IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| IN RE CLOROX CONSUMER LITIGATION | Master File No. 12-00280 SC |
| This Document Relates To: ALL ACTIONS | ORDER DENYING MOTION FOR CLASS CERTIFICATION |

## I. INTRODUCTION

Plaintiffs bring this putative class action against Defendant The Clorox Company ("Clorox") in connection with its marketing and advertising of Fresh Step cat litter. Plaintiffs now move to certify five plaintiff sub-classes, each distinguished by the state in which the plaintiff purchased his or her cat litter. ECF No. 89 ("Mot.") (filed under seal) at 7-14. The motion is fully briefed.[1]

[1] ECF Nos. 108-4 ("Opp'n") (filed under seal); 115-4 ("Reply") (filed under seal); 127 ("Pls. Supp. Brief"); 128-4 ("Defs. Supp. Brief") (filed under seal). Clorox has moved to strike new arguments and evidence from Plaintiffs' reply -- mainly regarding ascertainability -- or, in the alternative, for leave to file a surreply. ECF No. 116 ("MTS"). Plaintiffs have opposed these motions. ECF No. 118 ("MTS Opp'n"). Because Clorox devoted a large section of its brief to ascertainability, it was appropriate for Plaintiffs to respond. Additionally, one of the cases on which Clorox primarily relies was decided only one day before Plaintiffs filed their motion. Thus the Court is willing to consider the

Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for disposition without oral argument. For the reasons set forth below, Plaintiffs' motion is DENIED.

## II. BACKGROUND

A detailed discussion of this case's background appears in the Court's order on Clorox's motion to dismiss. See In re Clorox Consumer Litig., 894 F. Supp. 2d 1224, 1228-31 (N.D. Cal. 2012). The basic facts are these: Clorox's Fresh Step cat litter uses carbon to eliminate cat litter odors, whereas other cat litter products typically use baking soda. Clorox's marketing campaign allegedly conveys that Fresh Step is more effective at eliminating cat odors than products that do not contain carbon. Plaintiffs, consumers of Fresh Step from five different states, allege that these statements are false and misleading and are contradicted by scientific studies.

The lead plaintiffs in the case purport to represent five sub-classes, each identified by the state in which the plaintiff purchased his or her Clorox cat litter. Specifically, Plaintiffs seek certification of sub-classes including all purchasers of Fresh Step between October 2010 and the present in the states of California, Florida, New Jersey, New York, and Texas. Mot. at 7-14.

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arguments and new evidence that Plaintiffs offer for the first time on reply. However, the Court's lenience should not deprive Clorox of an opportunity to respond. Clorox's motion to strike is DENIED, but its alternative motion to file a surreply is GRANTED.

## III. LEGAL STANDARD

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (internal quotations and citations omitted). "In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Id. (internal quotations and citations omitted). "As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists." Wolph v. Acer Am. Corp., 272 F.R.D. 477, 482 (N.D. Cal. 2011).

Under Rule 23(a), four prerequisites must be satisfied for class certification:

> (1) the class is so numerous that joinder of all members is impracticable;
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> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

A plaintiff also must satisfy one or more of the separate prerequisites set forth in Rule 23(b). Plaintiffs move for certification under Rule 23(b)(3), which requires that common questions of law or fact predominate and that the class action is superior to other available methods of adjudication.

"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, 131 S. Ct. at 2551 (emphasis deleted). Analysis of these factors "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id. at 2552 (internal quotations and citations omitted). "Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation." Id.

## IV. DISCUSSION

Plaintiffs' motion for class certification is denied because the class is not ascertainable and because common questions do not predominate, as required by Rule 23(b)(3). Accordingly, this discussion focuses mostly on those issues, but the Court mentions the other class certification requirements (at least briefly) for the sake of completeness.

### A. Ascertainability

"A class definition should be precise, objective, and presently ascertainable." O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998) (internal quotations omitted). "While the identity of the class members need not be known at the time of certification, class membership must be clearly

ascertainable. The class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member." Wolph, 272 F.R.D. at 482 (internal citations omitted). Though there is a split among district courts in the Ninth Circuit on the issue, the undersigned has followed the guidance of the Third Circuit in requiring plaintiffs to "show, by a preponderance of the evidence, that the class is currently and readily ascertainable based on objective criteria." Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013) (internal quotation marks omitted). In a consumer class action, like this one, where Plaintiffs intend to rely on retailer records, Plaintiffs must produce sufficient evidence to show that such records can be used to identify class members. Sethavanish v. ZonePerfect Nutrition Co., 12-2907-SC, 2014 WL 580696, at *4-6 (N.D. Cal. Feb. 13, 2014) (citing Carrera, 727 F.3d at 308-09). Affidavits from consumers alone are insufficient to identify members of the class. Carrera, 727 F.3d at 306.

The problem Plaintiffs face is figuring out exactly who purchased Fresh Step during the class period. In their motion, Plaintiffs do not propose any method for making this determination. None of the named plaintiffs in this case, for example, kept receipts for their purchases of Fresh Step. ECF Nos. 108-8 ("Butler-Furr Depo.") at 39:3-5; 109-2 ("Lenz Depo.") at 14:22-24; 109-3 ("Luszcz Depo.") at 44:1-13; 109-4 ("Kowalewski Depo.") at 49:24-50:5; 109-5 ("Doyle Depo.") at 28:16-18.[2] Nor do consumers necessarily remember when they bought cat litter, or which sizes,

[2] One plaintiff, Ms. Kristin Luszcz, apparently began keeping receipts from her Fresh Step purchases after filing this lawsuit. Luszcz Depo. at 44:1-6.

types, or even brands of cat litter they purchased. Butler-Furr Depo. at 39:6-10; Kowalewski Depo. at 49:2-10; Doyle Depo. at 27:22-28:9. One of the plaintiffs in this case apparently cannot even recall whether she bought Fresh Step during the class period; Ms. Doyle testified at her deposition that the last time she bought Fresh Step was "around 2009." Doyle Depo. at 36:14-18, 37:17-21, 54:14-55:21. But the class includes only persons who purchased Fresh Step between October 2010 and the present. That is precisely why affidavits from consumers are insufficient to identify the class.

In their reply brief, Plaintiffs indicate that the classes might be ascertained by obtaining records from Clorox or from the retailers who sell Fresh Step. Reply at 8. Plaintiffs assert that this method of ascertaining the classes will capture "a substantial number of Class members." Id. To support their assertions, Plaintiffs contacted sixteen Fresh Step retailers, which together account for about 85 percent of Fresh Step sales nationwide. ECF No. 115-8 ("Dearman Decl.") (filed under seal) ¶ 15. Of those sixteen retailers, five have not responded or refused to turn over any information. Id. ¶¶ 17-19. Six of the retailers do not have any method for tracking Fresh Step purchases. Id. ¶¶ 20. Of the five retailers who had relevant information and were willing to provide it, few provided sufficient information to help Plaintiffs ascertain the class.

Target is the most helpful for Plaintiffs. It can identify customers who made purchases with "trackable" cards. Id. Ex. 16 (filed under seal). In Target's case, the purchaser is identifiable in about 67 percent of (approximately 18 million)

Fresh Step transactions. Dearman Decl. ¶ 21(b), Ex. 16. Similarly, PetSmart can identify 2.1 million Fresh Step customers, but it is not clear what portion of their Fresh Step sales those identifiable customers represent.

Pet Supermarket, Inc. provided a spreadsheet containing information on purchasers of Fresh Step since 2009. Plaintiffs claim that the spreadsheet identifies purchasers for 74,977 units of Fresh step between 2010 and present. Id. ¶21(a), Ex. 16 (filed under seal). Defendants counter, however, that "the vast majority" of consumers identified on the spreadsheet are not members of any putative class -- only five are from New Jersey, and only ten are from New York. ECF No. 117-3 ("Surreply") at 3. Regardless, Pet Supermarket can only identify purchasers who used the company's loyalty card program. Dearman Decl. Ex. 15 (filed under seal). Those 74,977 units represent only a tiny fraction of Fresh Step purchases.

Wal-Mart and Sam's Club estimate that approximately 4.3 million individuals may have purchased Fresh Step at their retail locations or online. However, in only about 18 percent of transactions are the individual customers identifiable. Dearman Decl. ¶ 21(c).

Clorox itself does not sell Fresh Step directly to consumers, but it does have a "Paw Points" loyalty program that Plaintiffs argue might be able to identify some class members. Reply at 8. However, only about five percent of Fresh Step purchases in California, New York, New Jersey, Texas, and Florida were registered through the Paw Points program. Even were this number larger, the Paw Points program's utility in determining class

membership would be limited. The program does not collect information on the date of purchase, and the location it records is the customer's address, rather than the location of the store where the product was purchased. Dearman Decl. ¶¶ 25-26.

Plaintiffs' evidence demonstrates quite clearly that there is no administratively feasible method for ascertaining the plaintiff classes. Customers do not remember when they purchased Fresh Step cat litter or how much they bought. Of the retailers who responded to Plaintiffs' inquiries, six do not have any way of identifying Fresh Step purchasers. Five can track some customers through loyalty programs or store credit cards, but three of those five can identify customers in only a small minority of Fresh Step transactions. Ultimately, only two of the sixteen retailers Plaintiffs contacted can help identify a substantial number of plaintiffs. The Court finds that there is no administratively feasible method of determining membership for the vast majority of potential members of Plaintiffs' proposed sub-classes. Therefore, Plaintiffs' proposed classes are not ascertainable. On this ground alone, their motion is DENIED.

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

Rule 23(a) requires numerosity, commonality, typicality, and adequacy of representation. See Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012).

**1. Numerosity**

Federal Rule of Civil Procedure 23(a)(1) requires that the proposed classes be "so numerous that joinder of all members is impracticable." Generally, "classes of forty or more are considered sufficiently numerous." Delarosa v. Boiron, Inc., 275

F.R.D. 582, 587 (C.D. Cal. 2011). Plaintiffs demonstrate using sales figures that at least tens of thousands of people purchased Fresh Step in each of the relevant states. Defendants do not contest these claims. The Court finds that the numerosity requirement of Rule 23 is met.

**2. Commonality**

Rule 23 also requires that "there be questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "This does not mean merely that [all plaintiffs have] suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). Nonetheless, "Rule 23(a)(2) has been construed permissively." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Plaintiffs argue that there are a number of common questions of law and fact that govern the claims of all members of the proposed classes. These questions mostly concern Clorox's claims that Fresh Step is superior to other cat litter brands -- such as the truthfulness and materiality of those claims, and whether they were likely to deceive a reasonable consumer. Mot. at 18. In response, Clorox argues that those questions are not actually common to all members of the proposed classes. Plaintiffs' proposed classes include all purchasers of Fresh Step. Clorox argues that some Fresh Step purchasers likely never saw the

allegedly misleading statements, did not rely on them, or did not actually find them to be false. Therefore, Clorox contends, questions regarding those claims are not common to the entire class.

The Court need not resolve this issue. Rule 23(b)(3) includes a related, but additional, requirement that these common questions predominate over questions affecting only individual class members. "The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3)." Hanlon, 150 F.3d at 1019. Consequently the Court assumes arguendo that at least one of these questions is common to the proposed classes. But, as discussed in Part IV.C.1, below, the Court finds that the questions Plaintiffs cite as common to the classes do not predominate over individual concerns.

**3. Typicality**

The Ninth Circuit has interpreted the typicality requirement, like the commonality requirement, permissively. Typicality requires that the class representatives' claims be "reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. Clorox argues that Plaintiffs' claims are not typical because consumers of Fresh Step used and experienced the product differently. For example, one plaintiff claims that Fresh Step did not work at all, while another says it was as effective as any other brand of cat litter (just not better). See Lenz Depo. at 76:4-19; ECF No. 109-1 ("Sterritt Depo.") at 131:6-14; see also Opp'n at 39-40.

The Court finds these arguments unconvincing. "In determining whether typicality is met, the focus should be on the defendants'

conduct and plaintiff's legal theory, not the injury caused to the plaintiff. Typicality does not require that all class members suffer the same injury as the named class representative." Simpson v. Fireman's Fund Ins. Co., 231 F.R.D. 391, 396 (N.D. Cal. 2005). All of the claims that plaintiffs bring here are similar: they all allege that they saw Clorox's allegedly misleading statements, purchased Fresh Step because of those statements, paid more for Fresh Step than they would have for other brands, and did not find Fresh Step to work better than other brands. See Reply at 13. Clorox's alleged conduct and Plaintiffs' legal theories are the same, regardless of variations in their individual experiences with Fresh Step.

Of course, these similarities apply only to the extent that class members have any claim at all. Plaintiffs' proposed classes are hopelessly overbroad and include many persons who likely never saw the allegedly misleading statements. Those class members therefore could not have relied on the alleged misrepresentations to purchase Fresh Step. However, the clearest analytical framework for the over breadth of the proposed classes is the predominance issue (again, see Part IV.C.1, below).

**4. Adequacy of Representation**

The Ninth Circuit applies a two-part test to determine the adequacy of class representation. First, the representative plaintiffs and their counsel must not have conflicts of interest with other class members. Second, the representative plaintiffs and their counsel must prosecute the action vigorously on behalf of the class. Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003).

There is no evidence of conflicts of interest between the lead plaintiffs, their counsel, and other class members. To the extent that members of the proposed classes have claims against Clorox, those claims all arise under the same legal theories and substantially similar facts. Thus, there is no indication that their theories of liability or legal arguments will create any sort of conflict.

With regard to the second part of the test, there is again nothing to suggest that the lead plaintiffs or their counsel will fail to adequately represent the class. Plaintiffs' attorneys are experienced class action litigators who have prosecuted this litigation since it was filed in early 2012.

Clorox argues in a footnote that Plaintiffs do not adequately represent their sub-classes for a variety of reasons including lack of typicality, lack of membership in the proposed classes, criminal history, and credibility concerns. Opp'n at 40 n.19. Because the Court denies Plaintiffs' motion on other grounds, it declines to examine these specific claims.

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

In addition to satisfying the requirements of Rule 23(a), a class action must fit at least one of the categories defined in Rule 23(b). Plaintiffs assert that this class action qualifies under Rule 23(b)(3). Mot. at 22. That Rule requires the Court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating controversy." Fed. R. Civ. P. 23(b)(3).

**1. Predominance**

The burden of demonstrating that common questions predominate lies with the party seeking class certification. Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1188 (9th Cir. 2001). Plaintiffs argue that questions common to all class members predominate here. These questions mostly concern Clorox's claims that Fresh Step is superior to other cat litter brands. Mot. at 18. Clorox argues that common issues do not predominate for a variety of reasons, including that many, or even most, members of the proposed classes did not see, much less rely upon, the allegedly misleading superiority claims. Opp'n at 25-30. The Court finds that these individual questions predominate; Plaintiffs cannot demonstrate that enough members of the proposed classes saw the allegedly misleading messages.

This inquiry is complicated by the fact that Plaintiffs have amended their complaint, adding new statements they claim were misleading to consumers. Plaintiffs' original complaint only identified allegedly misleading statements in Clorox's television commercials. ECF No. 1 ¶¶ 1-8. Five days after moving to file certain portions of their class certification motion under seal, Plaintiffs filed their third amended complaint, alleging that some variants of Fresh Step packaging also included misleading statements. ECF No. 93 ("TAC") ¶¶ 2-9. However, the third amended complaint still defines the beginning of the class period by the airdate of the first television commercials, and the bulk of Plaintiffs' allegations still focuses on the commercials. Id. ¶¶ 6-9, 33-39.

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Clorox argues that the television commercials reached only a very limited audience. The four commercials Plaintiffs identify ran for a total of only sixteen months. Reply at 1. Additionally, in mid-2011, several months before this class action was filed, Clorox commissioned an advertising analytics company to assess the commercials' effectiveness. The results indicated that "not enough people are seeing, or possibly remembering, the advertising." See ECF No. 108-25, at CL1560 (filed under seal); Opp'n at 9-10. Plaintiffs counter that the misleading statements also appear on Fresh Step packaging, resulting in a "uniform message to consumers." Reply at 1.

That is not the case. The allegedly misleading statements are limited to claims that Fresh Step eliminates odors better than other brands because it contains carbon. The complaint does not allege that statements that Fresh Step contains carbon, or even that claims that carbon eliminates odor, were misleading. According to the complaint, only claims that Fresh Step is superior to other brands because of its carbon content is misleading. This so-called "superiority message" appeared only on the back of some Fresh Step packaging during the proposed class period. Plaintiffs provide two examples of such packaging; Clorox has submitted ten versions of Fresh Step packaging that express no superiority claims.[3] Plaintiffs do not produce any evidence as to the

[3] Clorox asserts that "nearly ten dozen different packagings were used during the proposed class period, almost all of which did not include the carbon superiority language." Opp'n at 13. However, Clorox does not cite to the record in support of this proposition. Nonetheless, Plaintiffs do not dispute Clorox's figure. Plaintiffs provide only two examples of packaging containing the "superiority message," while Clorox provides ten that do not. See TAC ¶ 5, ECF No. 109 ("Lee Decl.") Exs. 39-44, 50-53.

percentage of Fresh Step units that included the allegedly misleading messages. Moreover, Clorox has provided evidence that only 11 percent of consumers read the back panel of cat litter packaging.[4] ECF No. 108-41, at CL5029 (filed under seal).

The effect that this lack of a consistent message has on Plaintiffs' motion varies according to state law. The consumer protection laws in California, Texas, New York, New Jersey, and Florida differ significantly in the protection they offer to potential class action plaintiffs. Generally speaking, however, two concepts are crucial: exposure and causation. That is, plaintiffs must be exposed to allegedly misleading statements, and those statements must cause them harm. All states require both, though the required proof of causation varies greatly; indeed, some states require reliance rather than causation. For example, New Jersey law infers causation in many instances, while Texas generally requires proof that each individual plaintiff relied on the allegedly misleading statements. Plaintiffs do not distinguish between reliance and exposure, and they offer no individualized proof of either. Though Plaintiffs may be entitled to a class-wide presumption of reliance in some states, a plaintiff can only reasonably be presumed to rely upon information he actually received. The problem Plaintiffs face is that there is powerful evidence that most members of the proposed classes probably never

[4] At least, that is how Clorox interprets the survey data. See Opp'n at 13. However, the Court's reading of the evidence is that only 11 percent of customers who read the packaging at all read the back panel. Only 37 percent of customers read the packaging at all, and only 11 percent of those read the back panel. Thus it appears that only about four percent of all cat litter customers read the back panel. Regardless, the percentage of customers who read the back panel is very low.

saw the allegedly misleading statements. The television commercials ran for only a small part of the class period, and the superiority claims appeared in small print on the back of a minority of Fresh Step packages. Regardless of the generosity of the various states' causation or reliance requirements, Plaintiffs simply cannot demonstrate that the proposed classes were uniformly exposed to the allegedly misleading messages. The Court proceeds to analyze each proposed sub-class by state.

**i. California**

Under California law, a class-wide presumption of reliance upon an allegedly misleading message may be appropriate in some cases. Plaintiffs urge the Court to "presume[] that all class members relied on Clorox's odor superiority misrepresentation." Reply at 10. Bizarrely, Plaintiffs cite a California Supreme Court case for the proposition that "[i]t is well-settled in the Ninth Circuit that class-wide reliance is presumed where a misrepresentation is 'material.'" Id. It is possible that Plaintiffs meant to argue that California Supreme Court precedent governs the application of California law when federal courts apply it.[5] Even if that were Plaintiffs' intended argument, they read the case they cite for a much broader proposition than it supports.

[5] Plaintiffs also cite a single case from this District that followed the California case on a different issue, holding that unnamed class members in an action brought under California's Unfair Competition Law need not establish standing. Reply at 10 (citing Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 376 (N.D. Cal. 2010)). The issue here is not standing but predominance, and the Ninth Circuit has made clear that they are distinct inquiries. See Mazza, 666 F.3d at 595-96 (class had standing despite lack of proof of reliance or injury, but lack of evidence of reliance still meant that individual questions predominated).

Plaintiffs appear, remarkably, to argue that any materially misleading product advertisement is automatically presumed under California law to reach and influence all of the product's customers. See Id. (citing In re Tobacco II Cases, 46 Cal. 4th 298, 326-27 (Cal. 2009)). The presumption established in Tobacco II was much more limited, and it applied only to reliance, not exposure. That is, it may be justified to presume that consumers who actually saw a materially misleading advertisement relied upon it. However, Tobacco II does not mean that Plaintiffs are entitled to a presumption that every purchaser of Fresh Step during the class period was exposed to the misleading statements.

Tobacco II involved cigarette advertising, and presumptions of exposure and reliance were justified by a "decades-long campaign of the tobacco industry to conceal the health risks of its product." Tobacco II, 46 Cal. 4th at 327. Since Tobacco II, both California state courts and federal courts in the Ninth Circuit -- when applying California law -- have refused to presume so broadly in other contexts. See, e.g., Mazza, 666 F.3d at 595 (presumption of reliance not justified under California law where it was likely that "many class members were never exposed to the allegedly misleading advertisements"); ConAgra Foods, C 12-01633 CRB, 2014 WL 2702726, at *14 (N.D. Cal. June 13, 2014) (examining treatment of Tobacco II in the Ninth Circuit and reaching same conclusion); Cohen v. DIRECTV, Inc., 178 Cal. App. 4th 966, 973 (Cal. Ct. App. 2009) ("An inference of classwide reliance cannot be made where there is no showing that representations were made uniformly to all members of the class.").

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"In the absence of the kind of massive advertising campaign at issue in Tobacco II, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading." Mazza, 666 F.3d at 596. A sixteen-month television advertising campaign combined with messages in small print on the back of a small minority of Fresh Step packaging does not even approach the "massive advertising campaign" at issue in Tobacco II. Plaintiffs' proposed class -- which includes all purchasers of Fresh Step in California over a period of almost four years -- is not defined so as to include only members who were exposed to the allegedly misleading material. Without any evidence that Clorox included its superiority message on a significant portion of Fresh Step products, or that consumers actually saw it, Plaintiffs have no basis for their claim that Clorox presented a uniform message to its customers. See also ConAgra Foods, 2014 WL 2702726, at *14 (variations in labeling of food products precluded cohesion among class members necessary for class-wide presumption of reliance).

The Court finds that Plaintiffs are not entitled to a class-wide presumption of reliance. Therefore, Plaintiffs must define their classes to include only persons exposed the allegedly misleading advertisement. Because Plaintiffs fail to do so, "common questions of fact do not predominate where an individualized case must be made for each member showing reliance." Id. at 596. Plaintiffs' motion to certify the California sub-class is DENIED because issues common to all class members do not predominate over questions applicable only to individual members.

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**ii. Texas**

Plaintiffs' Texas sub-class brings a claim under the Texas Deceptive Trade Practices -- Consumer Protection Act Section 17.50(a)(1) ("DTP-CPA"). Pls. Supp. Brief. at 6. The DTP-CTA requires a showing of reliance. Tex. Bus. & Com. Code § 17.50(B). Individualized proof is required for Plaintiffs' claim under the DTP-CPA. See Peltier Enters., Inc. v. Hilton, 51 S.W.3d 616, 624 (Tex. App. 2000) ("This claim requires individualized proof because reliance is an essential element of this DTPA claim."). By requiring individual proof of reliance, the Texas Supreme Court "did not entirely preclude class actions in which reliance was an issue, but it did make such cases a near-impossibility." Fid. & Guar. Life Ins. Co. v. Pina, 165 S.W.3d 416, 423 (Tex. App. 2005).

Plaintiffs' only response is to urge the court to "infer[] that no reasonable consumer would pay more for cat litter that said it provided superior odor control if it did not, in fact, provide that benefit." Pls. Supp. Brief at 7 (emphasis in original). That sort of inference is inappropriate under Texas law. See Pina, 165 S.W.3d at 424 ("Despite the fact that the misrepresentation clearly occurred and the purchases were then made by all class members, the class also had to show that every purchaser relied on the misrepresentation in making the purchase."). Even if such an inference were permitted, Clorox has provided sufficient evidence to rebut any claim that the inference would apply uniformly across the Texas sub-class. This strict interpretation of Texas consumer protection laws has precluded class certification due to lack of predominance in cases analogous to this one. See, e.g., Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 694 (Tex. 2002) ("[T]he

plaintiffs in this case have failed to show that individual issues of reliance do not preclude the necessary finding of predominance . . . ."); Pina, S.W.3d at 425 ("[A]ppellees failed to show that individualized determinations of reliance would not predominate over common questions of law or fact."); Ford Motor Co. v. Ocanas, 138 S.W.3d 447, 454 (Tex. App. 2004) ("[A]ppellee failed to show that individualized determinations will not predominate over common questions of law or fact . . . .").[6]

The Court finds that Texas law also precludes a presumption of reliance in Plaintiffs' favor. Accordingly, the Court DENIES Plaintiffs' motion as to the Texas sub-class because issues common to all class members do not predominate over questions applicable only to individual members.

**iii. New York**

The New York sub-class brings claims under New York General Business Law Sections 349 and 350. Neither of these claims includes a reliance requirement.[7] Even so, New York law requires that "[i]n a class action alleging deceptive acts and practices and false advertising, the proof must show that each plaintiff was reasonably deceived by the defendant's misrepresentations or omissions and was injured by reason thereof." Solomon v. Bell Atl.

[6] These cases applied Texas Rule of Civil Procedure 42(b)(3), which is virtually identical to Federal Rule of Civil Procedure 23(b)(3).

[7] Plaintiffs' briefs are contradictory on this issue. Compare Mot. at 12 ("A claim under Section 349 does not require a demonstration of reliance, although a claim under Section 350 does.") with Pls. Supp. Brief at 4 ("Reliance is not an element of either claim."). According to New York law, the latter statement is accurate. See Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941 (N.Y. 2012) ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law §§ 349 and 350 claims, it was error.").

Corp., 9 A.D.3d 49, 52 (N.Y. App. Div. 2004). Plaintiffs argue that "causation does not require individualized proof and can be resolved on a classwide basis where, as here, a misrepresentation is made uniformly to the class." Mot. at 13. Once again, Plaintiffs are stymied by the fact that the alleged misrepresentations were not made uniformly to the class.

Solomon illustrates this problem as it applies to cases, like this one, where allegedly misleading statements did not necessarily reach every member of a putative class. The Solomon court held that "class certification is not appropriate where the plaintiffs do not point to any specific advertisement or public pronouncement by the [defendants] which was undoubtedly seen by all class members." Solomon, 9 A.D.3d at 53 (citing Small v. Lorillard Tobacco Co., Inc., 252 A.D.2d 1, 9 (N.Y. App. Div. 1998), aff'd, 94 N.Y.2d 43 (N.Y. 1999)). Federal courts have followed these New York cases in denying class certification:

> Plaintiffs' proposed class makes no attempt to limit the class to persons who saw or heard a common misrepresentation . . . . Distinguishing between the different representations made to putative class members would require individualized inquiries not suitable for class litigation. Accordingly, this element supports denying class certification.

In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II), CIV.A. 03-4558, 2012 WL 379944, at *14 (D.N.J. Feb. 6, 2012). Like the plaintiffs in Ford, Solomon, and Small, Plaintiffs in this case failed to limit their proposed classes to persons who saw or heard a common misrepresentation. As in Solomon, "the individual plaintiffs did not all see the same advertisements; some saw no advertisements at all." Solomon, 9 A.D.3d at 53. Nor do

Plaintiffs point to any specific advertisement that was seen by all class members. Rather, Plaintiffs point to a series of television commercials and statements that appeared on a small minority of Fresh Step packaging. Plaintiffs have produced no evidence whatsoever as to which or how many members of their proposed classes ever saw these misrepresentations. Nor do they attempt to limit any of their proposed classes to persons who saw these alleged misrepresentations. As a result, common questions do not predominate over individual issues under New York law, either. Plaintiffs' motion to certify the New York sub-class is therefore DENIED.

**iv. New Jersey**

The parties agree that New Jersey imposes an "ascertainable loss" requirement, rather than a reliance element through its Consumer Fraud Act ("NJCFA"). Pls. Supp. Brief at 5-6; Defs. Supp. Brief at 8-9; see also Elias v. Ungar's Food Prods., Inc., 252 F.R.D. 233, 239 (D.N.J. 2008) ("In place of the traditional reliance element of fraud and misrepresentation, we have required that plaintiffs demonstrate that they have sustained an ascertainable loss.") (quoting Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 391 (N.J. 2007)). Thus stating a claim under the NJCFA requires alleging three elements: (1) unlawful conduct; (2) an ascertainable loss; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss. Merck, 192 N.J. at 389.

To establish the required causal relationship, the New Jersey plaintiffs rely upon "a presumption of reliance and/or causation"

developed in Varacallo v. Massachusetts Mutual Life Insurance Co., 752 A.2d 807, 817-18 (N.J. Super. Ct. App. Div. 2000). Varacallo specifically dealt with that presumption in situations where "omissions of material fact are common to the class." Id. at 817. However, at least one federal court has extended the Varacallo presumption to affirmative misrepresentations. See Elias, 252 F.R.D. at 238. Even assuming that the Elias court correctly extended Varacallo, Plaintiffs in this case are still not entitled to that presumption. In Elias, the court wrote that the allegedly misleading "statements to each purchaser are finite and readily identifiable." Id. Additionally, the Elias court found that "defendants' conduct subjected each purchaser to the same wrongful course of conduct and thereby produced the same claims, supported by the same evidence and responded to by defendants with the same defenses." Id. at 238-39.

The record simply does not support such a finding here. The alleged misrepresentations were made in television advertisements that ran for about 16 months of the nearly four-year class period and in small print on the back of a minority of Fresh Step packagings. It is likely that the majority of members of the New Jersey sub-class never saw the allegedly misleading claims. Consequently, Clorox's statements to each purchaser are not readily identifiable; Clorox's conduct did not subject each purchaser to the same wrongful conduct; and individualized evidence will be required to support the New Jersey plaintiffs' claims. Those individual questions preclude a finding that questions common to the New Jersey sub-class predominate over individualized issues. Plaintiffs' motion to certify the New Jersey sub-class is DENIED.

**v. Florida**

Florida consumer protection law does not require reliance but does require causation. The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") permits a person "who has suffered a loss as a result of a violation of this part" to recover actual damages. Fla. Stat. § 501.211(2) (emphasis added). One key Florida case on the reliance issue is Davis v. Powertel, Inc., 776 So. 2d 971, 973 (Fla. Dist. Ct. App. 2000) ("A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue."). However, the Powertel decision has since been criticized for its failure to analyze the causation element. See Pop's Pancakes, Inc. v. NuCO2, Inc., 251 F.R.D. 677, 686-87 (S.D. Fla. 2008) (collecting cases). Equally important, the Powertel court has since clarified that "[i]t does not follow, however, that because class litigation is possible in a statutory action for a deceptive trade practice, that it will always be appropriate. . . . We did not suggest otherwise in Powertel." Egwuatu v. S. Lubes, Inc., 976 So. 2d 50, 53 (Fla. Dist. Ct. App. 2008). In Egwatu, the court concluded "that class litigation would be impractical because there would be many differences in the facts supporting the claims of the individual plaintiffs. This conclusion was based on the fact that the defendants have employed a variety of methods over the years to inform customers [of the alleged misrepresentation]." Id.

Similarly, Plaintiffs allege here that Clorox employed a variety of methods over the years -- three different television commercials and two varieties of Fresh Step packaging -- to claim that Fresh Step is superior to other brands. The Court finds that,

as in Egwatu, there will be "many differences in the facts supporting the claims of the individual plaintiffs." Id. Many members of the proposed Florida sub-class never saw the alleged misrepresentations. Determining whether any individual member of the Florida sub-class has a claim against Clorox will therefore depend upon whether that person actually saw the misrepresentation. If a class member never saw Clorox's superiority message, it is impossible that he suffered damages as a result of Clorox's conduct. The Court finds that questions common to the Florida sub-class do not predominate over such individualized issues. Accordingly, Plaintiffs' motion to certify the Florida sub-class is DENIED.

**2. Measurement of Damages on a Class-Wide Basis**

The Supreme Court has interpreted Rule 23(b)(3) predominance to include a requirement that plaintiffs establish "that damages are capable of measurement on a classwide basis." Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). The parties disagree as to whether Plaintiffs had made that showing. Plaintiffs have submitted two expert reports, one of which includes a class-wide damages measurement. See Mot. at 24-25; ECF No. 89-6 ("Preston Rpt.") (filed under seal). Clorox has moved to exclude both of Plaintiffs' expert reports on the grounds that the experts used unreliable methods. ECF Nos. 114 (redacted version), 108-6 (unredacted version filed under seal). Because the Court denies Plaintiffs' motion on other grounds, the thorough examination of the experts' reports required to resolve this objection is unnecessary. Clorox's motion to exclude the expert testimony is therefore DENIED as moot.

**3. Superiority of Class Action**

The final Rule 23(b)(3) requirement is that a class action is superior to other available methods for fairly and effectively adjudicating the controversy. Relevant to determining the superiority of the class action are: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action. Fed. R. Civ. P. 23; see also ConAgra Foods, 2014 WL 2702726, at *23-24.

The problems Plaintiffs face with ascertainability and predominance are both pertinent to superiority as well. The immense difficulty of determining class membership will make managing this case as a class action extremely complicated. That alone may be sufficient to preclude a finding that a class action is the superior method for resolving this case. See ConAgra Foods, 2014 WL 2702726, at *24 (finding it "not at all clear" that a class action was superior because "Plaintiffs have not proposed an adequate means of identifying each class member, which products each class member purchased, and how many products each class member purchased"). Additionally, the variations in Clorox's Fresh Step packaging during the proposed class period, and the fact that most class members likely never saw the allegedly misleading statements at all, create individualized questions that render a class action unmanageable. See id. (variations in product labels

during the proposed class period were relevant to manageability of class action).

## V. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for class certification is DENIED with respect to all five proposed sub-classes.

IT IS SO ORDERED.

Dated: July 28, 2014

UNITED STATES DISTRICT JUDGE