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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 PENELOPE MUELLER, et al.,

8 Plaintiffs,

9 v.

10 PURITAN'S PRIDE, INC., et al.,

11 Defendants.

Case No. [3:16-cv-06717-JD](#)

**ORDER RE CLASS CERTIFICATION
AND DAUBERT MOTION**

Re: Dkt. No. 186, 196

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13 This order resolves plaintiffs' renewed motion to certify a class of California consumers
14 who bought vitamins and supplements from defendant Puritan's Pride under a "buy-one-get-one-
15 free" (BOGO) sales offer. Dkt. No. 218.¹ In plaintiffs' view, the offers were deceptive in that
16 they promised a discount on regular prices that was illusory. Plaintiffs revised their original
17 certification request to account for the Court's conclusions on summary judgment about restitution
18 and statutory damages. *See* Dkt. No. 178 (summary judgment order); Dkt. No. 185 (update order).
19 The Court previously dismissed claims alleged under the New York General Business Law. Dkt.
20 No. 112.

21 The claims for certification are under the California Unfair Competition Law (UCL) and
22 Consumers Legal Remedies Act (CLRA). Dkt. No. 218 at 4. Named plaintiffs Penelope Mueller,
23 Meg Larson, Diane Cabrera, and Mary Ludolph-Aliaga are California residents who ask for
24 certification of a class of California residents. Named plaintiffs Werner, Opas, Parker, and
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¹ Plaintiffs refiled their motion for class certification, originally Dkt. No. 186, as Dkt. No. 218
without redactions following the Court's denial of plaintiffs' administrative motion to seal, Dkt.
No. 216.

1 Krueger are New York residents, are not part of the proposed class, and are effectively out of the
2 case in light of the dismissal of the New York claim.

3 The parties have debated at considerable length whether plaintiffs may pursue any type of
4 monetary relief at all as a remedy. This dispute was the main focus of the summary judgment
5 proceedings, and the Court determined that plaintiffs were limited to actual damages under the
6 CLRA only. The Court ruled out plaintiffs' claim of damages under Business and Professions
7 Code Section 17537, which is a provision of the California False Advertising Law (FAL) that
8 makes it "unlawful for any person to use the term 'prize' or 'gift' or other similar term in any
9 manner that would be untrue or misleading." Dkt. No. 178 at 4. This was because the plain
10 language of the statute did not fit any of the allegations or facts in this case. *Id.* at 5. Even so,
11 plaintiffs brought up Section 17537 again in the renewed certification motion. *See, e.g.,* Dkt. No.
12 218 at 2, 14. Plaintiffs are advised that nothing has changed on this score, and they may not
13 obtain damages under Section 17537.

14 With respect to restitution under the UCL and FAL, the Court concluded that plaintiffs
15 were not necessarily restricted to the measure of a price/value differential, but that an "expected
16 discount" method which plaintiffs proposed to calculate restitution was foreclosed by California
17 law. Dkt. No. 178 at 8-9. Consequently, restitution was excluded as a remedy for plaintiffs.

18 As plaintiffs acknowledge, the net effect of the summary judgment order was to limit
19 plaintiffs' possible recovery to actual damages under the CLRA, and injunctive relief under the
20 UCL. *See* Dkt. No. 218 at 20. The Court recently held a supplemental hearing on plaintiffs'
21 model of actual damages under the CLRA in connection with their motion for class certification.
22 *See* Dkt. Nos. 217, 223. The purpose of the hearing was to clarify how plaintiffs proposed to
23 reasonably quantify actual damages for BOGO purchases that delivered exactly what the
24 consumer paid for -- for example, two bottles of vitamin C at the advertised price -- but are said to
25 have disappointed an expectation that they were getting a discount on regular prices in the form of
26 free products.

27 Overall, after several opportunities provided by the Court, plaintiffs have not adduced a
28 reasonable method to determine the value of the discount expectation and Puritan's Pride's alleged

1 misrepresentations. Plaintiffs have plausibly shown that they can demonstrate material
2 misrepresentations and reliance through common evidence. But plaintiffs' proposed method of
3 determining injury and damages is not supported by the evidence, and does not establish that
4 damages can be accurately calculated across the class. Consequently, the request to certify a class
5 under Rule 23(b)(3) is denied.

6 The request to certify the proposed class under Rule 23(b)(2) for injunctive relief is
7 granted. Puritan's Pride does not meaningfully contest this request, and its objection about the
8 potential overbreadth of an injunction, Dkt. No. 194 at 24, raises an issue for resolution as
9 warranted after trial.

10 BACKGROUND

11 The salient facts have been discussed in detail in prior orders. *See, e.g.*, Dkt. No. 112; Dkt.
12 No. 178. In pertinent summary, Puritan's Pride markets and sells vitamins and supplements to
13 consumers through catalogs, email, mail, and a website. Dkt. No. 218 at 5. Plaintiffs are
14 California residents who purchased products that Puritan's Pride marketed in BOGO sales offers.
15 Puritan's Pride advertised and sold most of its products under BOGO promotions that ran
16 continuously and without breaks over time. *Id.* at 5-6. The vast majority of its sales were based
17 on BOGO prices. *Id.* at 9.

18 Plaintiffs allege that the BOGO pricing was deceptive because the cost of the advertised
19 "free" products was built into the price of the purchased non-free product(s). Dkt. No. 218 at 1.
20 Put more plainly, the BOGO offer was misleading because a consumer never got a true discount
21 on their purchases in the form of free products. They purchased Puritan's Pride's products in
22 reliance on the BOGO promotions and the expectation that they were getting a substantial
23 discount over regular prices. *See* Dkt. No. 88 ¶ 16; Dkt. No. 218 at 10.

24 Plaintiffs seek certification of a class under Federal Rule of Civil Procedure 23(b)(2) and
25 (b)(3) based on the same proposed class definition: all "individual consumer residents of
26 California who purchased Defendants' Products pursuant to a BOGO price, directly from
27 Defendants, within the applicable statutory limitations period, including the period following the
28 filing of the date of this action." Dkt. No. 218 at ii. At the Court's direction, Puritan's Pride

1 produced sales and marketing information from 2016, which plaintiffs used to determine whether
2 class certification was appropriate. Dkt. No. 121.

3 DISCUSSION

4 I. CLASS CERTIFICATION

5 The Court has written extensively on the standards governing class certification, which
6 informs the discussion here. *See Meek v. SkyWest, Inc.*, No. 17-cv-1012-JD, 2021 WL 4461180
7 (N.D. Cal. Sep. 29, 2021). Under Rule 23, the overall goal is “to select the metho[d] best suited to
8 adjudication of the controversy fairly and efficiently.” *Amgen Inc. v. Connecticut Ret. Plans &*
9 *Trust Funds*, 568 U.S. 455, 460 (2013) (internal quotations omitted) (modification in original).
10 Plaintiffs must show that their proposed classes satisfy all four requirements of Rule 23(a), and at
11 least one of the subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013);
12 *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d
13 1266 (9th Cir. 2001). Plaintiffs have elected to proceed under Rule 23(b)(3), or alternatively
14 under Rule 23(b)(2) if the class is not certified under (b)(3). In each circumstance, plaintiffs bear
15 the burden of demonstrating that all of the requirements of Rule 23 are met for the proposed class.
16 *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

17 The Court’s class certification analysis “must be rigorous and may entail some overlap
18 with the merits of the plaintiff’s underlying claim,” but the merits questions may be considered
19 only to the extent that they are “relevant to determining whether the Rule 23 prerequisites for class
20 certification are satisfied.” *Amgen*, 568 U.S. at 465-66 (internal quotations and citations omitted).
21 The class certification procedure is decidedly not an alternative form of summary judgment or an
22 occasion to hold a mini-trial on the merits. *Alcantar v. Hobart Service*, 800 F.3d 1047, 1053 (9th
23 Cir. 2015). The decision of whether to certify a class is entrusted to the Court’s sound discretion.
24 *Zinser*, 253 F.3d at 1186.

25 II. RULE 23(B)(3) CLASS

26 The Rule 23(a) factors are the same for certification of the proposed class under either
27 Rule 23(b)(2) or (b)(3), and the conclusions reached here for the Rule 23(a) elements apply to both
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1 types of classes. The main difference is the predominance element of Rule 23(b)(3), which Rule
2 23(b)(2) does not require. The Court takes up the proposed Rule 23(b)(3) class first.

3 **A. Numerosity (23(a)(1))**

4 Rule 23(a)(1) requires that a proposed class be “so numerous that joinder of all members is
5 impracticable.” Fed. R. Civ. P. 23(a)(1). Plaintiffs state, with evidentiary support, that
6 “[d]efendants’ records indicate that there were millions of transactions in California in 2016 alone,
7 the vast majority of which were made pursuant to a BOGO offer.” Dkt. No. 218 at 10. Puritan’s
8 Pride does not contest numerosity, and the Court finds this element is satisfied.

9 **B. Typicality and Adequacy (23(a)(3)-(4))**

10 Plaintiffs have also established that their claims are typical of the putative class, and that
11 they are capable of fairly and adequately protecting the class’s interests. Fed. R. Civ. P. 23(a)(3)-
12 (4); *see* Dkt. No. 218 at 11-12. Named plaintiffs are California residents who purchased products
13 from Puritan’s Pride in connection with a BOGO offer. Plaintiffs have adduced evidence showing
14 that the putative class members are similarly situated consumers who saw the same BOGO offers
15 and bought the same types of products. All putative class members, including named plaintiffs,
16 are said to have suffered the same injury. In these circumstances, the fact that Puritan’s Pride sold
17 different vitamins and supplements to consumers is not a barrier to certification. *See Leyva v.*
18 *Medline Indus., Inc.*, 716 F.3d 510, 515 (9th Cir. 2013). Puritan’s Pride did not contest typicality,
19 and the Court finds that plaintiffs have done enough to “assure that the interest of the named
20 representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
21 508 (9th Cir. 1992).

22 So too for adequacy. Named plaintiffs have established that their claims and interests are
23 co-extensive with the absent class members, and they have actively prosecuted this case by
24 responding to discovery requests and the like. *See* Dkt. No. 218 at 12. Puritan’s Pride took a half-
25 hearted swing at plaintiffs for not proving that they and their counsel do not have conflicts with
26 other class members, Dkt. No. 194 at 22-23, but Puritan’s Pride did not offer any evidence to that
27 effect, and the Court sees none in the record. Overall, named plaintiffs and their attorneys have
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1 vigorously pursued their claims and adequately represented putative class members over the rather
2 long course of this litigation.

3 **C. Commonality (23(a)(2)) and Predominance (23(b)(3))**

4 The commonality requirement under Rule 23(a)(2) is satisfied when “there are questions of
5 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “Because any competently crafted
6 class complaint literally raises common questions,” the Court’s task is to look for a common
7 contention “capable of classwide resolution -- which means that determination of its truth or
8 falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
9 *Alcantar*, 800 F.3d at 1052 (internal quotations and citations omitted). What matters is the
10 “capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of
11 the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotations
12 omitted) (emphasis in original). This does not require total uniformity across a class. “The
13 existence of shared legal issues with divergent factual predicates is sufficient, as is a common core
14 of salient facts coupled with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*,
15 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*, 564 U.S. at 338.
16 The commonality standard imposed by Rule 23(a)(2) is “rigorous.” *Leyva v. Medline Indus. Inc.*,
17 716 F.3d 510, 512 (9th Cir. 2013).

18 Rule 23(b)(3) sets out the related but nonetheless distinct requirement that the common
19 questions of law or fact predominate over the individual ones. This inquiry focuses on whether
20 the “common questions present a significant aspect of the case and [if] they can be resolved for all
21 members of the class in a single adjudication.” *Hanlon*, 150 F.3d at 1022 (internal quotations
22 omitted); *see also Tyson Foods v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Each element of a
23 claim need not be susceptible to classwide proof, *Amgen*, 568 U.S. at 468-69, and the “important
24 questions apt to drive the resolution of the litigation are given more weight in the predominance
25 analysis over individualized questions which are of considerably less significant to the claims of
26 the class.” *Ruiz Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Rule
27 23(b)(3) permits certification when “one or more of the central issues in the action are common to
28 the class and can be said to predominate, . . . even though other important matters will have to be

1 tried separately, such as damages or some affirmative defenses peculiar to some individual class
2 members.” *Tyson*, 577 U.S. at 453-54 (internal quotations omitted).

3 “Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a),”
4 *Comcast*, 569 U.S. at 34, and the main concern under subsection (b)(3) is “the balance between
5 individual and common issues.” *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 560 (9th
6 Cir. 2019) (en banc) (internal quotations omitted). The Court finds it appropriate to assess
7 commonality and predominance in tandem, with a careful eye toward ensuring that the specific
8 requirements of each are fully satisfied. *See, e.g., Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120-
9 21 (9th Cir. 2017).

10 Plaintiffs have demonstrated that common questions and answers predominate with respect
11 to determining whether Puritan’s Pride may be liable under the California consumer statutes. The
12 same cannot be said for the determination of damages on a classwide basis, which is an essential
13 element of the commonality and predominance inquiry. *Comcast*, 569 U.S. at 35. The damages
14 shortfall defeats certification of a Rule 23(b)(3) class.

15 1. Liability

16 The liability question is the same for all class members: were Puritan’s Pride’s BOGO
17 offers likely to mislead an objectively reasonable consumer? This is true for both the UCL and
18 CLRA claims, which are the remaining ones in play. *See Williams v. Gerber Products Co.*, 552
19 F.3d 934, 938 (9th Cir. 2008) (claims under the UCL and CLRA are “governed by the ‘reasonable
20 consumer’ test”; plaintiffs “must ‘show that members of the public are likely to be deceived’”)
21 (internal quotations omitted); *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) (“To state a
22 claim under either the UCL or the false advertising law, based on false advertising or promotional
23 practices, it is necessary only to show that members of the public are likely to be deceived.”)
24 (cleaned up) (citation omitted).

25 The answer to the liability question will also be the same for all class members. Puritan’s
26 Pride made the same BOGO promotions and offers to putative class members via its website and
27 online communications, and its print catalogs. *See, e.g.,* Dkt. No. 186-6. The BOGO promotions
28 were a “long-term advertising campaign,” and deposition testimony and other evidence indicates

1 that they ran fifty-two weeks of the year throughout the class period. Dkt. No. 218-2 at 21:7-14,
2 101:22-102-20. Plaintiffs have shown that common evidence, such as product catalogs, deposition
3 testimony, and Puritan’s Pride’s own customer research, will be used to establish materiality and
4 reliance. *Id.* at 17-18; Dkt. No. 218-6 at ECF 27; Dkt. No. 218-7 at ECF 5. Additionally
5 plaintiffs’ expert witness, Dr. Larry Compeau, will offer opinions about the impact of BOGO
6 offers on consumer behavior and perception of value, which will apply across the class. Dkt. No.
7 218-5 ¶¶ 28-29.²

8 This is enough to demonstrate that a common question of liability predominates across the
9 class. As the Supreme Court has concluded, “[p]redominance is a test readily met in certain cases
10 alleging consumer . . . fraud.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). This
11 is one of those cases, and our circuit has said as much in an unpublished memorandum disposition
12 that the Court finds instructive. *See Bradach v. Pharmavite, LLC*, 735 F. App’x 251, 254-55 (9th
13 Cir. 2018) (“CLRA and UCL claims are ideal for class certification because they will not require
14 the court to investigate class members’ individual interaction with the product.”) (internal
15 quotations omitted).

16 Puritan’s Pride’s objections to commonality and predominance, *see* Dkt. No. 194 at 11-22,
17 are not well taken. To start, it says that plaintiffs must demonstrate that each individual BOGO
18 offer during the class period was deceptive and that plaintiffs must demonstrate each individual
19 class member relied on those deceptive offers. Dkt. No. 194 at 12-13, 17. That goes much too far,
20 and is not supported by the case law. Questions of materiality and reliance do not defeat
21 predominance. *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD, 2021 WL 4427427, at *5 (N.D. Cal.
22 Sep. 29, 2021); *see also Bradach*, 735 F. App’x at 254-55. The UCL and CLRA do not demand
23 that plaintiffs prove individual reliance on the BOGO promotions; they require only an objective
24 showing that members of the public were likely to have been deceived by Puritan’s Pride’s
25 promotions. To recover actual damages under the CLRA, plaintiffs may rely on common

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27 ² Puritan’s Pride’s motion to limit the expert opinions of Dr. Compeau, Dkt. No. 196, is addressed
28 in Section IV. The portions of Dr. Compeau’s report that the Court discusses in this order were
not challenged in the motion. The Court does not rely on any of the opinions that were
challenged.

1 evidence (such as the product catalogs, deposition testimony, and defendants' customer research)
2 to prove that material misrepresentations were made to the entire class, thereby giving rise to an
3 inference of classwide reliance. *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009);
4 *see also Amgen*, 568 U.S. at 467 (“[M]ateriality can be proved through evidence common to the
5 class.”).

6 Puritan's Pride suggests that deposition testimony by the named plaintiffs indicates they
7 did not rely on the BOGO offers, but the testimony it cites goes to whether plaintiffs would have
8 purchased the products if the misrepresentations had not been made. *See* Dkt. No. 194 at 19-20;
9 Dkt. No. 197-4 at 78:22-79:9. This does not establish that plaintiffs did not rely on the
10 misrepresentations, and plaintiffs also provided evidence that they purchased the products because
11 they thought they were getting a good deal. *See, e.g.*, 186-20 ¶ 6. In any event, as discussed,
12 reliance need not be established by individual proof; reliance and materiality are determined based
13 on whether a reasonable person would have relied on the misrepresentations. *Williams*, 552 F.3d
14 at 938; *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 332-33 (Cal. 2011).

15 Puritan's Pride says that plaintiffs' expert, Dr. Compeau, admits that prices are not
16 deceptive if they reflect the market prices. Dkt. No. 194 at 12. In Puritan's Pride view, this means
17 that an individual analysis of each BOGO offer on each product will be required to determine
18 whether it reflects market pricing for that product. *Id.* at 13.

19 Not so. Puritan's Pride selectively ignores Dr. Compeau's opinion that valid reference
20 prices could also be “a price at which the seller has actually sold a majority of units, or a price at
21 which the seller has offered the item for sale for a majority of the time,” not just the market price
22 of a product. Dkt. No. 187-11 ¶ 34. Dr. Compeau also opined that Puritan's Pride “does not make
23 a substantial number of sales of these products at the reference prices, and have advertised BOGO
24 offers a majority of the time.” *Id.* This is the crux of plaintiffs' allegations in this case: Puritan's
25 Pride's representations of discounts and free products were deceptive because the products were
26 always sold on the basis of a BOGO offer.

27 Puritan's Pride also highlights its own expert report, which says that shoppers respond to
28 BOGO offers in varied ways. *Id.* at 22; Dkt. No. 197-2 ¶¶ 15, 30. What that means is not at all

1 clear, and Puritan’s Pride did not cogently explain why it might weigh against predominance.
 2 Overall, plaintiffs’ evidentiary showings, coupled with the liability test of an objectively
 3 reasonable consumer, are enough to satisfy commonality and predominance for liability purposes.

4 2. Damages

5 A different outcome holds for damages. While a damages methodology need not deliver
 6 mathematical precision, and may accommodate some individual variability among class members,
 7 *see In re Capacitors Antitrust Litigation*, No. 17-md-2801-JD, 2018 WL 5980139, at *9 (N.D.
 8 Cal. Nov. 14, 2018), it must be capable of determining damages across the class in a reasonably
 9 accurate fashion. *Comcast*, 569 U.S. at 35 (plaintiffs bear burden of showing that “damages are
 10 susceptible of measurement across the entire class for purposes of Rule 23(b)(3)”). This is part of
 11 the predominance inquiry. *Id.* at 34 (“[I]t is clear that, under the proper standard for evaluating
 12 certification, respondents’ model falls far short of establishing that damages are capable of
 13 measurement on a classwide basis. Without presenting another methodology, respondents cannot
 14 show Rule 23(b)(3) predominance.”); *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 816 (9th Cir.
 15 2019) (“The central issue before us is whether Plaintiff’s proposed damages model -- specifically,
 16 a benefit-of-the-bargain model as measured by the average cost of replacing the allegedly
 17 defective clutch system -- satisfies Rule 23(b)(3)’s predominance requirement.”). The damages
 18 model “must measure only those damages attributable to” the plaintiff’s theory of liability.
 19 *Comcast*, 569 U.S. at 35. Failure to identify a feasible method for calculating damages is fatal to
 20 class certification. *Id.* at 38.

21 That is the situation here. For actual damages under the CLRA, which are the only
 22 damages available in the case, *see* Dkt. No. 178 at 12, plaintiffs proposed an “expected discount”
 23 model as a measure of their actual damages in their motion for class certification. Dkt. No. 218 at
 24 21. This is the model that the Court held a supplemental hearing on to better understand plaintiffs’
 25 approach. *See* Dkt. Nos. 217, 223.

26 The method they propose is unsound. Plaintiffs do not dispute that they received from
 27 Puritan’s Pride exactly the products they expected to get for the price they paid. For example, a
 28 consumer who bought three bottles of lutein (a supplement said to benefit the eyes) for a BOGO

1 price of \$19.79 got exactly that delivered to her by Puritan’s Pride, namely three bottles of lutein
2 for \$19.79. This is not a case where the consumers bought products with a hidden defect that
3 reduced their value, were adulterated or watered down, or otherwise of less value than what the
4 seller promised to provide. *E.g.*, *Nguyen*, 932 F.3d at 814; *Wilson v. Hewlett-Packard, Inc.*, 668
5 F.3d 1136, 1138 (9th Cir. 2012). Plaintiffs do not contend, and the record does not show, that
6 Puritan’s Pride deprived consumers in any way of the substantive products they paid for.

7 Even so, plaintiffs say they were actually damaged by the BOGO offers. In plaintiffs’
8 view, the consumer who bought the lutein believed that she was paying \$19.79 for one bottle, and
9 getting two more bottles free. *See* Dkt. No. 218 at 22, 23 (“Plaintiffs’ theory of liability is that
10 their injury occurred at the time they purchased the Products when they saw and relied on
11 Defendants’ deceptive BOGO prices.”). Consequently, the injury is said to be the consumer’s
12 disappointed expectation of not getting two free products as promised. *Id.* at 22.

13 To measure the value of this alleged misrepresentation, plaintiffs propose an “expected
14 discount” model. The model operates by assigning a percentage figure to the discount a consumer
15 expected to reap. *See id.* In the lutein example, plaintiffs’ model would indicate that the
16 consumer expected to realize a 67% discount because the BOGO offer communicated that she was
17 buying one bottle at the full price of \$19.79 and getting two more free -- a 2/3rds discount on what
18 she would have paid if she bought each bottle at the undiscounted \$19.79 price. *Id.* The model
19 then applies this percentage to what the consumer actually paid. For the lutein purchase, it would
20 apply the expectation of a 67% discount to the \$19.79 the consumer paid, to conclude that the
21 BOGO offers inflicted \$13.19 in actual damages. *Id.*

22 This is perilously close to voodoo economics. It is a poor fit with the case because nothing
23 in the record indicates that a plaintiff thought about her purchases in the way the model assumes.
24 Plaintiff’s damages expert, Dr. Brian Bergmark, developed the expected discount model based
25 entirely on Puritan’s Pride’s sales and pricing data, product orders, and the First Amended
26 Complaint. Dkt. No. 186-11 ¶ 9. He did not account for plaintiffs’ deposition testimony, which
27 indicated that they did not have an expectation of a percentage discount. That testimony shows
28 that plaintiffs believed they were getting a good deal from Puritan’s Pride, but not that they were

1 getting a 67% discount, or some similar understanding. *See, e.g.*, Dkt. No. Dkt. No. 186-12 at
2 69:1-25; Dkt. No. 186-13 at 65:11-66:25. To the contrary, plaintiff Mueller testified to her
3 understanding that, when she bought one bottle for \$7.99 and received two other bottles free, each
4 bottle was worth \$7.99, not that each bottle was worth \$2.30, as the expected discount model
5 would have it. Dkt. No. 186-14 at 68:1-6. Mueller did not say that she had any expectations about
6 the discount she would receive. Plaintiff Larson also understood that she was getting free bottles,
7 and not a specific percentage discount. Dkt. No. 186-12 at 69:8-14.

8 Plaintiffs' damages method does not account for this evidence, and likely for good reason.
9 A model that calculated actual damages based on the ostensible value of the free products would
10 give class members much more than they actually paid. The consumer who bought the lutein, for
11 example, would be said to have sustained actual damages to the tune of \$39.58 for the two bottles
12 she expected to get free, which is twice the amount she actually spent on her purchase. Needless
13 to say, a model that returns 200% or more of a purchase price is more alchemy than a valid and
14 reliable methodology.

15 To avoid this dubious result, plaintiffs came up with an expected discount method as a
16 means of putting a dollar figure on an intangible, namely the expectation of getting free products.
17 The method is not tethered to the consumer evidence in this case, and has no apparent support in
18 the case law. Plaintiffs have not identified a case in which this approach was accepted for use in
19 determining classwide damages, or to certify a class. When pressed by the Court on this point at
20 the supplemental hearing, plaintiffs identified *Hinojos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir.
21 2013), but it is inapposite. *Hinojos* addressed the standing requirement of "any damages" under
22 the CLRA; it did not discuss any particular method of determining actual damages at the class
23 certification stage, and certainly not the model plaintiffs propose here. *See id.* at 1107-08. While
24 the lack of supporting case law is not necessarily fatal to the model, it underscores the need for a
25 persuasive demonstration of its utility and fit in this action, which plaintiffs did not achieve.

26 The "expected discount" model is not viable a measure of actual damages on a classwide
27 basis here. It fails to reliably determine the value of the alleged misrepresentations posed by the
28 BOGO offers. Consequently, certification of a Rule 23(b)(3) class is denied.

III. RULE 23(B)(2) CLASS

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Plaintiffs ask in the alternative to certify the putative class under Rule 23(b)(2) for injunctive relief in connection with their UCL and CLRA claims. Such a class may be certified when “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). “Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive.” *Zinser*, 253 F.3d at 1195. The primary use of Rule 23(b)(2) classes has been the certification of civil rights class actions, but courts have certified many different kinds classes under Rule 23(b)(2). *See Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). The Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy must also be shown for a Rule 23(b)(2) class. *Zinser*, 253 F.3d at 186. As discussed, plaintiffs have met their burden for proving the Rule 23(a) requirements.

For Rule 23(b)(2), the Court is not required “to examine the viability or bases of class members’ claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). “It is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole.” *Id.* (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)) (internal quotations omitted).

In a prior order, the Court concluded that the California Supreme Court has held that “[i]njunctive relief is the ‘primary form of relief available under the UCL to protect consumers from unfair business practices.’” Dkt. No. 178 at 3 (quoting *Kwikset*, 51 Cal.4th at 337); *see also Tobacco Cases II*, 46 Cal. 4th at 319. For the proposed Rule 23(b)(2) class, plaintiffs seek injunctive relief in the form of “the discontinuation of Defendants’ false BOGO prices.” Dkt. No. 218 at 24.

Plaintiffs are on firmer ground here than under Rule 23(b)(3). They have standing to seek an injunction. As our circuit has determined, “a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows

1 or suspects that the advertising was false at the time of the original purchase,” because
2 “[k]nowledge that the advertisement or label was false in the past does not equate to knowledge
3 that it will remain false in the future.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th
4 Cir. 2018). Plaintiffs have proffered declarations and deposition testimony to the effect that they
5 would consider purchasing defendants’ products in the future if they could be sure that the pricing
6 and sale offers were not deceptive. Dkt. No. 186-12 at 72:2-4; Dkt. No. 186-18 ¶ 7; Dkt. No. 186-
7 19 ¶ 7; Dkt. No. 186-20 ¶ 7; Dkt. No. 186-21 ¶ 7. This establishes plaintiffs’ standing to pursue
8 injunctive relief in this case.

9 Puritan’s Pride offered only light opposition to a (b)(2) class. Its main objection is that
10 plaintiffs did not adequately establish that Puritan’s Pride acted in a manner generally applicable
11 to the class. This is a reprise of the objection in the (b)(3) context that each BOGO promotion
12 needs to be evaluated separately to determine whether it is deceptive, Dkt. No. 194 at 23-24, and it
13 is unavailing for the same reasons. The record amply establishes that plaintiffs’ claims will be
14 determined on the basis of common evidence of the BOGO practices.

15 Puritan’s Pride also says that the injunction plaintiffs may seek is “wildly overbroad.”
16 Dkt. No. 194 at 24. This conclusory remark is not developed by Puritan’s Pride in a meaningful
17 way, and concerns about the scope of an injunction are premature. There is considerably more to
18 be done in this case, namely trial, before the specific terms of an injunction might warrant debate.

19 Consequently, a Rule 23 (b)(2) class is appropriate, all the more so in light of the
20 unavailability of actual damages. A monetary award of a purely incidental sort is not entirely out
21 of the question. “A class seeking monetary damages may be certified pursuant to Rule 23(b)(2)
22 where such relief is merely incidental to the primary claim for injunctive relief.” *Zinser*, 253 F.3d
23 at 1195 (cleaned up); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 987 (9th Cir. 2011)
24 (where a district court finds that a (b)(2) class may be properly be certified, it may consider
25 whether a plaintiffs’ claim for damages incidental to the injunctive relief may also be sought by
26 the (b)(2) class). But Rule 23(b)(2) “does not authorize class certification when each class
27 member would be entitled to an individualized award of monetary damages.” *Wal-Mart*, 564 U.S.
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1 at 360-61. An incidental monetary award may be considered as warranted by further
2 developments.

3 **IV. MOTION TO STRIKE**

4 Puritan’s Pride’s request to strike portions of Dr. Compeau’s expert report, Dkt. No. 196, is
5 denied without prejudice. The request is directed to Dr. Compeau’s opinions about corporate
6 intent, causation, deception, and the like. *Id.* The Court did not rely on any of the opinions that
7 Puritan’s Pride asks to strike, and declines to take up the motion at this time. The Court will
8 revisit the objections as warranted going forward.


9 **CONCLUSION**

10 The Court certifies a Rule 23(b)(2) injunctive relief class of California residents who
11 purchased defendants’ products pursuant to a BOGO promotion after October 14, 2021. Plaintiffs
12 Penelope Mueller, Meg Larson, Diane Cabrera, and Mary Ludolph-Aliaga are appointed class
13 representatives, and their counsel, Marlin & Saltzman, LLP, the Law Offices of W. Hansult, and
14 Vision Legal, Inc., are appointed class counsel.

15 A status conference is set for January 27, 2022, at 10:00 a.m. The parties should file a
16 joint statement by January 20, 2022, with proposed dates for the final pretrial conference and trial.
17 The case is referred to Magistrate Judge Hixon for a settlement conference to be held as his
18 schedule permits.

19 **IT IS SO ORDERED.**

20 Dated: November 23, 2021

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24 _____
25 JAMES DONATO
26 United States District Judge
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