitsch v. Dreamworks Animation SKG Inc., 315 F.R.D. 270, 283 (N.D. Cal. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JW1-GP01-F04C-T2S8-00000-00&context=). Here, Allergan's sales data reveals that Allergan sold Botox to direct [TEXT REDACTED BY THE COURT] purchasers in the second and third quarter of 2015. (Mangum Reply ¶ 12.) [TEXT REDACTED BY THE COURT] of these direct purchasers negotiated a sales price for Botox that was not directly tied to Allergan's standard list price. (*Id.* ¶ 37.) Accordingly, Plaintiffs have easily established numerosity. *See, e.g.,* *Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003)*.

**2. Typicality**

To be typical of the class, a proposed class representative's claims must be "reasonably co-extensive with those of absent class members; they need not be substantially identical." [*Hanlon, 150 F.3d at 1020*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T7M-D1S0-0038-X3SM-00000-00&context=). A typicality analysis must focus both on the named plaintiffs' claims and potential defenses. [*Ellis, 657 F.3d at 984*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:836D-Y8G1-652R-82V2-00000-00&context=). If a putative class representative "is subject to unique defenses which threaten to become the focus of the litigation," certification is inappropriate. [*Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0VD0-008H-V1HF-00000-00&context=) (citation omitted). "In ***antitrust*** cases, typicality usually will be established by plaintiffs and all class members alleging the same ***antitrust*** violations by defendants." [*Pecover v. Elec. Arts Inc., No. C 08-2820 VRW, 2010 U.S. Dist. LEXIS 140632, 2010 WL 8742757, at \*11 (N.D. Cal. Dec. 21, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:522R-H251-652H-7273-00000-00&context=).**[\*25]**

Allergan contends that Drs. Tawfilis and Towhidian are not typical of the class because they purchased fewer vials of Botox than some class members during the class period. (Opp'n at 6-8.) According to the named Plaintiffs' 2015-2016 sales records, Dr. Tawfilis purchased [TEXT REDACTED BY THE COURT] while Dr. Towhidian purchased [TEXT REDACTED BY THE COURT]. (Towhidian Records, Doc. 162-2; Tawfilis Records, Doc. 162-1.) These named Plaintiffs, Allergan argues, did not purchase enough Botox to qualify for Allergan's rebates and thus cannot sufficiently represent the interests of those who did receive rebates. (Class Opp'n at 7.) Allergan also specifically challenges Dr. Towhidian's competency to represent the class because he indicated that he may switch entirely to Innotox if it were available. (*Id.*)

The Court finds the named Plaintiffs to be sufficiently typical of the class. Like all class members, Drs. Tawfilis and Towhidian purchased Botox directly from Allergan during the class period at an allegedly inflated list price due to Allergan's exclusive licensing agreement with Medytox. (*See* Class Mem. at 11.) Differences in the amount of harm sustained**[\*26]** "do not negate a finding of typicality, provided the cause of those injuries arises from a common wrong." [*Pecover, 2010 U.S. Dist. LEXIS 140632, 2010 WL 8742757, at \*11*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:522R-H251-652H-7273-00000-00&context=). Nor have Defendants identified any defenses unique to these named Plaintiffs that would potentially defeat ***antitrust*** liability. *See* [*Hanon, 976 F.2d at 508*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0VD0-008H-V1HF-00000-00&context=). As for Plaintiffs' potential substitution of Innotox for Botox in the but-for world, this challenge sounds more in adequacy and predominance than typicality, and—for the reasons elaborated upon there—are irrelevant or highly speculative.

**3. Adequacy**

Legal adequacy focuses on (1) whether "the named plaintiffs and their counsel have any conflicts of interest with other class members" and (2) whether the "named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." [*Hanlon, 150 F.3d at 1020*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T7M-D1S0-0038-X3SM-00000-00&context=). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." [*Ellis, 657 F.3d at 985*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:836D-Y8G1-652R-82V2-00000-00&context=). But "[m]ere speculation as to conflicts that may develop at the remedy stage is insufficient to support denial of initial class certification." [*Hart v. Colvin, 310 F.R.D. 427, 436 (N.D. Cal. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H58-FF21-F04C-T0C5-00000-00&context=) (quoting [*Soc. Servs. Union, Local 535, Serv. Employees Int'l Union, AFL-CIO v. Santa Clara Cnty., 609 F.2d 944, 948 (9th Cir. 1979))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-TF30-0039-M0Y7-00000-00&context=).

Allergan posits that there is a conflict here between low-and high-volume purchasers of Botox cosmetics because high-volume**[\*27]** purchasers will be pressured by their patients to switch to Innotox, thereby lowering their rebate tier. (Class Opp'n 8-10.) Allergan also raises specific challenges to Drs. Tawfilis and Towhidian's adequacy as class representatives. (*Id.* at 10-11.)

The Court finds that there are no genuine conflicts between the named Plaintiffs and higher-volume direct purchasers of Botox. Allergan's argument that downstream consumers' preference for Innotox would reduce class members' Botox rebates is a subtle cousin of the "generic bypass" theory that courts have repeatedly found does not create intraclass conflicts. *See* [*In re Lidoderm* ***Antitrust*** *Litig., No. 14-MD-02521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at \*14 (N.D. Cal. Feb. 21, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MXT-H4Y1-F04C-T2X4-00000-00&context=) (finding that downstream consumers' potential shift in purchases from the direct purchaser plaintiffs to other suppliers did not create an intraclass conflict because this question was legally irrelevant and highly speculative); [*Meijer, Inc. v. Abbott Labs., No. C 07-5985 CW, 2008 U.S. Dist. LEXIS 78219, 2008 WL 4065839, at \*7 (N.D. Cal. Aug. 27, 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TMC-PHK0-TXFP-C2DT-00000-00&context=) (observing that determining whether some class members would, on balance, benefit from an alleged anticompetitive pricing scheme "would require a great deal of speculation. This fact alone negates the possibility that there**[\*28]** is a present and apparent fundamental conflict between class members."); [*In re K-Dur* ***Antitrust*** *Litig., No. CIV.A. 01-1652 (JAG), 2007 U.S. Dist. LEXIS 96066, 2007 WL 5302308, at \*15 (D.N.J. Jan. 2, 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RR3-DCT0-TXFR-F24P-00000-00&context=); [*Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 304 (D.D.C. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R2V-K9W0-TXFP-H271-00000-00&context=). If Plaintiffs succeed on the merits, all direct purchasers would benefit from the relief Plaintiffs seek because every direct purchaser could make the same Botox purchases, just at a lower price. If high-volume direct purchasers choose instead to switch some of their Botox purchases to Innotox, they would also benefit from the opportunity to purchase a cheaper or preferable product. Indeed, Allergan's internal projections concluded that Innotox would enter the United States market at [TEXT REDACTED BY THE COURT] per vial, [TEXT REDACTED BY THE COURT], thereby allowing direct purchasers to purchase a cheaper substitute. (Allergan Internal Planning Doc., Appendix D.1, Doc. 153.) Simply put, there is no evidence that any class member wants fewer choices or more expensive products.

Allergan's specific challenges to Drs. Tawfilis and Towhidian's legal adequacy fare no better. Allergan speculates that a jury's focus may be derailed because Dr. Towhidian—in addition to purchasing Botox from Allergan—purchased Botox from a "an unauthorized and potentially illegal supplier" for an amount unrelated to Allergan's standard**[\*29]** list price. (Opp'n at 10.) Dr. Towhidian, however, is not seeking damages from Allergan for his purchases of Botox from this third-party supplier; he seeks to certify a class consisting solely of direct Botox purchasers. (Mem. at *i*.)

Allergan further attacks Dr. Towhidian's credibility because his staff have "writ[ten] Botox instead of Xeomin" on patients bills because they find it "easier to write Botox." (Towhidian Dep. 211:10-14, 213:4-6, Doc. 160.) For questions of credibility or integrity to undermine the adequacy of a class representative, they must be either "directly relevant to the litigation" or "confirmed examples of dishonesty, such as a conviction for fraud." [*Polanco v. Schneider Nat. Carriers, Inc., No. CV 10-4565-GHK JEMX, 2012 U.S. Dist. LEXIS 190050, 2012 WL 10717265, at \*3 (C.D. Cal. Apr. 25, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BYD-5KP1-F04C-T07N-00000-00&context=) (citation omitted). The cases Allergan references are instructive in determining the types of information that undermine a class representative's legal adequacy. In *Pena v. Taylor Farms Pacific*, for example, the court found two named plaintiffs were not adequate class representatives in a wage-and-hour class action because they had significant credibility concerns that would be admissible at trial and cast doubt on their testimony. [*305 F.R.D. 197, 215-16 (E.D. Cal. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8K-F831-F04C-T0XD-00000-00&context=). One of these named plaintiffs had**[\*30]** three felony convictions, including one for a crime of falsehood (identity theft) that he failed to disclose initially during discovery. [*Id. at 215-16*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8K-F831-F04C-T0XD-00000-00&context=). The other named plaintiff provided contradictory testimony about the length of her rest breaks, a central issue in the case. [*Id. at 216*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F8K-F831-F04C-T0XD-00000-00&context=). Similarly, in *Polanco*, the named plaintiff had committed time-and-attendance fraud, an issue that was "directly relevant" in the wage-and-hour class action and would significantly undermine his testimony. [*2012 U.S. Dist. LEXIS 190050, 2012 WL 10717265, at \*6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BYD-5KP1-F04C-T07N-00000-00&context=).

Allergan argues in passing that Dr. Towhidian's recordkeeping practices may be relevant to a pass-on defense (Opp'n at 10), but such a defense is unavailable under either the Sherman Act, [*Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FHW0-003B-S04W-00000-00&context=), or the Cartwright Act, [*Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1086 (Cal. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YXH-GNT0-YB0K-J00H-00000-00&context=). Thus, at this time, the Court does not believe that Dr. Towhidian's recordkeeping practices are logically or legally relevant to any issue that will be presented to a jury in this antirust case.

Separately, Allergan challenges Dr. Towhidian's legal adequacy because he is a low-volume, brand-loyal Botox purchaser. (Opp'n at 10-11.) This is simply a repackaged version of Allergan's argument that low-volume purchasers cannot adequately represent the interests of high-volume customers. If Plaintiffs prove that the**[\*31]** Allergan-Medytox Agreement has delayed Innotox's entry into the United States market, all class members were injured by the artificially high price of Botox. Because there are no real conflicts between Dr. Towhidian and other class members, he can adequately represent the interest of the entire class.

Finally, Drs. Tawfilis and Towhidian and their proposed Class Counsel will vigorously prosecute this case on behalf of the class. *See* [*Hanlon, 150 F.3d at 1020*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T7M-D1S0-0038-X3SM-00000-00&context=). Drs. Tawfilis and Towhidian have both actively participated in this litigation by meeting with Dr. Mangum, sitting for depositions, and providing documentation. (*See* Mem. at 12; Mangum Expert Report ¶ 10.) As for the adequacy of their counsel, the Court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *Fed. R. Civ. P. 23(g)(1)(A)*. Roy A. Katriel and Ralph B. Kalfayan have submitted profiles detailing their extensive experience in complex class actions, including numerous complex**[\*32]** ***antitrust*** class actions. (Katriel Profile, Doc. 118-11; Kalfayan Profile, Doc. 118-12.) Katriel and Kalfayan have led or served on the executive committees for several high-profile ***antitrust*** cases, including *Park v. The Thomson Corp.; Conroy v. The 3M Corp.; Franz, Inc. v. Quantum Corp.; In re Dynamic Random Access Memor*y *(DRAM); In re Korean Airlines Co. Ltd.* ***Antitrust*** *Litigation; In re Wholesale Electricity Cases I & II; In re Natural Gas* ***Anti-Trust*** *Cases I, II, III, IV, & V; In re Cipro Cases I & II; In re Lithium Ion Batteries* ***Antitrust*** *Litigation*; and *In Re Processed Egg Indirect Purchaser* ***Antitrust*** *Litigation*. (*See id.*) So far, they have effectively prosecuted this case by developing a well-pleaded complaint, defeating Allergan's Motion to Dismiss, and marshalling the evidence needed to support class certification. Considering their investment of time and effort in this case, experience, understanding of the law, and available resources, Katriel and Kalfayan can adequately represent the class's interests.

**4. Commonality**

To satisfy the commonality requirement, putative class members' claims must involve at least one common question "that is capable of classwide resolution." [*Dukes, 564 U.S. at 350*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:534M-F5W1-F04K-F4CT-00000-00&context=). "[W]hat**[\*33]** matters to class certification[,]" the Supreme Court has stressed, "is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (emphasis in original). "Where an ***antitrust*** conspiracy has been alleged, courts have consistently held that 'the very nature of a conspiracy ***antitrust*** action compels a finding that common questions of law and fact exist.'" [*In re High-Tech Employee* ***Antitrust*** *Litig., 985 F. Supp. 2d 1167, 1180 (N.D. Cal. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:59NR-FYY1-F04C-T17W-00000-00&context=). Here, Plaintiffs easily satisfy commonality because there are numerous questions shared among the entire class that can be resolved on a classwide basis. These include the relevant market definition for Botox, whether Allergan has market power, and when Innotox would have entered the relevant market if Medytox had not entered into the exclusive licensing agreement with Allergan.

**D. *Rule 23(b)(3)* Requirements**

**1. Predominance**

To certify a *Rule 23(b)(3)* class action "questions of law or fact common to class members [must] predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. Determining whether common questions predominate "begins . . . with the elements of the underlying cause of action." [*Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:531M-TPM1-F04K-F3WJ-00000-00&context=). To succeed on their ***antitrust*** claims, Plaintiffs must prove "(1) a violation of the ***antitrust*** laws . . . (2) individual injury resulting from that violation, and (3) measurable damages." [*In re Hydrogen Peroxide* ***Antitrust*** *Litig., 552 F.3d 305, 311 (3d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4V8Y-WGY0-TXFX-527F-00000-00&context=). Besides demonstrating ***antitrust*** impact through common proof, Plaintiffs must supply a reliable methodology for measuring**[\*34]** damages on a classwide basis. [*Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515 (2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:582C-DKS1-F04K-F1Y9-00000-00&context=); [*Doyle v. Chrysler Grp., LLC, 663 Fed. Appx. 576, 2016 WL 6156062, at \*1 (9th Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M14-8KY1-F04K-V03N-00000-00&context=). In this case, the parties dispute whether Plaintiffs can establish classwide ***antitrust*** impact and a reliable methodology for measuring the class's damages.

a. ***Antitrust*** Impact

While Plaintiffs need not prove that all class members were harmed to secure certification of the class, they must demonstrate that "***antitrust*** impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." [*In re Hydrogen Peroxide* ***Antitrust*** *Litig., 552 F.3d at 311-12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4V8Y-WGY0-TXFX-527F-00000-00&context=); *see also* [*In re New Motor Vehicles Canadian Exp.* ***Antitrust*** *Litig., 522 F.3d 6, 20 (1st Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S5B-G8J0-TXFX-32S2-00000-00&context=).

Plaintiffs contend that ***antitrust*** impact can easily be established on a classwide basis here because Allergan has one standard list price with rebates that are percentage-based discounts off this price. (Class Mem. at 1-6, 12-14; Reply at 1-5.) Allergan, by contrast, argues that ***antitrust*** impact cannot be determined on a classwide basis because class members could have reduced their purchases of Botox in the but-for world so substantially that, with Allergan's rebates, they would have paid more per each vial of Botox. (Class Opp'n at 11-17.)

***Antitrust*** law has traditionally not required direct purchasers to determine how much of the relevant product they would have purchased in the but-for world to establish**[\*35]** ***antitrust*** impact. Professors Areeda and Hovenkamp observe that in foreclosure cases, the overcharge equals "the difference between the actual price and the 'but for' price (P1-P2) *times the quantity sold at the higher price* (Q11)." Areeda & Hovenkamp et al., *supra* at ¶ 291e1 (emphasis added). Likewise, the American Bar Association's handbook on calculating ***antitrust*** damages provides that the proper measure of overcharge damages in various contexts uses the quantity of the product actually sold. *See* ABA Section of ***Antitrust*** Law, Proving ***Antitrust*** Damages: Legal and Economic Issues 233-34 (2d ed. 2010) (noting, in rejecting calculating damages based on deadweight loss, that "[t]he difference between the price charged and the competitive price . . . multiplied by the quantity *actually purchased*[] is an accurate measure of the wealth transfer from consumers to producers resulting from the violation" (emphasis added)); *see also id.* at 231 (observing that, in exclusionary conduct cases, consumers' overcharge would be "the difference between the price actually paid and the price that would have paid absent collusion, multiplied by quantity").

The case law likewise supports the conclusion that an ***antitrust*** impact analysis for direct purchasers**[\*36]** need not consider downstream substitution effects that could have affected the amount of the product purchased in the but-for world. In *In re Skelaxin (Metaxalone)* ***Antitrust*** *Litigation*, for instance, the district court held that the class's damages should not be reduced based on indirect consumers switching from the brand name drug to a generic version, a theory known in pharmaceutical ***antitrust*** cases as "generic bypass." *See* [*No. 1:12-MD-2343, 2014 U.S. Dist. LEXIS 66707, 2014 WL 2002887, at \*2 (E.D. Tenn. May 15, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C6P-1KM1-F04F-B06R-00000-00&context=). The district court found this theory to be irreconcilable with the basic premise underlying the Supreme Court's decision in *Hanover Shoe*—that the ***antitrust*** injury "occurs and is complete when the defendant sells at the illegally high price." [*2014 U.S. Dist. LEXIS 66707, [WL] at \*5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C6P-1KM1-F04F-B06R-00000-00&context=) (quoting [*Meijer, Inc., 246 F.R.D. at 304*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4R2V-K9W0-TXFP-H271-00000-00&context=)); *see also* [*Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 883 (10th Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S12-RJP0-00B1-D0M1-00000-00&context=) (same); [*In re Nexium* ***Antitrust*** *Litig., 777 F.3d 9, 27 (1st Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4D-4MY1-F04K-H002-00000-00&context=) ("[A]ntitrust injury occurs the moment the purchaser incurs an overcharge . . . .").

Product switching may be used, however, to determine the but-for price of the relevant product. In *In re Lower Lake Erie Iron Ore* ***Antitrust*** *Litigation*, for instance, the Third Circuit allowed the plaintiffs to recover the difference between the shipping charges they actually paid and the lower price the more efficient suppliers, who were foreclosed from the market, would have charged. [*998 F.2d 1144, 1169-70 (3d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G390-003B-P0P4-00000-00&context=). Specifically, the steel**[\*37]** manufacturers claimed that the defendant railroads conspired to prevent the entry of more-efficient truck transportation, so the steel manufacturers were allowed to collect the difference between the costs of transporting ore by rail and truck. *See* [*id. at 1154, 1182, 1169-70*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G390-003B-P0P4-00000-00&context=). Likewise, in so-called "pay-for-delay" suits such as *In re Cardizem CD* ***Antitrust*** *Litigation* and *In re Wellbutrin XL* ***Antitrust*** *Litigation*, district courts approved of overcharge estimations based on "the difference between the actual price and the presumed competitive price multiplied by the quantity purchased." [*In re Cardizem CD* ***Antitrust*** *Litig., 200 F.R.D. 297, 309 (E.D. Mich. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42V6-90D0-0038-Y3JY-00000-00&context=); [*In re Wellbutrin XL* ***Antitrust*** *Litig., No. CIV.A. 08-2431, 2011 U.S. Dist. LEXIS 90075, 2011 WL 3563385, at \*7-10 (E.D. Pa. Aug. 11, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82YJ-5611-652J-J3N6-00000-00&context=). The but-for price for the product was the price of the generic version of the drug allegedly foreclosed from the market. *See* [*In re Cardizem CD* ***Antitrust*** *Litig., 200 F.R.D. at 310-11*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42V6-90D0-0038-Y3JY-00000-00&context=); [*In re Wellbutrin XL* ***Antitrust*** *Litig., 2011 U.S. Dist. LEXIS 90075, 2011 WL 3563385, at \*10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82YJ-5611-652J-J3N6-00000-00&context=).

Thus, to summarize, the case law and literature support three propositions about measuring ***antitrust*** impact under an overcharge theory in direct purchaser cases. First, an overcharge calculation in a direct purchaser suit considers the but-for price of the product and the quantity actually purchased. *See, e.g.,* [*Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 374 (3d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H58-W9J0-0038-X4H4-00000-00&context=) (defining overcharge as "the difference between the price paid for goods actually purchased and the price that would have been paid absent the illegal conduct"). This precludes not only the**[\*38]** "generic bypass" defense, *see, e.g.,* [*In re Skelaxin (Metaxalone)* ***Antitrust*** *Litigation, 2014 U.S. Dist. LEXIS 66707, 2014 WL 2002887, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C6P-1KM1-F04F-B06R-00000-00&context=), but also recovery for those who did not actually purchase the good but would have purchased it absent collusion, *see, e.g.,* [*Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 867-68 (10th Cir. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YH10-0039-W2RV-00000-00&context=). Second, to demonstrate that they suffered an overcharge, direct purchasers may demonstrate either that the product they actually purchased would have been cheaper absent collusion or that they would have purchased a less expensive substitute. *See* [*In re Flonase* ***Antitrust*** *Litig., 284 F.R.D. 207, 230 (E.D. Pa. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55XD-8F11-F04F-44WF-00000-00&context=) (observing that brand-loyal consumers could demonstrate ***antitrust*** impact by showing that the price of the product they actually purchased would have been lower if the rival product had entered the market earlier but finding that the plaintiffs had not met their burden); [*In re Wellbutrin XL* ***Antitrust*** *Litig., 2011 U.S. Dist. LEXIS 90075, 2011 WL 3563385, at \*9-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SFH-KDH0-TXFR-P2YG-00000-00&context=) (establishing ***antitrust*** impact through switching to the cheaper substitute); [*In re Cardizem CD* ***Antitrust*** *Litig., 200 F.R.D. at 311*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42V6-90D0-0038-Y3JY-00000-00&context=) (same). Third, how a direct purchaser establishes the fact of damage should not be conflated with possible offsets (*i.e.*, potential secondary effects that could theoretically result in a purchaser recouping the overcharge loss). Potential offsets, if they have any legal relevance, would affect the amount of damages, not the fact of damage. *See, e.g.,* [*In re Nexium* ***Antitrust*** *Litig., 777 F.3d at 27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4D-4MY1-F04K-H002-00000-00&context=); [*In re Delta/AirTran Baggage Fee* ***Antitrust*** *Litig., 317 F.R.D. 675, 684-86 (N.D. Ga. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MY9-YHM1-F04D-214M-00000-00&context=); [*In re Cardizem CD* ***Antitrust*** *Litig., 200 F.R.D. at 311-17*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42V6-90D0-0038-Y3JY-00000-00&context=).

Here, Allergan's discounts could not possibly have resulted in uninjured class**[\*39]** members. Allergan's argument relies heavily on Dr. Cremieux's observation that the Allergan Partner Privileges and Portfolio Bonus Rebate programs result in significant variation in class members' per vial cost of Botox; if direct purchasers had switched a large portion of their neuromodulator purchases to Innotox, their per vial price of Botox may have increased. (Cremieux Decl. ¶¶ 28-65, Doc. 153.) But what Dr. Cremieux paints as a mountain appears to be little more than a molehill: As Dr. Mangum concludes in his Reply Report, the evidence currently available reveals that Allergan's rebates could have resulted in only a tiny fraction of class members paying more per vial of Botox in the but-for world. (Mangum Reply Report ¶¶ 29-32, Table 2, Charts 2, 3, 4.) Dr. Cremieux does not rebut Dr. Mangum's empirical analysis with his own estimates.

In any event, because Allergan's rebates are retrospective, any substitution of Botox for Innotox would not change how much a class member paid for Botox until the next calendar year. (*Id.* ¶ 33.) As the First Circuit has noted, "an injury for part of the class period is sufficient to establish injury," even if it could hypothetically have been offset**[\*40]** by purchases later in the class period. [*In re Nexium* ***Antitrust*** *Litig., 777 F.3d at 27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4D-4MY1-F04K-H002-00000-00&context=). This is because "***antitrust*** injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset." *Id.* Besides this temporal flaw in Allergan's argument, class members would have switched some of their purchases from Botox to Innotox in the but-for world only if the rival product were cheaper or otherwise preferable. (*See* Mangum Reply Report ¶¶ 14, 19, 21, 24, Exh. 1.) Allergan's own internal documentation projected that Innotox would have entered the American market [TEXT REDACTED BY THE COURT] at per vial, [TEXT REDACTED BY THE COURT]. (Allergan Internal Planning Doc., Appendix D.1.) The only way Allergan can posit that some fraction of class members were uninjured is by focusing solely on purchasers' per vial price for Botox. But Allergan cannot have it both ways: If, as Allergan contends, switching effects must be considered in determining ***antitrust*** impact, the lower price of the rival drug must also be considered. And all class members allegedly lost the possibility to make the same Botox purchases at a lower cost.

In opposing class certification, Allergan relies on a series of "pay-for-delay" cases involving**[\*41]** allegations that a brand-name and generic pharmaceutical manufacturer conspired to delay the entry of generic competition. (Mangum Mem. at 5-6 (citing [*Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 2010 U.S. Dist. LEXIS 105646, at \*41, 48, 85-86, 91 (E.D. Pa. Sep. 30, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:515K-7T51-652J-J000-00000-00&context=); [*In re Wellbutrin XL* ***Antitrust*** *Litig., 282 F.R.D. 126, 142 (E.D. Pa. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82YS-M4P1-652J-J3SF-00000-00&context=); [*Zuccarini v. Hoechst (In re Cardizem CD* ***Antitrust*** *Litig.), 200 F.R.D. 326, 343 (E.D. Mich. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43DV-T6F0-0038-Y476-00000-00&context=). These cases simply show that where a pharmaceutical manufacturer allegedly conspired to delay the introduction of a generic version, plaintiffs may demonstrate ***antitrust*** impact through switching from the brand-name drug to the generic because the drugs are close substitutes and consumers' preferences can be shown through actual consumer behavior after a generic version becomes available. *See* [*In re Wellbutrin XL* ***Antitrust*** *Litig., 2011 U.S. Dist. LEXIS 90075, 2011 WL 3563385, at \*9-10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SFH-KDH0-TXFR-P2YG-00000-00&context=); [*In re Cardizem CD* ***Antitrust*** *Litig., 200 F.R.D. at 311*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42V6-90D0-0038-Y3JY-00000-00&context=) ("***Antitrust*** law requires only that the two products at issue be close substitutes for each other."). Indeed, because there is often insufficient evidence in these cases that the price of the brand-name drug would have been lower absent the alleged collusion, product switching may be the only feasible way to demonstrate ***antitrust*** impact. *See, e.g.,* [*In re Flonase* ***Antitrust*** *Litig., 284 F.R.D. at 230*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55XD-8F11-F04F-44WF-00000-00&context=). But these authorities do not foreclose the possibility that—if supported by reliable evidence—direct purchasers may demonstrate ***antitrust*** impact by showing that they would have paid less for the product they actually purchased absent collusion. *See id.* Here, Plaintiffs**[\*42]** will have at least two reliable methods at trial to demonstrate that class members paid an artificially high price for Botox during the class period.[[2]](#footnote-1)2

The Court, however, will narrow the class definition to exclude the [TEXT REDACTED BY THE COURT] purchasers of Botox who entered agreements with Allergan that specified prices for Botox that were not directly linked to Allergan's list price. (*See* Mangum Reply Report ¶¶ 37, 38, Exh. 1.) While the lack of a common list price for all class members does not preclude certification under *Rule 23(b)(3)*, *see* [*In re Korean Ramen* ***Antitrust*** *Litig., No. 13-CV-04115-WHO, 2017 U.S. Dist. LEXIS 7756, 2017 WL 235052, at \*11 & n.28 (N.D. Cal. Jan. 19, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MNT-2HT1-F04C-T26D-00000-00&context=); [*In re Cathode Ray Tube (CRT)* ***Antitrust*** *Litig., 308 F.R.D. 606, 627 (N.D. Cal. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GF7-DBR1-F04C-T3GK-00000-00&context=), Plaintiffs have not supplied evidence about how the parties reached the purchase price of Botox under these [TEXT REDACTED BY THE COURT] contracts, much less demonstrated that the price negotiated under these agreements would have responded to changes in Allergan's list price for Botox. (*See* Mangum Reply Report ¶¶ 37, 38, Exh. 1.) The possibility that these purchasers would have negotiated a more favorable price for Botox if the list price had been lower carries significant intuitive appeal, but sheer speculation about these purchasers' behavior does not justify**[\*43]** including them in the class definition.

In short, because this case involves a large group of direct purchasers who paid one list price (with percentage-based, retrospective rebates deducted from this list price), it is particularly well suited for resolution on a classwide basis. If Plaintiffs are successful on the merits, they will be able to show that all class members were harmed by the artificially inflated price of Botox.

b. Damages Model

After demonstrating ***antitrust*** impact, Plaintiffs may rely on the Supreme Court's relaxed standard of proof for quantifying ***antitrust*** damages. *See* [*Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DH60-003B-755V-00000-00&context=). Under this standard, "while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." [*Id. at 563*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DH60-003B-755V-00000-00&context=); *accord* [*Comcast Corp., 133 S. Ct. at 1433*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:582C-DKS1-F04K-F1Y9-00000-00&context=) (citing *Story Parchment Co.* with approval); [*J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DX0-003B-S0YX-00000-00&context=); [*Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-25, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F880-003B-S1K4-00000-00&context=).

Two of Plaintiffs' damages methodologies—one based on the internal planning document and the other based on a yardstick approach—withstand *Daubert* scrutiny. Using Allergan's internal planning document, Dr. Mangum calculates classwide damages as the difference between the actual price of Botox from 2014**[\*44]** to 2017 and the price of Botox held constant at its 2013 level. (Mangum Expert Report ¶ 86, Exh. 1.) Because Allergan charged the same list price for the entire United States market, all class members paid this price or an amount based on it. (*See id.* ¶ 87.) Accordingly, the difference in price reasonably approximates the damages suffered by the entire class. As discussed in Section III.A.1 above, Dr. Mangum's reliance on the internal planning document to set the "but-for" price at 2013 levels is reasonable. In particular, it is reasonable to assume that a planning document created by a large pharmaceutical company that projects prices in a but-for world would accurately approximate how that company would have set prices in that world.

The yardstick approach measures damages as the market-wide percentage decrease in the price for Botox in South Korea after Innotox's entry into that market. (Mangum Expert Report ¶ 88, Exh. 1.) Application of the same percentage decrease to Botox list price in the United States during the class period would have a common impact on all class members, regardless of whether they received a rebate. (*Id.* ¶ 89.) Although this methodology is based on the price**[\*45]** charged in a different market, as discussed in Section III.A.2, Dr. Mangum has provided ample explanation for why the South Korean market is an appropriate and reasonable "yardstick" for the United States market. (*See* Mangum Reply Report ¶¶ 56-58, Exh. 1; Mangum Expert Report ¶¶ 88 & n.155, Exh. 1.)

Thus, based on these methodologies, Plaintiffs can establish classwide damages.

**2. Superiority**

To certify a *Rule 23(b)(3)* class action, the class device must be "superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. *Rule 23(b)(3)* identifies four non-exclusive factors a court should consider in determining whether superiority has been satisfied:

[1] the class members' interests in individually controlling the prosecution or defense of separate actions; [2] the extent and nature of any litigation concerning the controversy already begun by or against class members; [3] the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and [4] the likely difficulties in managing a class action.

*Fed. R. Civ. P. 23(b)(3)*. "[I]f common questions are found to predominate in an ***antitrust*** action, . . . courts generally have ruled that the superiority prerequisite of *Rule 23(b)(3)* is satisfied."**[\*46]** Charles Alan Wright et al., 7AA Fed. Prac. & Proc. Civ. § 1781 (3d ed. 2017).

The focus of this action will be whether Allergan's agreement with Medytox contravenes the ***antitrust*** laws and, if so, whether this agreement has kept the price of Botox artificially inflated in the United States. Individual prescribers' claims "are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress." [*In re TFT-LCD (Flat Panel)* ***Antitrust*** *Litig., 267 F.R.D. 583, 608 (N.D. Cal. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:50TJ-Y111-F04C-T002-00000-00&context=) (quoting [*In re Static Random Access (SRAM)* ***Antitrust*** *Litig., No. C0701819CW, 2008 U.S. Dist. LEXIS 107523, 2008 WL 4447592, at \*7 (N.D. Cal. Sept. 29, 2008))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VPC-GDB0-TXFP-C1XC-00000-00&context=). The parties have not identified any manageability concerns or parallel proceedings that would caution against certifying a *Rule 23(b)(3)* class. Therefore, considering the nonexclusive factors provided under *Rule 23(b)(3)(A)-(D)*, the Court finds that class members' potential interests in individually controlling the prosecution of separate actions and the potential difficulties in managing the class action do not outweigh the desirability of concentrating this matter in one proceeding.

**E. Appointment of Class Counsel**

Under *Rule 23(g)*, "a court that certifies a class must appoint class counsel." *Fed. R. Civ. P. 23(g)(1)*. As previously stated in this Order, Katriel and Kalfayan have effectively represented the class's interests**[\*47]** so far and shall be appointed as Class Counsel in this case.

**IV. CONCLUSION**

For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART Allergan's *Daubert* Motion, DENIES WITHOUT PREJUDICE Plaintiffs' *Daubert* Motion, and GRANTS Plaintiffs' Motion for Class Certification under *Rule 23(b)(3)*. The Court certifies the following class:

All purchasers within the United States who purchased Botox Cosmetic directly from Defendant Allergan, Inc. during the Class Period for a price that was based on Allergan's list price. Excluded from the class definition are all judicial officers assigned to this case, as well as their staff and immediate relatives. The class definition also excludes all employees, agents, or officers of Defendant Allergan, Inc., and all federal, state, and local government employees.

The Court appoints Roy A. Katriel and Ralph B. Kalfayan as Class Counsel and Drs. Adel Tawfilis and Hamid A. Towhidian as Class Representatives. Plaintiffs shall submit a proposal specifying how they intend to provide notice to class members in a manner consistent with *Rule 23(c)(2)(B)* forthwith.

DATED: June 26, 2017

/s/ Josephine L. Staton

JOSEPHINE L. STATON

UNITED STATES DISTRICT JUDGE

**End of Document**

1. 1The Court's exclusion of Plaintiffs' regression model proposal for purposes of this Motion should not be construed as precluding Plaintiffs from presenting a regression model at summary judgment or trial if Plaintiffs demonstrate at that time that the model withstands *Daubert* scrutiny. [↑](#footnote-ref-0)
2. 2Allergan also relies heavily on [*Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P., 247 F.R.D. 156 (C.D. Cal. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RKN-VHC0-TXFP-C1S1-00000-00&context=), but that decision supports the Court's analysis. There, the district court observed that the plaintiffs would have to show that, absent the ***antitrust*** violation, class members would have paid less for the product actually purchased or switched to a cheaper generic alternative. *See* [*id. at 166-67*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RKN-VHC0-TXFP-C1S1-00000-00&context=). Plaintiffs could not show that more than "a handful" of class members would have switched to the foreclosed generic product and had not submitted credible evidence that the alleged ***antitrust*** violations (market-share discounts, sole-source contracts, and the introduction of the defendant's new product line) had artificially inflated the price of the product that class members actually purchased. [*Id. at 166*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RKN-VHC0-TXFP-C1S1-00000-00&context=). [↑](#footnote-ref-1)