UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SKYE ASTIANA,

Plaintiff,

v.

BEN & JERRY'S HOMEMADE, INC.,

Defendant.
_____/

No. C 10-4387 PJH

ORDER DENYING MOTION FOR CLASS CERTIFICATION

Plaintiff's motion for class certification came on for hearing before this court on November 20, 2013. Plaintiff appeared by her counsel Joseph Kravec and Michael Braun, and defendant appeared by its counsel William Stern. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby DENIES the motion as follows.

BACKGROUND

This is a case filed as a proposed class action on behalf of individuals who purchased ice cream products produced by defendant Ben & Jerry's Homemade, Inc. ("Ben & Jerry's"), including ice cream, frozen yogurt, and popsicles, which contained alkalized cocoa and were labeled "all natural." Plaintiff Skye Astiana claims that both the packaging and the advertising for the Ben & Jerry's ice cream products were deceptive and misleading to the extent that the cocoa was alkalized with a "synthetic" agent.

Plaintiff filed the complaint in this action on September 29, 2010, against Ben & Jerry's. On December 8, 2010, plaintiff filed a first amended complaint ("FAC"), alleging six causes of action – "unlawful business practices" in violation of Business & Professions Code § 17200; "unfair business practices" in violation of § 17200; "fraudulent business practices" in violation of § 17200; false advertising, in violation of Business & Professions Code § 17500; restitution based on quasi-contract/unjust enrichment; and common law fraud.

On March 28, 2012, the court granted plaintiff's motion for preliminary approval of class action settlement, and also ordered dissemination of notice to the class. The court set the matter for a hearing on final approval on September 12, 2012. On September 4, 2012, the Ninth Circuit issued its decision in Dennis v. Kellogg, 697 F.3d 858 (9th Cir. 2012), in which it vacated an order granting preliminary approval of settlement, based on its finding that the provision regarding distribution of the unclaimed portion of the settlement fund to a cy pres fund was improper because the cy pres fund was not oriented towards providing the type of consumer remedies sought in the complaint.

At the September 12, 2012 hearing in this case, the court denied the motion for final approval, based on, among other things, numerous problems with the claim procedure and the amount requested for fees and costs, and also based on issues related to the Ninth Circuit's ruling in Kellogg.

The parties subsequently advised that they were unable to resolve the court's concerns, and the court issued an order on November 21, 2012 denying the motion for final approval and the accompanying motion for fees and costs. At a case management conference on January 31, 2013, the court set deadlines for the class certification motion and for dispositive motions.

DISCUSSION

A. Legal Standard

"Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of [Federal Rule

of Civil Procedure] 23." Mazza v. American Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012) (citation and quotation omitted). The party seeking class certification must affirmatively demonstrate that the class meets the requirements of Rule 23. Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S.Ct. 2541, 2551 (2011); see also Gen'l Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982). Thus, in order for a plaintiff class to be certified, the plaintiff must prove that he/she meets the requirements of Federal Rule of Civil Procedure 23(a) and (b). As a threshold matter, and apart from the explicit requirements of Rule 23, the party seeking class certification must also demonstrate that an identifiable and ascertainable class exists. Mazur v. eBay Inc., 257 F.R.D. 563, 567 (N.D. Cal. 2009).

Rule 23(a) requires that plaintiffs demonstrate numerosity, commonality, typicality and adequacy of representation in order to maintain a class. Mazza, 666 F.3d at 588. That is, the class must be so numerous that joinder of all members individually is "impracticable;" there must be questions of law or fact common to the class; the claims or defenses of the class representative must be typical of the claims or defenses of the class; and the class representative must be able to protect fairly and adequately the interests of all members of the class. See Fed. R. Civ. P. 23(a)(1)-(4).

If the class is ascertainable and all four prerequisites of Rule 23(a) are satisfied, the court must also find that the plaintiff has "satisf[ied] through evidentiary proof" at least one of the three subsections of Rule 23(b). Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1432 (2013). A class may be certified under Rule 23(b)(1) upon a showing that there is a risk of substantial prejudice or inconsistent adjudications from separate actions. Fed. R. Civ. P. 23(b)(1). A class may be certified under Rule 23(b)(2) 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). Finally, a class may be certified under Rule 23(b)(3) if a court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other

available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

"[A] court's class-certification analysis . . . may 'entail some overlap with the merits of the plaintiff's underlying claim.'" Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S.Ct. 1184, 1194 (2013) (quoting Dukes, 131 S.Ct. at 2551). Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." Id. at 1194-95. "Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 1195. If a court concludes that the moving party has met its burden of proof, then the court has broad discretion to certify the class. Zinzer v. Accuflix Res. Inst., Inc., 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001).

B. Plaintiff's Motion

Through this motion, plaintiff seeks certification of a class pursuant to Rule 23(a) and Rule 23(b)(3).[1] The proposed class is defined as a class of "[a]ll persons who, on or after September 29, 2006, purchased in the State of California Ben & Jerry's ice cream products that were labeled 'All Natural' but contained alkalized cocoa processed with a synthetic ingredient."

Plaintiff argues that all requirements of Rule 23(a) and Rule 23(b)(3) are satisfied. She contends that the class is sufficiently "numerous," that her claims are "typical" of the claims of the class, that she and her counsel are "adequate," and that "common questions" exist because she and the class members have all suffered the same injury. She asserts further that common questions predominate as to the UCL claims, and as to the common law fraud and quasi-contract claims, and that individual issues of damages do not predominate. Finally, she argues that a class action is superior to other methods for the adjudication of this controversy.

[1] The FAC alleges a nationwide class and a California sub-class, plus two injunctive relief classes, but the present motion seeks a California-only Rule 23(b)(3) damages class. The court concludes that plaintiff has abandoned the "national class" allegations and the "(b)(2) class" claims.

In opposition, defendant contends that the motion should be denied, because plaintiff has not shown that the class is "ascertainable" or "numerous;" because plaintiff has not shown that she has Article III standing or injury-in-fact; because commonality and predominance are lacking; because plaintiff cannot show that she or her attorneys are "adequate" representatives; and because plaintiff cannot show that a class action is "superior."

The court finds that the motion must be denied, for two primary reasons – plaintiff has not established that the class is ascertainable, and she has not established that common issues predominate over individual issues.

1. Ascertainability

While there is no explicit requirement concerning the class definition in Rule 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed. See Xavier v. Philip Morris USA Inc., 787 F.Supp. 2d 1075, 1089 (N.D. Cal. 2011); Schwartz v. Upper Deck Co., 183 F.R.D. 672, 679-80 (S.D. Cal. 1999); see also DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (identity of class members need not be known at time of certification, but class membership must be clearly ascertainable).

"A class definition should be 'precise, objective and presently ascertainable.'" Rodriguez v. Gates, 2002 WL 1162675 at *8 (C.D. Cal. May 30, 2002) (quoting O'Connor v. Boeing North American, Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998)); see also Manual for Complex Litigation, Fourth § 21.222 at 270-71 (2004). That is, the class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member. See Xavier, 787 F.Supp. 2d at 1089.

Plaintiff does not directly address ascertainability in her moving papers. In the opposition, defendant argues that the proposed class definition does not describe a group of people whose membership in the class can be ascertained in a reliable manner. Defendant contends that because cocoa can be alkalized using one of several alkalis – some of which are "natural" and some of which are "non-natural" (i.e., "synthetic") – it will

be necessary to determine which class members bought an ice cream containing alkalized cocoa processed with a synthetic ingredient. Defendant asserts, however, that there is no way to identify which class members bought which type of ice cream, particularly given that Ben & Jerry's is a wholesale manufacturer that does not maintain records identifying the ultimate customers or their purchases.

The court agrees with defendant that the class is not sufficiently ascertainable. The class is defined as persons who bought Ben & Jerry's labeled "all natural" which contained alkalized cocoa processed with a synthetic ingredient. However, plaintiff has provided no evidence as to which ice cream contained the allegedly "synthetic ingredient" (assuming that alkali can be considered an "ingredient"). More importantly, plaintiff has not shown that a means exists for identifying the alkali in every class member's ice cream purchases. The packaging labels say only "processed with alkali," because that is all the FDA requires.

Defendant uses cocoa that is sourced from as many as 15 different suppliers. Plaintiff contends that one supplier, Barry Callebaut, was the only supplier that provided Ben & Jerry's with alkalized cocoa for use in products where the cocoa powder provided the chocolate base of the ice cream. However, while Barry Callebaut's corporate designee testified that the alkalized cocoa the company provided to Ben & Jerry's was alkalized with synthetic substances, he also testified that he did not know which alkalizing agent was used in every instance. Moreover, other sources provided Ben & Jerry's with "mix-in" ingredients made from alkalized cocoa, which sources did not identify the specific alkalizing agent used in processing the alkalized cocoa. Because plaintiff has not shown that a method exists for determining who, among the many California purchasers of Ben & Jerry's, fits within the proposed class, the class is not ascertainable.

2. Standing

A second threshold issue for any class action is that the named plaintiff must show that she has been personally injured and has Article III standing. See Lierboe v. State Farm Mut. Auto Ins. Co., 350 F.3d 1018, 1022 (9th Cir. 2003). If the plaintiff lacks a claim

in her own right, she cannot represent a class. Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 216 (1974).

Plaintiff does not directly address standing in her moving papers. In its opposition, defendant contends that plaintiff cannot show Article III standing or injury-in-fact. Defendant cites plaintiff's deposition testimony, where she asserted that she consumed all the ice cream she bought, that the products were not tainted, that she did not become ill, and that until she met her attorneys she was not unhappy. Defendant contends that plaintiff's only claim to non-economic injury is that she decided Ben & Jerry's "disrupted my vibe," but argues that "hurt feelings" is not an injury-in-fact, and that it is not susceptible to classwide proof. Defendant also argues that plaintiff's injury is contingent on whether she bought ice cream with "bad alkali," and is thus not certain.

Defendant asserts further that plaintiff's only allegation of injury is the payment of a premium for Ben & Jerry's ice cream, see FAC ¶¶ 5, 6, 23, 41, but notes that she testified in her deposition that the price had no bearing on her purchase decisions. Defendant contends that to someone who did not care about the price, paying a premium cannot be an "injury." Moreover, plaintiff testified that she had no idea how much of a premium she paid for Ben & Jerry's as opposed to other ice creams.

In response, plaintiff argues that she has standing and injury-in-fact. She cites to her deposition testimony, where she was asked if the allegation in the FAC that she "is willing to and has paid a premium for foods that are all natural and has refrained from buying their counterparts that were not all natural" was a true statement, and she responded, "Yes;" and where she was asked if the statement in the FAC that she paid more for Ben & Jerry's ice cream than she "would have had to pay for other similar ice cream . . . products that were not all natural," and she responded, "Yes." She also points to her response to Interrogatory No. 1, where she stated that she "lost money because she paid more to buy [d]efendant's "All Natural" ice cream . . . than she would have paid for similar ice cream . . . that was not touted as "All Natural."

Plaintiff notes that the court previously (in its May 26, 2011 order denying the motion

to dismiss) rejected defendant's standing/injury-in-fact argument, stating that if plaintiff did in fact purchase the ice cream based on the representation that it was all-natural, and if that representation proves to be false, then plaintiff will arguably have suffered an injury in fact. Plaintiff claims that the above-cited deposition testimony and interrogatory response show that she did purchase the Ben & Jerry's ice cream products based on the representation that they were all-natural.

The court finds that plaintiff has alleged facts sufficient to establish standing, at least for purposes of the present motion. The arguments raised by defendant – particularly regarding whether plaintiff paid a "premium" and regarding what in fact constitutes "premium" ice cream – would more properly be addressed in the context of a dispositive motion, rather than in a motion to dismiss or a motion for class certification.

3. Rule 23(a)

"Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." Dukes, 131 S.Ct. at 2550. When considering a class certification motion, the trial court must perform a "rigorous analysis" to ensure that "the prerequisites of Rule 23(a) have been satisfied." Id. at 2551. In doing so, and as Dukes clarifies, a district court must examine evidence going to the merits, to the extent examination of that evidence necessarily overlaps with the analysis required to determine whether Rule 23(a) factors have been met. See id. at 2552.

a. Numerosity

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. In order to satisfy this requirement, the plaintiff need not state the exact number of potential class members, nor is there a specific number that is required. See In re Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 350-51 (N.D. Cal. 2005). Rather, the specific facts of each case must be examined. General Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980).

While the ultimate issue in evaluating this factor is whether the class is too large to make joinder practicable, courts generally find that the numerosity factor is satisfied if the

class comprises 40 or more members, and will find that it has not been satisfied when the class comprises 21 or fewer. See, e.g., Celano v. Marriott Int'l, Inc., 242 F.R.D. 544, 549 (N.D. Cal. 2007).

Here, plaintiff argues that the proposed class is sufficiently numerous because, at a minimum, it includes thousands of members. Defendant argues, however, that plaintiff has not shown numerosity, because merely "buying" ice cream is not enough – plaintiff must show that the consumer bought a flavor that used a "bad" alkali. Defendant asserts that when a putative class is a subset of some larger pool, the trial court may not infer numerosity from the number in the larger pool alone.

The court finds it more likely than not that the class is sufficiently numerous. The real problem, however, is ascertainability, because (as explained above) it is impossible to tell who does or does not fit within the class definition.

b. Commonality

Commonality requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The plaintiff must show that the class members have suffered "the same injury" – which means that the class members' claims must "depend upon a common contention" which is of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." Dukes, 131 S.Ct. at 2551 (quotation and citation omitted). The plaintiff must demonstrate not merely the existence of common questions, but rather "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (quotation omitted) (emphasis in original). Nevertheless, for purposes of Rule 23(a)(2), "'[e]ven a single [common] question' will do." Id. at 2556.

Plaintiff argues that this case involves questions of law and fact common to the class. She combines her arguments regarding Rule 23(a)(2) commonality with her arguments regarding Rule 23(b)(3) predominance, but the substance of her assertion regarding commonality is that the claims in the case "depend on common factual and legal contentions the determination of which will resolve issues that are central to the validity of

[the] claims in a single stroke." She contends that all claims arise from defendant's identical misrepresentations that the Ben & Jerry's ice cream products at issue were "all natural," when in fact those products used alkalized cocoa powder processed with a substance the FDA recognizes as "synthetic."

Plaintiff asserts that the common questions include (a) whether defendant labeled its Ben & Jerry's ice cream "all natural;" (b) whether the Ben & Jerry's ice cream products labeled "all natural" used alkalized cocoa that was alkalized with a non-natural alkalizing agent; (c) whether Ben & Jerry's ice cream products that contained cocoa alkalized with a non-natural alkalizing agent are in fact "all natural;" (d) whether Ben & Jerry's "all natural" labeling and failure to comply with 21 C.F.R. § 135.110(f)(2) (by labeling its products "artificially flavored") was likely to deceive class members or the general public;[2] and (e) the appropriate measure of restitution and/or restitutionary disgorgement.

In opposition, defendant makes three main arguments. First, defendant contends that "all natural" has no common meaning – given that food producers, consumers, and the FDA have all failed to define "all natural" in any consistent manner (and in the case of the FDA, declined to attempt to define it) – and in any event cannot result in certification if the ingredient (such as alkalized cocoa) would qualify as "organic." Defendant also notes that in the original complaint, plaintiff attacked all alkalized cocoa, but now alleges that only synthetic alkalis are "non-natural," and also suggests again that all alkalis are "bad." Defendant asserts that if even plaintiff can't decide what is or is not "all natural," the term is evidently not susceptible to common definition or proof.

Second, defendant argues that plaintiff has no evidence, let alone common evidence, of deception. Defendant asserts that at trial, plaintiff must show that the term "all natural" is "likely to deceive," which must be shown by common evidence, such as a consumer survey. Defendant notes that plaintiff has provided no expert declarations, and no other evidence supporting her theory that the words "all natural" would cause a

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[2] As defendant notes in its opposition, the FAC does not allege violation of 21 C.F.R. § 135.110(f).

reasonable consumer to anticipate a non-synthetic alkali; and that in lieu of evidence, all she has provided is a selection of articles discussing consumer preferences for products in general, not ice cream, and which in any event are hearsay.

Third, defendant asserts that its evidence refutes any common understanding of "all natural." Defendant's expert Dr. Kent Van Liere conducted a consumer survey in which he showed 400 consumers a "Cherry Garcia®" cartoon with either the words "all natural" (test group) or "Vermont's Finest" (control group) on the label. More than half the respondents had no expectation that the ice cream contained alkalized cocoa (although both packages included "cocoa (processed with alkali)" as an ingredient; only 13% shown the "all natural" label expected that the alkali would be "natural," and of that group, only 3% said that would make them more likely to buy. Defendant contends that this is consistent with the findings of its expert Dr. Carol Scott, who found no evidence that consumers who purchased the Ben & Jerry's ice cream products at issue gave significant consideration to whether the ice cream was labeled "all natural," and that in fact, numerous other factors were more likely to motivate their purchases.

As noted above, commonality can be established by the presence of a single significant common issue, which in this case, includes the ultimate question whether consumers were likely to be deceived by defendant's labeling and advertising of the Ben & Jerry's ice cream products as "all natural." It is undisputed that defendant labeled some Ben & Jerry's ice cream products as "all natural." It also appears to be undisputed that at least some of the Ben & Jerry's products labeled "all natural" contained cocoa that had been alkalized with a "synthetic" alkalizing agent, and that some contained cocoa that had been alkalized with a "natural" alkalizing agent – although plaintiff has provided no reliable method to determine whether the alkalized cocoa in a given container of ice cream was processed using a "synthetic" or a "natural" alkalizing agent.

Defendant has provided evidence suggesting that consumers are not likely to be deceived by the "all natural" label, while plaintiff has presented no evidence in opposition. Thus, plaintiff has not established that this is a common legal or factual question that is

susceptible to classwide determination. The related question whether there is a common or accepted meaning of "all natural," while essential to any ultimate resolution of the claims raised in this case, has also not been resolved in this motion. Nevertheless, the court finds that the existence of this question is arguably sufficient to establish Rule 23(a)(2) commonality, as class treatment is likely to generate common answers likely to drive the resolution of the litigation.

c. Typicality

The third requirement under Rule 23(a) is that the claims or defenses of the class representatives must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class. See Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984-85 (9th Cir. 2011); Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Id. (quotation omitted).

Under the "permissive standards" of Rule 23(a), "representative claims are 'typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003). To be considered typical for purposes of class certification, the named plaintiff need not have suffered an identical wrong. Id. Rather, the class representative must be part of the class and possess the same interest and suffer the same injury as the class members. See Falcon, 457 U.S. at 156.

Plaintiff argues that her claims are typical of the claims of the class, because all the claims arise from the same course of events – the sale of "all natural" labeled Ben & Jerry's ice cream products which contain alkalized cocoa processed with a synthetic substance. Plaintiff also contends that she and the members of the class were each exposed to identical misrepresentations on the ice cream packages, and thus share the same interests in determining whether the Ben & Jerry ice cream products were

deceptively labeled. She asserts that a plaintiff who purchases products within the same product line with the same labeling omissions or claims is "sufficiently similar to" and thus can represent all other class members within that product line.

In opposition, defendant argues that the contrast between what plaintiff testified to in her deposition, and what Dr. Van Liere's consumer survey showed, is "glaring." Plaintiff testified that nothing mattered except the words "all natural" on the label, whereas 97% of consumers in Dr. Van Liere's survey responded that it did not matter if the product contained cocoa processed with a synthetic alkali. Defendant also notes that plaintiff complains about her "vibe" being "disrupted" upon learning from class counsel that Ben & Jerry's might have used a "synthetic" alkali, but that she provides no evidence that other consumers shared this view. Moreover, they note that she is suing over many ice cream products, including 27 that she never purchased, and argue that her claim cannot be typical of those of consumers who purchased products she did not purchase.

The court finds that plaintiff has not established that her claims are typical of those of the class, in part because she has not identified an ascertainable class. It is true that all purchasers of Ben & Jerry's ice cream were exposed to the same package labeling, but that alone is not sufficient to establish that plaintiff's claims of having been deceived are typical of the claims of the class, given that the class is not sufficiently ascertainable.

d. Adequacy

The fourth requirement under Rule 23(a) is adequacy of representation. The court must find that named plaintiff's counsel is adequate, and that the named plaintiff(s) can fairly and adequately protect the interests of the class. To satisfy constitutional due process concerns, unnamed class members must be afforded adequate representation before entry of a judgment which binds them. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).

Legal adequacy is determined by resolution of the question whether the named plaintiffs and their counsel have any conflicts with class members; and the question whether the named plaintiffs and their counsel will prosecute the action vigorously on

behalf of the class. Id. Generally, representation will be found to be adequate when the attorneys representing the class are qualified and competent, and the class representatives are not disqualified by interests antagonistic to the remainder of the class. Lerwill v. Inflight Motion Pictures, 582 F.2d 507, 512 (9th Cir. 1978).

Plaintiff argues that she is an adequate representative because she is a member of the class she seeks to represent, shares the same claims and interest in obtaining relief as the other class members, and has no conflicts of interest with other class members. She asserts that she has also demonstrated her adequacy through her participation thus far in this litigation, and was found to be an adequate representative in another food labeling case (represented by the same counsel). Plaintiff contends that proposed class counsel are also adequate, as they are qualified, experienced, and generally able to conduct the proposed litigation as required by Rule 23(g).

The plaintiff's burden of showing adequacy is fairly minimal, and she has arguably met it here. Defendant essentially makes only one argument in opposition – that plaintiff's refusal to disclose the details of her settlement with the defendant in another proposed class action (where certification was denied) makes her an inadequate representative.

4. Rule 23(b)

Under Rule 23(b)(3), a plaintiff must show 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. Pro. 23(b)(3). Matters pertinent to the Rule 23(b)(3) inquiry include the class members' interests in individually controlling the prosecution or defense of separate actions, the extent and nature of any litigation concerning the controversy already begun by or against class members, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the likely difficulties in managing a class action. Id.

a. Predominance of common questions

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are

sufficiently cohesive to warrant adjudication by representation." AmChem Prods., Inc., v. Windsor, 521 U.S. 591, 623 (1997). This inquiry requires the weighing of the common questions in the case against the individualized questions, which differs from the Rule 23(a)(2) inquiry as to whether the plaintiff can show the existence of a common question of law or fact. See Dukes, 131 S.Ct. at 2556.

In addition, however, the predominance analysis under Rule 23(b)(3) is more stringent than the commonality requirement of Rule 23(a)(2). Thus, to satisfy the predominance inquiry, it is not enough to establish that common questions of law or fact exist, as it is under Rule 23(a)(2)'s commonality requirement. Indeed, the analysis under Rule 23(b)(3) "presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2)." Hanlon, 150 F.3d at 1022.

Rule 23(b)(3) focuses on "the relationship between the common and individual issues." Id. The inquiry is more rigorous as it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." AmChem Prods., 521 U.S. at 623-24. Under the predominance inquiry, "there is clear justification for handling the dispute on a representative rather than an individual basis" if "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication . . . ." Hanlon, 150 F.3d at 1022, quoted in Mazza, 666 F.3d at 589.

Considering whether questions of law or fact common to class members predominate begins with the elements of the underlying causes of action. See Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020 (9th Cir. 2011). Here, plaintiffs allege six causes of action – three claims under § 17200, one claim under § 17500, a claim for common law fraud, and a claim for restitution/quasi-contract.

Plaintiff contends that common questions predominate as to all six claims, and that individual issues of damages do not predominate. First, with regard to the claims under § 17200 and § 17500, plaintiff argues (a) that common issues predominate as to the "unlawful" business practices claim because she will be able to establish through common

evidence that the "all natural" claims are false and misleading to consumers; (b) that common issues predominate as to the "unfair" business practices claim because the court must weight the utility of defendant's conduct against the gravity of the harm to the alleged victim, an inquiry plaintiff asserts is common to all members of the class; and (c) that common issues predominate as to the "fraudulent" business practices claim and false advertising claim because plaintiff's own reliance on defendant's representation caused her injury, and because she can show that members of public are "likely to be deceived," but (under Stearns) need not show individualized reliance as to the other class members.

With regard to the common law fraud claim, plaintiff asserts that common issues predominate because the elements of the fraud claim (misrepresentation of a material fact, knowledge of falsity, intent to deceive and to induce reliance, justifiable reliance, and resulting damage) can all be proved from common evidence that defendant misrepresented that the Ben & Jerry's ice cream products were "all natural;" that the "all natural" statement is material to the average consumer; that defendant knew the ice cream was not "all natural;" that defendant intended to deceive consumers about the nature of its ingredients; that plaintiff justifiably relied on defendant's "all natural" misrepresentation; and that plaintiff and the class members were damaged by buying a product that was not "all natural."

With regard to the claim for restitution based on quasi-contract, plaintiff contends that this claim can be proved by evidence of receipt and unjust retention of a benefit at the expense of another, which she asserts is the same common evidence referenced above. Finally, plaintiff argues that individual issues of damages do not predominate, because damages can be measured from defendant's record of sales, profits, and prices for Ben & Jerry's ice cream. Plaintiff contends that an opinion from a damages expert is not required at the class certification stage, particularly where losses can be determined by a "purely mechanical process" or a "mathematical calculation."

Plaintiff asserts that restitutionary disgorgement of defendant's profits can be calculated using "simple math" based on the financial records of Ben & Jerry's showing

what its sales, profits, and costs were on the products at issue. For example, she claims she can get sales information in California "through subpoenas of retailers or from retail tracking servicers . . . who gather and sell point-of-sales data, including products sold, the stores sold at, and the prices paid."

In its opposition, defendant argues that common issues do not predominate because reliance, materiality, and causation are all inherently individual; because entitlement to monetary relief raises inherently individual issues; and because proving a violation of FDA "policy" or FDA regulations raises individual issues.

First, defendant asserts that reliance, materiality, and causation are all inherently individual, and plaintiff has no evidence of any of these being common factors, let alone that they predominate. For example, defendant contends, its experts have established that consumer choice is affected by many different factors, and plaintiff has no evidence to show that "all natural" has any uniform meaning or that it would have any major impact on a consumer's decision to purchase (or not to purchase) a particular brand of ice cream. Defendant also contends that likelihood of confusion must be "probable," not just "possible," and that while plaintiff provides no evidence of likelihood of confusion, the study conducted by defendant's expert shows that only 3% of consumers who saw "all natural" on the packaging expected that the alkali used to process the cocoa was "natural."

Defendant argues that the only way to test materiality and reliance would be to determine how much each consumer would have de-valued the ice cream products given the alleged presence of potassium carbonate – the "synthetic" alkalizing agent. However, defendant asserts, this cannot be done on a classwide basis, because consumer choice is affected by myriad factors, as reflected in the report of its expert Dr. Scott.

In its second main argument, defendant asserts that entitlement to monetary relief raises inherently individual issues. As an initial matter, defendant notes that while plaintiff claims that restitution and damages can be proven on a price-premium theory from data of "average retail prices," she has provided no evidence supporting this assertion – in

particular, no expert testimony in support. Defendant contends that under Comcast, where a plaintiff fails to submit expert testimony, he/she cannot demonstrate that common questions predominate.

As for plaintiff's claim that it is a matter of "simple math" to calculate damages based on Ben & Jerry's sales figures, defendant responds that at most, Ben & Jerry's sales figures show only aggregate dollar amounts and numbers of units sold at wholesale – not who bought them, how many units each class member bought, or which alkali a particular flavor used. Defendant also asserts that the class is overbroad, because at most only 13% of consumers surveyed expected that the "all natural" label meant that the alkali was "natural" and only 3% said it would affect their purchasing decision. Finally, defendant contends that a remedy based on "average" prices, which is what plaintiff seems to be suggesting, would alter defendant's substantive right to pay damages that are reflective of its actual liability.

More importantly, defendant argues, the evidence shows that no one paid a premium for the "all natural" Ben & Jerry's ice cream, as Ben & Jerry's charges wholesale customers the same price regardless of flavor and regardless of the contents of the label. Defendant cites to the report of its marketing expert Dr. Scott, who found that Ben & Jerry's did not charge more for ice cream labeled "all natural" than it did for ice cream without that label; that there was no difference at the retail level between the two; that when Ben & Jerry's removed the "all natural" label from the ice cream packages, the prices did not decrease (neither the wholesale nor the retail prices) as one would have anticipated; and there is no support for plaintiff's speculation that "all natural" ice creams command a premium of $0.50 to $0.75 per container.

In its third main argument, defendant contends that proving a violation of FDA "policy" raises inherently individualized issues. Defendant argues that the FDA's "policy" has two components – (a) nothing artificial or synthetic (including color additives) and (b) the thing added would not be expected to be in food. Defendant contends that plaintiff cannot show either element, as alkali is merely a processing aid, used to raise the pH –

not an ingredient or flavoring agent – and plaintiff has submitted no evidence showing that a synthetic alkali is "not normally to be expected."[3]

Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The statute is phrased in the "disjunctive," and, as a result, is violated where a defendant's act or practice is unlawful, unfair, or fraudulent. Prata v. Super. Ct., 91 Cal. App. 4th 1128, 1137 (2001). Likewise, § 17500 broadly prohibits the dissemination of advertising that is deceptive, untrue, or misleading. Cal. Bus. & Prof. Code § 17500; Jolley v. Chase Home Finance, LLC, 213 Cal. App. 4th 872, 906-907 (2013).

Relief under § 17200 and § 17500 is available "without individualized proof of deception, reliance and injury," so long as the named plaintiffs demonstrate injury and causation. Mass. Mut. Life Ins. Co. v. Sup. Ct., 97 Cal. App. 4th 1282, 1289 (2002); see also In re Tobacco II Cases, 46 Cal. 4th 298, 326-27 (2009). Moreover, under these statutes, only the named plaintiffs are required to establish reliance and causation, not each class member. See Astiana v. Kashi Co., 291 F.R.D. 493, 504 (S.D. Cal. 2013); Thurston v. Bear Naked, Inc., 2013 WL 5664985 at * 7 (S.D. Cal. July 30, 2013).

In this case, however, the court need not consider all the elements of each of these claims, as all claims asserted in the FAC have "damages" as an element, and plaintiff has not established that common issues predominate such that there is a classwide method of granting relief.

Under the UCL, a court may grant a class restitution as a form of relief. Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 694 (2006); Cal. Bus. & Prof. Code §§ 17203, 17535. Restitutionary relief is an equitable remedy, and its purpose is "to restore the status quo by returning to the plaintiff funds in which he or she has an

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[3] In addition, with regard to the new "flavoring" claim, defendant asserts (i) that it was not pled, (ii) that plaintiff previously disclaimed it as inapplicable, (iii) that if a "bad alkali" is a "flavor" then so too is a "good alkali," and (iv) that it is wrong, as even plaintiff admits in the ¶ 14 of the FAC that the function of the alkali is not to impart flavor but to neutralize the acids and alter the pH level of the beans. These arguments, while legitimate, do not have any bearing on the court's decision regarding class certification.

ownership interest." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149 (2003); see also Cortez v. Purolator Air Filtration Products Co., 23 Cal. 4th 163, 177 (2000). The form of restitutionary relief authorized by California law has two purposes: returning money unjustly taken from the class, and deterring the defendant from engaging in future violations of the law. Colgan, 135 Cal. App. 4th at 695.

While a court of equity "may exercise its full range of powers in order to accomplish complete justice between the parties" when awarding restitution, the restitution awarded must be a "quantifiable sum," and the award must be supported by substantial evidence. Colgan, 135 Cal. App. 4th at 698, 700; Cortez, 23 Cal. 4th at 178. Thus, the restitution awarded to class members must correspond to a measurable amount representing the money that the defendant has acquired from each class member by virtue of its unlawful conduct. Colgan, 135 Cal. App. 4th at 697-98. Unlawful profits unfairly obtained can provide a measure for recovery, but only "to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." Korea Supply, 29 Cal. 4th at 1148.

In Leyva v. Medline Indus., Inc., 716 F.3d 510 (9th Cir. 2013), one of the cases on which plaintiff relies, the Ninth Circuit acknowledged that under the Supreme Court's recent decision in Comcast, the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability. Id. at 514. However, the Ninth Circuit noted that in the case before it, if the class members proved the defendant's liability, damages would be "calculated based on the wages each class member lost due to" the defendant's unlawful practices. In other words, the damages in that case were ascertainable and quantifiable.

One method of quantifying the amount of restitution to be awarded is computing the effect of unlawful conduct on the market price of a product purchased by the class. Colgan, 135 Cal. App. 4th at 698-99. This measure of restitution contemplates the production of evidence that attaches a dollar value to the "consumer impact or advantage" caused by the unlawful business practices. Id. at 700. Restitution can then be calculated

by taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices. Expert testimony may be necessary to determine the amount of price inflation attributable to the challenged practice. Id.

Further, the first step in any damages study is "the translation of the legal theory of the harmful event into an analysis of the economic impact of that event." Comcast, 133 S.Ct. at 1435. "[A]t the class certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case." Id. at 1433. Thus, under Comcast, a court can certify a Rule 23(b)(3) class only if there is evidence demonstrating the existence of a classwide method of awarding relief that is consistent with the plaintiffs' theory of liability. Forrand v. Federal Exp. Corp., 2013 WL 1793951, at *3 (C.D. Cal. Apr. 25, 2013); see also Roach v. T.L. Cannon Corp., 2013 WL 1316452 at *3 (N.D.N.Y. March 29, 2013).

Whichever way one approaches it, plaintiff has not met her burden of showing that there is a classwide method of awarding relief that is consistent with her theory of deceptive and fraudulent business practices, false advertising, or common law fraud (or the alternative theory of restitution based on quasi-contract).

Plaintiff has not offered any expert testimony demonstrating that the market price of Ben & Jerry's ice cream with the "all natural" designation was higher than the market price of Ben & Jerry's without the "all natural" designation. Thus, by definition, there is no evidence showing how much higher the price of one was than the other. More importantly, plaintiff has not offered any expert testimony demonstrating a gap between the market price of Ben & Jerry's "all natural" ice cream and the price it purportedly should have sold for if it had not been labeled "all natural" – or any evidence demonstrating that consumers would be willing to pay a premium for "all natural" ice cream that was made with cocoa alkalized with a "natural" alkali, and did in fact pay such a premium.

Ben & Jerry's does not sell retail, and does not set retail prices. Establishing a

higher price for a comparable product would be difficult because prices in the retail market differ and are affected by the nature and location of the outlet in which they are sold. See Red v. Kraft Foods, Inc., 2012 WL 8019257 at *11 (C.D. Cal. Apr. 12, 2012). Moreover, individualized awards of monetary restitution would require individualized assessments of damages based on how many packages of ice cream each class member purchased. See Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 541 (N.D. Cal. 2012); see also Red, 2012 WL 8019257 at *11 (common questions did not predominate due to the individualized nature of the damages calculations).

As noted above, under Comcast, the plaintiff is required to provide "evidentiary proof" showing a classwide method of awarding relief that is consistent with plaintiff's theory of liability. See 133 S.Ct. at 1432. Here, however, plaintiff has provided no damages evidence. More importantly, her failure to offer a damages model that is capable of measurement across the entire class for purposes of Rule 23(b)(3) bars her effort to obtain certification of the class. The fact that plaintiff may have established that common questions predominate with regard to some elements of some of the claims, is not sufficient to support certification.

b. Superiority

Rule 23(b)(3) also requires the court to determine whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy, based on the following nonexclusive factors:

> (A) the interest of members of the class in individually controlling the prosecution. . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by. . . members of the class; (C) the desirability. . . of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). Plaintiff argues that these factors support class certification here.

In light of the finding that plaintiff has not identified an ascertainable class, and that common issues do not predominate, a class action is plainly not a superior method of adjudication of the controversy.

CONCLUSION

In accordance with the foregoing, the court finds that plaintiff's motion for class certification must be DENIED.

IT IS SO ORDERED.

Dated: January 7, 2014

PHYLLIS J. HAMILTON
United States District Judge