EXHIBIT 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REBECCA YUMUL, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

SMART BALANCE, INC.,

Defendant.

CASE NO. CV 10-00927 MMM (AJWx)

TENTATIVE ORDER GRANTING MOTION FOR CLASS CERTIFICATION

Rebecca Yumul filed this putative class action against Smart Balance, Inc. ("Smart Balance" or "SBI") on February 8, 2010.[1] On May 24, 2010, the court dismissed the complaint with leave to amend for failure to allege with particularity the facts upon which the claims were based.[2] On July 30, 2010, the court dismissed the amended complaint insofar as it pled claims that predated the limitations period.[3] The court directed Yumul to file a second amended complaint alleging any facts on which she based her invocation of the delayed discovery rule. On August 12, 2010, she filed a second amended complaint pleading three claims: (1) violation of

[1]Complaint for Violations of Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act ("Complaint"), Docket No. 1 (Feb. 8, 2010).

[2]Order Granting in Part and Denying in Part Defendant's Motion to Dismiss ("First Order"), Docket No. 18 (May 17, 2010).

[3]Order Granting in Part and Denying in Part Defendant's Motion to Dismiss ("Second Order"), Docket No. 29 (July 30, 2010).

California's unfair competition law ("UCL"), California Business & Professions Code § 17200 et seq.; (2) violation of California's false advertising law ("FAL"), California Business & Professions Code § 17500 et seq.; and (3) violation of California's Consumer Legal Remedies Act ("CLRA"), California Civil Code § 1750 et seq.[4]

On November 22, 2010, Yumul filed a motion for class certification, which Smart Balance opposed on the grounds that Yumul's claims were preempted by federal law. The court treated the opposition as a third motion to dismiss, and dismissed the complaint with leave to amend.[5] Thereafter, Smart Balance filed a motion to strike certain allegations in Yumul's third amended complaint on the ground that they exceeded the scope of the court's order granting leave to amend. The court granted in part and denied in part the motion to strike.[6] On June 3, 2011, Yumul filed a fourth amended complaint consistent with the court's order on the motion to strike.[7]

Yumul has now filed a second motion for class certification,[8] seeking to certify two classes under Rules 23(a) and 23(b)(3)[9] of the Federal Rules of Civil Procedure: (1) a proposed CLRA

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[4]Second Amended Complaint, Docket No. 30 (August 12, 2010).

[5]Order Denying Class Certification; Dismissing Complaint with Leave to Amend ("Third Order"), Docket No. 73 (March 14, 2011).

[6]Order Granting in Part and Denying in Part Defendant's Motion to Strike ("Fourth Order"), Docket No. 89 (May 27, 2011).

[7]Fourth Amended Complaint ("FAC"), Docket No. 95 (June 3, 2011).

[8]Motion for Class Certification ("Motion"), Docket No. 90 (June 3, 2011); Declaration of Jack Fitzgerald ("Fitzgerald Decl."), Docket No. 92 (June 3, 2011); Declaration of Gregory Weston ("Weston Decl."), Docket No. 91 (June 3, 2011). See also Reply, Docket No. 108 (July 8, 2011); Declaration of Gregory Weston ("Weston Reply Decl."), Docket No. 109 (July 8, 2011); Objection to Wind Declaration, Docket No. 110 (July 8, 2011).

[9]In Yumul's moving papers, she seeks certification under both Rule 23(b)(2) and Rule 23(b)(3). In her reply, however, she states that "[i]n light of SBI's representation that it permanently removed trans fat from Nucoa after this lawsuit was instituted, Opp. at 33, and the Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, 2011 U.S. LEXIS 4567 (June 20, 2011), Plaintiff withdraws her request that a class be certified under Rule 23(b)(2)." (Reply at 1 n. 1.)

and FAL class consisting of "[a]ll persons (excluding officers, directors, and employees of SBI) who purchased, on or after January 1, 2000 [ ] Nucoa Real Margarine in the United States for their own use, rather than resale or distribution[;]" and (2) a proposed UCL class, consisting of "[a]ll persons (excluding officers, directors, and employees of SBI) who purchased, on or after February 8, 2006 [ ] Nucoa Real Margarine in the United States for their own use, rather than resale or distribution."[10] Defendant opposes certification of the classes.[11]

I. FACTUAL BACKGROUND

Smart Balance is a Delaware corporation with its principal place of business in New Jersey.[12] Yumul alleges that she purchased Nucoa Real Margarine ("Nucoa"), a product distributed by Smart Balance, repeatedly during the class period.[13] Specifically, Yumul asserts that she purchased one package of Nucoa approximately every two weeks and that, in the aggregate, she purchased Nucoa 200 to 300 times between January 1, 2000 and January 24, 2010.[14]

Yumul alleges that Nucoa contains artificial trans fat, which raises the risk of coronary heart disease by raising the level of "bad" LDL blood cholesterol and lowering the level of "good" HDL blood cholesterol.[15] Yumul also alleges that trans fat causes cancer and type 2

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[10]Motion at 6.

[11]Opposition ("Opp."), Docket No. 103 (June 24, 2011); Declaration of Peter Dray ("Dray Decl."), Docket No. 104 (June 24, 2011); Declaration of Victoria Ianni ("Ianni Decl."), Docket No. 105 (June 24, 2011); Declaration of Yoram Wind ("Wind Decl."), Docket No. 103 (June 24, 2011). On July 15, 2011, defendant filed an *ex parte* application for an order allowing it to file a sur-reply, which the court granted. (See Order Granting *Ex Parte* Application, Docket No. 120 (July 18, 2011); see also Sur-Reply, Docket No. 121 (July 18, 2011)).

[12]FAC, ¶ 10.

[13]*Id.*, ¶ 3

[14]*Id.*, ¶ 13.

[15]*Id.*, ¶¶ 42, 50.

diabetes.[16] Despite the ill effects of trans fat, she contends that at all times relevant to this action, Nucoa packages was labeled "No Cholesterol" or "Cholesterol Free."[17]

Yumul asserts that three different Nucoa labels were used during the class period.[18] The first label, which was used from January 1, 2000 through early 2005, and the second label, which was used from early 2005 through November 2009, included a claim that the product was "Cholesterol Free."[19] The third label, which was used from November 2009 through at least March 2010, made the claim that the product contained "No Cholesterol."[20] Yumul contends that because cholesterol is not naturally present in vegetable oil, these labels should have read "a cholesterol free food" instead of "Cholesterol Free" and "[Contains] No Cholesterol." She asserts that the latter charactizations suggest Smart Balance used "special processing, alteration, formulation, or reformulation to lower cholesterol content."[21]

In addition to claims regarding cholesterol content, Yumul asserts that each of the labels used during the class period violated certain regulations promulgated by the Food and Drug Administration ("FDA") pursuant to the Federal Food Drug and Cosmetic Act ("FDCA"). Specifically, she alleges that all three labels should have stated: "See nutrition information for fat, saturated fat, and sodium content." Instead, she contends, the labels stated only: "See back panel for information on saturated fat, sodium and other nutrients."[22] Yumul alleges that this constitutes

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[16] *Id.*, ¶¶ 54, 56.

[17] *Id.*, ¶¶ 72, 78, 105.

[18] *Id.*, ¶ 19.

[19] *Id.*, ¶¶ 25, 27, 72, 78.

[20] *Id.*, ¶¶ 29, 105.

[21] *Id.*, ¶ 82.

[22] *Id.*, ¶¶ 77-78, 90-91, 110-111. Plaintiff contends that "[t]his statement violates [21 C.F.R.] § 101.13(h)(l) in that it the statement both is not in the form prescribed (for example, directing the consumer to 'See back panel' rather than 'See nutrition information'), and fails to direct the consumer to see the nutrition information for *fat*, which is more than triple (39.3g) the prescribed level (13g)."). (*Id.*, ¶¶ 79, 92, 112.)

mislabeling in violation of the FDCA, and that it "failed to draw consumers' attention to the fact that, despite its lack of cholesterol, Nucoa was very high in fat."[23] She asserts that the "representation was especially insidious, and therefore especially deceptive, false, and misleading, in light of Nucoa's high trans fat content."[24]

Yumul asserts that the second and third labels also violated FDCA regulations that permit the branding of food as "Cholesterol Free" only if the product label discloses the level of total fat in a serving of the food in immediate proximity to the "Cholesterol Free" claim in type that shall be no less than one-half the size of the type used for the claim.[25] Yumul contends that by not including such a disclosure on the second and third Nucoa labels, Smart Balance "failed to alert consumers that, despite its lack of cholesterol, Nucoa was very high in fat," which was "deceptive, false, and misleading, in light of the high trans fat content of Nucoa."[26]

Finally, Yumul alleges that the third Nucoa label, which was used commencing in November 2009, contained the statement: "Nucoa® Tastes Better . . . Cooks Better . . . Fries Better and Bakes Better because it's Real Margarine. What could be better! Our special formula has been designed with you and your family in mind. Nucoa's Real Margarine is great for cooking and baking. Because it's Lactose Free and Cholesterol Free, it's the *healthy* and delicious way to make your favorite dishes come to life. Enjoy!"[27] Yumul asserts that defendant's inclusion of the word "healthy" violated several FDCA regulations, which specify that the term may only be used on foods that meet certain nutritional criteria.[28]

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[23] *Id.*, ¶¶ 80, 93, 113.

[24] *Id.*, ¶¶ 81, 94, 114.

[25] *Id.*, ¶¶ 95, 115 (citing 21 C.F.R. § 101.62(d)(1)(ii)(D)).

[26] *Id.*, ¶¶ 96-98, 116-118.

[27] *Id.*, ¶ 125 (emphasis added).

[28] *Id.*, ¶¶ 128-31, 132-35.

Yumul contends that Smart Balance's "violations of law were not mere technicalities."[29] She asserts that each "violation of the FDCA individually rendered the First, Second, and Third Nucoa Labels [ ] false or misleading in some respects and particulars, . . . especially when taken together and in the context of the overall packaging as a whole."[30]

Smart Balance proffers evidence that in March 2010, it removed all trans fat from Nucoa, and all references to trans fat from the product's label.[31] It contends that it reformulated Nucoa in March 2010 for several reasons. First, as the cost of vegetable oil rose, most competitive products contained reduced amounts of vegetable oil.[32] Most competitors also eliminated trans fat in reaction to the negative public image trans fat had developed.[33] To ensure competitive pricing, Smart Balance made similar changes to Nucoa; these included a reduction in the percent of vegetable oil that the product contained to 65%.[34] Smart Balance also deleted the reference to "healthy" from the back label when the product was reformulated in March 2010.[35]

Yumul contends she did not discover that Smart Balance's labeling of Nucoa was allegedly false, deceptive, or misleading until late January 2010, when she learned of the causal link between Nucoa and coronary heart disease, type-2 diabetes, and cancer during a conversation she had with an acquaintance who was highly knowledgeable about the subject.[36] Until that time, she asserts she did not know that Nucoa posed a risk to her health, nor of the facts supporting her

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[29] *Id.*, ¶ 136.

[30] *Id.*, ¶ 141.

[31] Dray Decl., ¶ 33.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*, ¶ 30.

[36] FAC, ¶ 155.

claims against Smart Balance.[37] Yumul maintains that she is a reasonably diligent consumer who exercised reasonable diligence in purchasing, using, and consuming Nucoa.[38] She alleges that, like nearly all consumers, she is not a nutrition expert and lacked the means to discover Smart Balance's deceptive practices.[39] She also argues that Smart Balance's labeling – in particular its representations that Nucoa was "healthy" and "Cholesterol Free" – actively impeded her ability and the ability of similarly situated consumers to discover the alleged fraud.[40]

Plaintiff seeks an order compelling Smart Balance (1) to cease using the allegedly misleading tactics to market and sell Nucoa; (2) to conduct a corrective advertising campaign; (3) to make restitution to consumers of amounts by which it was unjustly enriched; (4) to destroy all allegedly misleading and deceptive materials and products; and (5) to award class members actual damages, restitution, punitive damages, costs, expenses, and reasonable attorneys' fees.[41]

II. DISCUSSION

A. Article III Standing

As the threshold matter, the court must consider Smart Balance's argument that the plaintiff class lacks standing to sue under the UCL, FAL, and CLRA.[42] Standing is a threshold

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[37] *Id.*

[38] *Id.*, ¶ 156.

[39] *Id.*, ¶ 157.

[40] *Id.*, ¶ 158.

[41] *Id.*, ¶ 5.

[42] "The Ninth Circuit has held that [it is proper to address] standing . . . before the Rule 23(a) factors as long as the court is not considering a global class settlement." *Fine v. ConAgra Foods, Inc.*, No. CV 10-01848 SJO (Ex), 2010 WL 3632469, *2 (C.D. Cal. Aug. 26, 2010) (citing *Easter v. Am. W. Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) ("The district court correctly addressed the issue of standing before it addressed the issue of class certification"), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) ("Any . . . Article III court must be sure of its own jurisdiction before getting to the merits")).

requirement in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Indeed, it is "an essential and unchanging part of the case-or-controversy requirement of Article III," and thus constitutes a limitation on the court's jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Three elements comprise the "irreducible constitutional minimum of standing": (1) the plaintiff must have suffered an "injury in fact," (2) there must be a "causal connection between the injury and the conduct complained of," and (3) the injury will likely be redressed by a favorable decision. *Id.* at 560-61.

Courts do not require that each member of a class make an individualized showing of standing. See, e.g., *Rozema v. The Marshfield Clinic*, 174 F.R.D. 425, 444 (W.D. Wis. 1997) ("Those represented in a class action are passive members and need not make individual showings of standing"); *PBA Local No. 38 v. Woodbridge Police Dep't*, 134 F.R.D. 96, 100 (D.N.J. 1991) ("Once it is ascertained that there is a named plaintiff with the requisite standing, however, there is no requirement that the members of the class also proffer such evidence"); see also Herbert B. Newberg & Alba Conte, 1 NEWBERG ON CLASS ACTIONS § 2.7 (4th ed. 2002) ("[P]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court"). Nonetheless, no class can be certified that contains members lacking Article III standing. See *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir.1980) (affirming the denial of class certification because the definition of the class was "so amorphous and diverse" that it was not "reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief"); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (noting petitioners' argument that "exposure-only" class members lack an injury-in-fact and acknowledging need for Article III standing but addressing class certification issues first); *id.* at 884 (Breyer, J., dissenting) (referring to the "standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 334 (S.D.N.Y. 2003) (noting that "each member of the class must have standing with respect to

injuries suffered as a result of defendants' actions"); 7 AA Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE CIV.3d § 1785.1 (2005) ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention"). A class must therefore be defined in such a way that anyone in it has standing.

Named plaintiffs who pursue a UCL or FAL action on behalf of others based on allegations of false or fraudulent advertising must demonstrate that they have suffered an injury in fact by pleading and proving actual reliance and the loss of money or property. *In re Tobacco II*, 46 Cal.4th 298, 321 (2009). The *Tobacco II* Court emphasized, however, that the reliance requirement did not apply to other members of the class. See *Greenwood v. Compucredit Corp.*, No. 08-04878 CW, 2010 WL 4807095, * 1 (N.D. Cal. Nov, 19, 2010) ("UCL claims for misrepresentation do not require that absent class members individually demonstrate reliance," citing *Tobacco II*).[43] This is so because, in false advertising cases, the focus of the inquiry is

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[43]See *Tobacco II*, 46 Cal.4th at 321 ("To conclude: (1) there is nothing in the express language of Proposition 64 that purports to alter accepted principles of class action procedure that treat the issue of standing as referring only to the class representative and not the absent class members; (2) nor is there any indication in the ballot pamphlet materials that would have alerted the voters that such alteration in class action procedure was an intended result of passage of the initiative; (3) imposing such a novel requirement is not necessary to remedy the specific abuse of the UCL at which Proposition 64 was directed; (4) but, on the other hand, imposing this unprecedented requirement would undermine the guarantee made by Proposition 64's proponents that the initiative would not undermine the efficacy of the UCL as a means of protecting consumer rights, because requiring all unnamed members of a class action to individually establish standing would effectively eliminate the class action lawsuit as a vehicle for the vindication of such rights; and (5) the remedies provision of UCL, left unchanged by Proposition 64, offers additional support for the conclusion that the initiative was not intended to have any effect at all on unnamed members of UCL class actions."); *Shein v. Canon U.S.A., Inc.*, No. CV 08-7323 CAS (Ex), 2010 WL 3170788, *7 (C.D. Cal. Aug. 10, 2010) ("The California Supreme Court has held that relief under [the] UCL is available without individualized proof . . . of deception, reliance and injury," citing *Tobacco II*, 46 Cal.4th at 312); *Kingsbury v. U.S. Greenfiber, LLC*, No. CV 08-00151 AHM (JTLx), 2011 WL 2619231, *3 (C.D. Cal. May 23, 2011) ("The California Supreme Court, in *In re Tobacco II*, held that standing to bring a UCL action requires actual reliance, but only the named Plaintiff in a class action suit must show actual reliance on deceptive advertising"); *In re Steroid Hormone Prod. Cases*, 181 Cal.App.4th 145, 158 (2010) (holding that plaintiffs were not required to show class members' reliance on an alleged misrepresentation in

whether "'members of the public are likely to be deceived.'" *Shein*, 2010 WL 3170788 at *7 (citing *Tobacco II*, 46 Cal.4th at 312); *In re Vioxx Class Cases*, 180 Cal.App.4th 116, 130 (2009) ("In order to obtain a remedy for deceptive advertising, a UCL plaintiff need only establish that members of the public were likely to be deceived by the advertising. . . . The law focuses on a reasonable consumer who is a member of the target population").[44]

The "substantive right extended to the public by the UCL is the right to protection from fraud, deceit and unlawful conduct, and the focus of the statute is on the defendant's conduct." *Tobacco II*, 46 Cal.4th at 324 (quotation marks and citations omitted). Therefore, a person who

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a UCL action).

[44]The same standard applies under the FAL and CLRA. See *Dvora v. General Mills, Inc.*, No. CV 11-1074-GW(PLAx), 2011 WL 1897349, *6 (C.D. Cal. May 16, 2011) ("To state a claim under the UCL and CLRA, Plaintiff must allege, *inter alia*, that General Mills made statements that are likely to deceive a reasonable consumer." See also *Colgan [v. Leatherman Tool Group, Inc.]*, 135 Cal.App.4th [663,] 682 [(2006)] ("To prevail on a false advertising claim, a plaintiff need only show that members of the public are likely to be deceived. A 'reasonable consumer' standard applies when determining whether a given claim is misleading or deceptive. A 'reasonable consumer' is 'the ordinary consumer acting reasonably under the circumstances,' and 'is not versed in the art of inspecting and judging a product, in the process of its preparation or manufacture,'" quoting 1A CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (4th ed. 2004), § 5:17, p. 5-103 (internal citations omitted)); *Pom Wonderful LLC v. Welch Foods, Inc.*, No. CV 09-567 AHM (AGRx), 2009 WL 5184422, *2 (C.D. Cal. Dec. 21, 2009) (holding that "standing requirements [under the UCL] also apply to the FAL[,]" citing *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal.App.4th 798, 819 (2007)); *Paduano v. American Honda Motor Co., Inc.*, 169 Cal.App.4th 1453, 1497 (2009) ("Unless an advertisement is directed to a particularly susceptible audience or specific group of consumers, a plaintiff claiming deceptive advertising under the CLRA and UCL bears the burden of proving that the defendant's conduct or advertising is likely to deceive a 'reasonable consumer'"); *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal.App.4th 1351, 1360 (2003) ("[W]e agree with the trial court, and find, in the words of *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, . . . that 'unless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer.' And, while *Lavie* considered only the application of the reasonable consumer standard to the UCL and False Advertising Act, we do not hesitate to find that it also applies to the CLRA, which like the UCL concerns 'unfair methods of competition and unfair or deceptive acts or practices,' and which is intended 'to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection'" (citations omitted)).

"los[t] [ ] money" by purchasing Nucoa during the class period has suffered an "injury in fact" in violation of this state-created substantive right sufficient to give him or her standing for purposes of Article III.

Defendant does not appear to dispute that Yumul herself has standing. Nor could it. Yumul has affirmatively alleged that she purchased Nucoa in reliance on Smart Balance's "Cholesterol Free" and "healthy" claims.[45] Yumul has substantiated these allegations through her deposition testimony.[46] Her allegations and testimony are sufficient to demonstrate, at this stage of the proceedings, that she actually relied on the allegedly false claims and as a result suffered an economic injury by purchasing Nucoa in reliance thereon. See *Kwikset*, 51 Cal.4th at 316 (holding that "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue"); *Johnson v. General Mills, Inc.*, __ F.R.D. __, 2011 WL 1514702, * 1 (C.D. Cal. Apr. 20, 2011) ("Mr.

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[45]See FAC, ¶¶ 164-67 ("Like other members of the Classes, Ms. Yumul saw, understood, and relied on the Nucoa Labels depicted above when she made her decisions to purchase Nucoa. In particular, like other members of the Classes, Ms. Yumul saw and relied on the representations that Nucoa is 'healthy,' 'Cholesterol Free,' and has 'No Cholesterol' in making each of her purchases of Nucoa. Moreover, like other members of the Classes, Ms. Yumul relied on the overall perception, created by SBI through its unlawful, false and misleading labeling, that Nucoa was healthy and good for her cholesterol levels and the cholesterol levels of her family, in making each of her purchases of Nucoa. Like other members of the Classes, Plaintiff purchased Nucoa believing it had the qualities she sought based on its unlawful and deceptive advertising, and SBI's misrepresentations and omissions, but the product was actually unsatisfactory to her for the reasons described herein."); *id.*, ¶ 174 ("Absent SBI's deceptive claims and fradulent omissions, Plaintiff and Class members would not have purchased Nucoa.").

[46]Weston Decl., Exh. I (Deposition of Rebecca Yumul ("Yumul Depo.")) at 79:13-21 (testifying that she started buying Nucoa in the 1990s because "[t]he price was good, and somehow, it says 'cholesterol free,' so its good for me."); *id.* at 89:19-22 (testifying that she purchased Nucoa instead of another stick product "[b]ecause it's cholesterol free[.]"); *id.* at 111:25-112:12("I relied on the label. You know, I didn't really read on it, but I just relied thatit said it's good for my health . . . . It says it's healthy for you, so it's . . . good for you . . . I saw it's cholesterol free. Then I relied on what they claimed, that it's . . . good for me because it's cholesterol free").

Johnson has UCL and CLRA standing because he alleges that he bought YoPlus in reliance on General Mills' allegedly deceptive representations concerning the digestive health benefit of YoPlus as communicated by the second generation YoPlus packaging and a television commercial for YoPlus. He further asserts that he suffered economic injury because he purchased YoPlus but did not receive the promised digestive health benefit"); *Kingsbury*, 2011 WL 2619231 at *3 ("Here, Plaintiff has satisfied the requirements for UCL standing. The Parties do not dispute that he has alleged sufficient injury in fact. Plaintiff also sufficiently alleges reliance: 'Plaintiff and other consumers individually and collectively acted in foreseeable and justifiable reliance, to their detriment, on the warranties and representations of Defendants regarding the superior quality of Cocoon insulation as a selling point for homes and[ ] acted in actual, justifiable and detrimental reliance to purchase a Pulte home incorporating Cocoon insulation'" (record citation omitted)); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW, 2011 WL 2221113, *4 (N.D. Cal. June 7, 2011) ("Zeisel testified throughout his deposition that he has purchased Shelled Walnuts Products. Although Zeisel did in fact testify that he purchased Shelled Walnuts Products because he thought they were a good product, Zeisel also testified that he purchased Shelled Walnuts Products because he 'was interested in the heart-healthy benefits as advertised on the packaging.' According to Zeisel, he made that decision based on the information on the labels," citing *Laster v. T-Mobile, Inc.*, No. 05cv1167, 2009 WL 4842801, *5 (S.D.Cal. Dec.14, 2009) ("A plaintiff does not need to show that a defendant's misrepresentation was the only cause of the injury producing conduct; rather, the plaintiff need only show that the misrepresentation was a substantial factor in influencing his decision") (record citations omitted)).

Smart Balance asserts, however, that "under Article III, [Yumul] must demonstrate that the proposed class consists of individuals who suffered injury caused by SBI's conduct," and that she cannot do so using "classwide proof, but [must proffer evidence of] . . . individualized inquiry."[47] It asserts that the California Supreme Court's interpretation of the UCL, FAL, and CLRA "'did not, and could not, hold that uninjured parties could be class members in a class

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[47]Opp. at 22.

action brought in federal court, despite their lack of Article III standing.'"[48] As noted, however, any person who suffered an economic injury by purchasing Nucoa in packaging that was likely to deceive a reasonable consumer has Article III standing to assert a claim. Thus, defining the class to exclude those who did not lose money by purchasing Nucoa will adequately address Article III standing. See *Denney*, 443 F.3d at 264 ("The class must therefore be defined in such a way that anyone within it would have standing"); *Presbyterian Church of Sudan*, 244 F.Supp.2d at 334 ("each member of the class must have standing with respect to injuries suffered as a result of defendants' actions"). See also *Vuyanich v. Republic Nat'l Bank of Dallas*, 82 F.R.D. 420, 428 (N.D. Tex. 1979) ("If th[e] court, guided by the nature and purpose of the substantive law on which the plaintiffs base their claims, properly applies Rule 23, then the certified class must necessarily have standing as an entity").

Yumul proposes that the court certify classes of people who purchased Nucoa during the relevant class periods for their own use, rather than for resale or distribution. Yumul has adequately demonstrated that she has standing to represent these classes, which are defined in such a way that all members, by virtue of their status as purchasers of Nucoa, have suffered the requisite injury-in-fact. The court thus concludes that Article III requirements are satisfied, and it turns to whether the classes are properly certified under Rule 23.

B. Legal Standard Governing Class Certification

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect the rights of persons who might not be able to present claims on an individual basis." *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)). A district court may certify a class only if

> "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the

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[48] *Id.* (citing *Webb v. Carter's Inc.*, No. CV 08-7367, 2011 WL 343961, *12 (C.D. Cal. Feb. 3, 2011)).

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.PROC. 23(a).

In addition, the district court must also find that at least one of the following three conditions is satisfied:

> "(1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; (2) 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; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[49] FED.R.CIV.PROC. 23(b).

"The party seeking class certification bears the burden of demonstrating it has met all four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)." *In re Paxil Litigation*, 212 F.R.D. 539, 543 (C.D. Cal. 2003) (citing *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234 (9th Cir. 1996)).

In deciding whether to certify a class under Rule 23, an inquiry regarding "the merits of

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[49]See also FED.R.CIV.PROC. 23(b)(3)(A-D)("The matters pertinent to these findings include: (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.").

the claims is [generally] inappropriate." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1759 (2006); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996). Nonetheless, the court may find it necessary to look beyond the pleadings and examine plaintiffs' substantive claims to determine whether the elements of Rule 23 have been satisfied. See *Wal-Mart Stores, Inc. v. Dukes*, __ S.Ct. __, 2011 WL 2437013, *7 (June 20, 2011) ("*Dukes III*") ("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. . . . '[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and [ ] certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied[.]' Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped" (citations omitted)). See also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (whether to certify a class "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (internal quotation marks omitted)); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (holding that the court can consider evidence regarding the merits of the claims to determine whether Rule 23 has been satisfied); *In re Unioil Secs. Litig.*, 107 F.R.D. 615, 618 (C.D. Cal. 1985) ("[N]otwithstanding its obligation to take the allegations in the complaint as true, the Court is at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case").

C. Whether Plaintiff Has Identified an Ascertainable Class

Although not specifically mentioned in Rule 23(a), there is an additional prerequisite to certification – that the class be ascertainable. See, e.g., *Lukovsky v. San Francisco*, No. C 05-00389 WHA, 2006 WL 140574, *2 (N.D. Cal. Jan. 17, 2006) ("'Although there is no explicit requirement concerning the class definition in FRCP 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed,'" quoting

Schwartz v. Upper Deck Co., 183 F.R.D. 672, 679-80 (S.D. Cal. 1999)); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 163 (C.D. Cal. 2002) ("Prior to class certification, plaintiffs must first define an ascertainable and identifiable class. Once an ascertainable and identifiable class has been defined, plaintiffs must show that they meet the four requirements of Rule 23(a), and the two requirements of Rule 23(b)(3)" (citation and footnote omitted)); *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (c.D. Cal. 1998) (holding that a class definition must be "precise, objective and presently ascertainable"); *Bishop v. Saab Auto. A.B.*, No. CV 95-0721 JGD (JRx), 1996 WL 33150020, *4 (C.D. Cal. Feb. 16, 1996) ("To file an action on behalf of a class, the named plaintiffs must be members of the class that they purport to represent at the time the class action is certified. The named plaintiffs must also demonstrate that the class is ascertainable" (citation omitted)).[50]

A class is sufficiently defined and ascertainable if it is "administratively feasible for the court to determine whether a particular individual is a member." *O'Connor*, 184 F.R.D. at 319; accord *Davoll v. Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995); see also *Buford*, 168 F.R.D. at 347 ("[T]he 'description of the class must be sufficiently definite to enable the court to determine if a particular individual is a member of the proposed class,'" quoting *Pottinger v. Miami*, 720 F.Supp. 955, 957 (S.D. Fla. 1989)).

Smart Balance asserts that the class is unascertainable because Yumul "offers no suggestion

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[50]See also, e.g., *In re A.H. Robbins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989) (same), abrogated on other grounds by *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 477 (S.D. Ohio 2004) ("Before delving into the 'rigorous analysis' required by Rule 23, a court first should consider whether a precisely defined class exists and whether the named plaintiffs are members of the proposed class"); *Robinson v. Gillespie*, 219 F.R.D. 179, 183 (D. Kan. 2003) ("In determining whether to certify a class, the court begins with the proposed definition of the class" because "[a]bsent a cognizable class, determining whether Plaintiffs . . . satisfy the other Rule 23(a) and (b) requirements is unnecessary" (internal quotations omitted)); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 346 (S.D. Ga. 1996) ("Before considering the requirements of Rule 23 . . . a court must determine whether a class exists that can adequately be defined. . . . [C]lass definition is an implicit requirement which must be met before a Rule 23 analysis can be undertaken by the district court").

for how class members could be determined. The Nucoa product was one that could be purchased by anyone. Neither SBI nor anyone else has any way of determining who is and is not a class member, which renders any [R]ule 23(b)(3) class impossible because it cannot be ascertained."[51] Aside from this comment, included in the section of its brief dedicated to Article III standing, Smart Balance does not explain why the class is not ascertainable.

District courts in California routinely certify consumer class actions where class members' identities are not known at the time of certification, and where notice will be required to allow class members to self-identify. See, e.g., *Tchoboian v. Parking Concepts*, No. SACV 09-422 JVS (ANx), 2009 WL 2169883, *5 (C.D. Cal. July 16, 2009) ("[A]lthough the class members are not currently known, they are objectively ascertainable, certainly by themselves on notice of the pendency of a certified class. . . . [T]here may be some difficulty in ascertaining the class. However, the Court can imagine methods of identifying the class members, including publishing a notice of the action and allowing class members to come forward"); *Zeisel*, 2011 WL 2221113 at *6 ("Diamond argues that it is not administratively feasible to determine if a person is a member of the proposed class because it sells its Shelled Walnut products to retailers and it does not track consumer purchases. Diamond also argues that it sells numerous other nut products and that neither the prospective class members nor the Court would have a means by which they could determine whether they purchased the Shelled Walnut products at issue in this litigation. The Court is not persuaded. The proposed class includes (1) all persons (2) who purchased Shelled Walnut Products in 6 ounce, 10 ounce, 16 ounce and/or 3 pound bags (3) which bore labels bearing the Structure Function Claim and Banner (4) from March 22, 2006 through the present. The Court does not find this definition to be subjective or imprecise. Rather, it includes objective characteristics that would permit a consumer to identify themself as a member of the proposed class[,]" citing *Parkinson v. Hyundai Motor America*, 258 F.R.D. 580, 594 (C.D. Cal. 2008) ("The class definition identifies a particular make, model, and production period for the class vehicle, while excluding from the class persons who did not pay for repairs, persons who paid for

[51]Opp. at 22-23.

repairs outside the warranty period, and certain persons affiliated with defendant. Because the proposed class definition allows prospective plaintiffs to determine whether they are class members with a potential right to recover, the defined class is sufficiently ascertainable" (citation omitted)); *Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 336 (N.D. Cal. 2010) ("The definition of the class is relatively straightforward. Class members must (1) live in the United States and (2) own a home within which a Superior or Lennox brand single-paned sealed glass front fireplace was installed after a particular date. This definition is not subjective or imprecise. Unnamed Plaintiffs will be able to identify the alleged offending products by viewing the exposed face of their fireplace, which will either bear the name Superior or Lennox"); *Chavez v. Blue Sky Nat. Bev. Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010) ("Plaintiff proposes a class of all persons who (1) purchased any beverage bearing the Blue Sky mark or brand (2) in the United States (3) between May 16, 2002 and June 30, 2006. By these objective criteria the members of the proposed class can be ascertained by 'tangible and practicable standards for determining who is and who is not a member of the class'")).

Here, Yumul's proposed classes include (1)(a) all persons who purchased Nucoa Real Margarine; (b) in the United States; (c) on or after January 1, 2000; (d) for their own use, rather than resale or distribution; and (2)(a) all persons who purchased Nucoa Real Margarine; (b) in the United States; (c) on or after February 8, 2006; (d) for their own use, rather than resale or distribution. Because these classes are reasonably ascertainable through commonly used methods such as publication of class notice and self-identification, the court concludes that this prerequisite to certification has been satisfied.[52]

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[52]Moreover, because all Nucoa packages contained the same representations during the class period, this is unlike other false advertising class actions where defendants made non-uniform claims to the proposed class, such that there is a possibility that the proposed class includes members who were not exposed to the allegedly misleading representations. Cf. *Sanders v. Apple, Inc.*, 672 F.Supp.2d 978, 991 (N.D.Cal. 2009) (declining, in a false advertising suit, to certify a class of "all persons who own a twenty-inch Aluminum iMac" because, *inter alia*, "t]his definition necessarily includes individuals who did not purchase their 20-inch Aluminum iMac, [and] individuals who . . . did not see or were not deceived by [the] advertisements. . ."); *Hodes v. Van's Intern. Foods*, No. CV 09-01530 RGK (FFMx), 2009 WL 2424214, *4 & n. 5

D. Numerosity

Under the Federal Rules of Civil Procedure, before a class can be certified, the court must determine that the class is "so numerous that joinder of all members is impracticable." See FED.R.CIV.PROC. 23(a)(1). "Impracticability does not mean impossibility,.[however,] . . . only . . . difficulty or inconvenience in joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (internal quotations omitted). There is no set numerical cutoff used to determine whether a class is sufficiently numerous; courts must examine the specific facts of each case to evaluate whether the requirement has been satisfied. See *General Tel. Co. v. EEOC*, 446 U.S. 318, 329-30 (1980). "As a general rule, [however,] classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (citing 3B J. Moore & J. Kennedy, MOORE'S FEDERAL PRACTICE ¶ 23-05[1] (2d ed. 1987)). "'Where the exact size of the proposed class is unknown, but general knowledge and common sense indicate it is large, the numerosity requirement is satisfied.'" *In re HiEnergy Technologies, Inc. Sec. Litig.*, No. CV 08-1226 DOC (JTLx), 2006 WL 2780058, *3 (C.D. Cal. Sept. 26, 2006) (quoting *In re Intermec Corp. Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 96, 178 (W.D. Wash. 1991)). Yumul has adduced evidence that there were 320,900 separate "buying households" that purchased Nucoa in the twelve months ending June 26, 2010.[53] This number easily satisfies the numerosity requirement of Rule 23. Furthermore, Smart Balance earlier conceded that the numerosity requirement is satisfied and

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(C.D. Cal. July 23, 2009) (stating, in a putative class action challenging allegedly false nutritional information provided regarding certain varieties of frozen waffles and not others, that "the Court has concerns about how Plaintiffs will identify each class member and prove which brand of Van's frozen waffles each member purchased. . . . Plaintiffs lose sight of the . . . individualized purchasing inquiries that remain in this case," citing *Mahfood v. QVC, Inc.*, No. SACV 06-0659-AG (ANx), 2008 WL 5381088, *4-5 (C.D. Cal. Sept. 22, 2008) (refusing to certify a class because there was no evidence that defendant made a single, uniform misrepresentation)).

[53]Weston Decl., Exh. K at 1.

perhaps for this reason, did not address this prerequisite in its opposition to the pending motion.[54]

E. Commonality

Commonality requires "questions of law or fact common to the class." See FED.R.CIV.PROC. 23(a)(2). The commonality requirement is construed liberally, and the existence of some common legal and factual issues is sufficient. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982); accord *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively"); see also, e.g., *Ventura v. New York City Health & Hosps. Corp.*, 125 F.R.D. 595, 600 (S.D.N.Y. 1989) ("Unlike the 'predominance' requirement of Rule 23(b)(3), Rule 23(a)(2) requires only that the class movant show that a common question of law or fact exists; the movant need not show, at this stage, that the common question overwhelms the individual questions of law or fact which may be present within the class"). As the Ninth Circuit has noted: "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019.

That said, the putative class' "claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. 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." *Dukes III*, 2011 WL 2437013, *7. Although "for purposes of Rule 23(a)(2) even a single common question will do," *id.* at *11, "'[w]hat matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" *Id.* at *7 (citing Nagareda, Class Certification in the Age of

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[54]Opposition to First Motion to Certify Class, Docket No. 57 (December 20, 2010) at 14.

Aggregate Proof, 84 N.Y.U.L.REV. 97, 132 (2009)).

Here, as in other recently certified consumer class actions, common questions abound. These include: whether the representations on Nucoa labels violated the FDCA; whether they were misleading; if so, whether the representations were material to Nucoa consumers; and if reasonable consumers who purchased Nucoa were deceived by a material misrepresentation, what methodology should be used to calculate their damages.[55] See *Johnson*, 2011 WL 1514702 at *3 ("Johnson's UCL and CLRA claims present core issues of law and fact that are common and suitable for adjudication on a classwide basis. These issues include: (1) whether General Mills communicated a representation – through YoPlus packaging and other marketing, including television and print advertisements – that YoPlus promoted digestive health; (2) if so, whether that representation was material to individuals purchasing YoPlus; (3) if the representation was material, whether it was truthful; in other words, whether YoPlus does confer a digestive health benefit that ordinary yogurt does not; and (4) if reasonable California consumers who purchased YoPlus were deceived by a material misrepresentation as to YoPlus' digestive health benefit, what is the proper method for calculating their damages. The commonality requirement is . . . met here"); *Zeisel*, 2011 WL 2221113 at *7 (finding commonality because "Zeisel alleges that the putative class was exposed to the same misleading and misbranded labels. According to his theory, the case will focus on whether those statements were reasonably likely to deceive members of the general public and whether they are unlawful"); *Kingsbury*, 2011 WL 2619231 at *4-5 ("The common question of fact in this case arises out of Pulte's use of the standard form purchase agreement, which Plaintiff and other consumers signed, and wherein Pulte stated that its insulation was 'blown' (not 'wet-blown') and failed to include information regarding the moisture retention

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[55]Smart Balance does not appear to dispute that the commonality requirement of Rule 23(a) is satisfied. It argues instead that individual issues predominate such that certification is not warranted under Rule 23(b)(3). (See Opp. at 20-23). The court addresses that concern below. See *Keilholtz*, 268 F.R.D. at 337 ("Although Defendants assert that this case does not satisfy Rule 23(a)'s commonality provision, their arguments actually focus on whether common issues predominate, and thus are more appropriately directed at the issue of certification under Rule 23(b)(3), discussed below").

issues of which Pulte was aware. . . . [T]he representations were made to Plaintiff in a standard purchase agreement, and thus, Plaintiff has met the commonality requirement[,]" citing *Yokoyama v. Midland Life Ins. Co.*, 594 F.3d 1087 (9th Cir.2010) ("These plaintiffs base their lawsuit only on what [Defendant] Midland did not disclose to them in its forms. The jury will not have to determine whether each plaintiff subjectively relied on the omissions, but will instead have to determine only whether those omissions were likely to deceive a reasonable person. . . . The plaintiffs have thus crafted their lawsuit so as to avoid individual variance among the class members. . . . [T]he fact-finder will focus on the standardized written materials given to all plaintiffs and determine whether those materials are 'likely to mislead consumers acting reasonably under the circumstances'")).[56]

The court therefore concludes that the commonality requirement has been met.

F. Typicality

Typicality requires a determination as to whether the named plaintiff's claims are typical of those of the class members she seeks to represent. See FED.R.CIV.PROC. 23(a)(3). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; see also *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985) ("A plaintiff's claim meets this requirement if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory").

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class

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[56]The Supreme Court's recent opinion in *Dukes III* does not compel a contrary conclusion. While the Court held that plaintiffs in an employment discrimination class action had "not established the existence of any common question," *Dukes III*, 2011 WL 2437013 at *11, it based this conclusion primarily on plaintiffs' failure to adduce evidence of a companywide discriminatory pay and promotion policy, and to demonstrate that all members of the class were subject to the same discriminatory treatment. Here, there is no question that all class members were exposed to the same allegedly false and misleading advertising and labels. As in the cases cited above, where all consumers were exposed to the same allegedly misleading materials, the commonality requirement is satisfied.

members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508 (citation and internal quotations omitted). Typicality, like commonality, is a "permissive standard[ ]." *Hanlon*, 150 F.3d at 1020. Indeed, in practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 n. 13 (1982). See also *Dukes III*, 2011 WL 2437013 at *7 n. 5 ("We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest;'" citing *Falcon*). Typicality may be found lacking, however, "if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Hanon*, 976 F.2d at 508 (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)); see also *J.H. Cohn & Co. v. Am. Appraisal Assoc., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) ("[E]ven an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation").

Smart Balance contends that Yumul is subject to "substantial unique defenses in two regards."[57] Noting Yumul's "attempt[ ] to avoid the statute of limitations by invoking a delayed discovery argument[,]" it "is simply not plausible that [she] was not on notice of the alleged possible effects of trans fat" given the specialized knowledge she had as a mental health nurse.[58] Yumul asserts that she "did not know . . . the extent of the connection between trans fact and

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[57]Opp. at 18.

[58]*Id.*

disease until shortly before bringing this lawsuit"[59] because, like all consumers, she is "not an expert on nutrition, and does not typically read or have access to . . . scholarly journals . . . where the scientific evidence on trans fat's dangers has been published."[60] In addition, she contends that "many of [Smart Balance's] unlawful labeling practices . . . were . . . omissions and violations of federal law, and . . . [she] is not an expert on FDA regulations."[61]

The evidence on which Smart Balance relies to argue that Yumul's claims of ignorance are implausible is thin. Smart Balance contends that Yumul's work as a mental health nurse indicates she has extensive training and experience in nutrition. As Yumul's deposition makes clear, however, she works with indigent patients who have conditions like schizophrenia, major depression, or bipolar disorder,[62] whom counsels on issues such as "cop[ing] with . . . mental illness, preventing relapse and maintaining community life."[63] Asked "what kind of things [she] do[es] pertaining to diet and nutrition" for her clients; Yumul stated that she works with them primarily on "budgeting" and "food choices of what to buy . . . like places where they could get groceries."[64] Asked what she "generally tell[s] folks about reading food labels as part of [her] counseling practice[,]" Yumul responded that she "focus[es] on the calories" and "[i]f there's more, [she] refer[s] them to the nutritionist [or dietician], because [the clinic] ha[s] a dietician, and . . . a nutritionist, so if anything is particular to [a client's] illness, it's not [her] specialty."[65] While this testimony could be read to suggest that Yumul has more exposure to nutritional issues

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[59]Reply at 17.

[60]FAC, ¶ 157.

[61]*Id.*, ¶ 158.

[62]Weston Reply Decl., Exh. A (Deposition of Rebecca Yumul ("Yumul Depo.")) at 19:10-18.

[63]*Id.* at 22:22-23:1.

[64]*Id.* at 18:3-12.

[65]*Id.* at 28:10-16.

on a daily basis than some consumers, her testimony made clear that she is not an nutritional expert and that her counseling for the most part involves imparting commonly known information, such as the importance of food budgeting, fresh groceries, and where to look on a food label for calorie information.[66]

Furthermore, the court disagrees with Smart Balance that Yumul's diabetes and diagnosed high cholesterol defeat typicality. Smart Balance argues the fact that Yumul "is a diabetic who was warned by her doctor and nutritionist to limit her consumption of fats as far back as 1996" renders implausible her assertion that she was ignorant of the effects of trans fats until shortly before filing this lawsuit.[67] Yumul testified that her doctor told her in 2002 to "[w]atch out for [her] cholesterol level [and] foods that are high in fat" as a result of her high cholesterol.[68] When Yumul was diagnosed with diabetes, her doctor gave her the same information.[69] She stated, however, that although her doctor advised her to avoid dietary cholesterol, he did not discuss trans fats with her.[70] As Yumul notes, Smart Balance's own advertising documents show that "'100 million people have elevated cholesterol' (of 305 million Americans), and that '42% are treating their cholesterol level in some way.' Similarly, '71 million Americans have cardiovascular disease.'"[71] The fact, therefore, that Yumul has elevated cholesterol does not necessarily make her different than the class as a whole. This is particularly true given that Smart Balance "targets health-conscious consumers," making it more likely that the class is populated with individuals

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[66]The fact that the common area of the Los Angeles Department of Mental Health building in which Yumul works contains two pamphlets regarding nutrition and the fact that Yumul had a nursing textbook in her office with three pages instructing nurses to analyze the amount of fat and saturated fat in a patient's diet do not demonstrate that "[i]t is simply not plausible that Plaintiff was not on notice of the alleged possible effects of trans fat." (Opp. at 18.)

[67]*Id.*

[68]Yumul Depo. at 68:1-25.

[69]*Id.* at 70:8-71:2.

[70]*Id.* at 124:20-124:12.

[71]Reply at 21 (citing Weston Reply Decl., Exh. R at 1).

who have high cholesterol, heart disease, diabetes, and other health concerns, and who purchased Nucoa in reliance on Smart Balance's health-related claims. See *Zeisel*, 2011 WL 2221113 at *8 ("The record indicates that Zeisel has a specific medical condition that Diamond argues renders him atypical. The Court finds this argument unpersuasive. Based on Zeisel's theory of the case, namely that the Shelled Walnut Products were misbranded and misleading, the Court concludes that his claims – notwithstanding his medical condition – are 'reasonably co-extensive with those of absent class members,'" citing *Hanlon*, 150 F.3d at 1020)).

Smart Balance also asserts that it "has a strong individual defense . . . to [Yumul's claims] because her behavior . . fails to meet the 'reasonable consumer' standard." It contends that "[d]espite her training and diabetes, [Yumul], in over ten years, never read the nutritional information on the Nucoa label (which disclosed the presence of trans fat). . . ."[72] It notes as well that "after she was informed by her attorney of the health risks of trans fat, [Yumul] stopped using Nucoa, and began using Land O' Lakes margarine that has a higher trans fat content than Nucoa. [She] then switched to butter which, . . . of course, contains cholesterol, the very ingredient that [Yumul] claims she hoped to avoid by consuming Nucoa, [as well as] much more saturated fat than the other two products."[73] Smart Balance argues that this pattern of conduct "calls into severe question the reasonableness of her behavior."[74]

The court has previously rejected Smart Balance's first point, i.e., that Yumul's failure to read the label, which would have revealed Nucoa's trans fat content, renders her an "unreasonable consumer" as a matter of law. In the court's first order partially granting Smart Balance's motion to dismiss, the court noted that this argument

> "runs afoul of the Ninth Circuit's decision in [*Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008)]. There, defendant advanced an argument identical to the one that Sunny Delight made before Judge Klausner and that Smart

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[72]Opp. at 18.

[73]*Id.* at 18-19.

[74]*Id.* at 19.

Balance makes here – i.e., that the federally regulated nutritional label revealed the truth [concerning] the product's contents. The court stated:

> 'We disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. The ingredient list on the side of the box appears to comply with FDA regulations and certainly serves some purpose. We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.' *Williams*, 552 F.3d at 939. . . .

Williams stands for the proposition that where product packaging contains an affirmative misrepresentation, the manufacturer cannot rely on the small-print nutritional label to contradict and cure that misrepresentation. . . . Viewing the facts in the light most favorable to plaintiff, . . . the court cannot find that this case presents 'the rare situation in which granting a motion to dismiss is appropriate.' *Williams*, 523 F.3d at 939. Rather, the court concludes that 'the parties should be able to submit evidence to demonstrate whether a reasonable consumer would find the labeling on the subject [product] to be deceptive.' *Hitt v. Arizona Beverage Co., LLC*, No. 08cv809 WQH (POR), 2009 WL 449190, *7 (S.D. Cal. Feb. 4, 2009)."[75]

There is, indeed, a more fundamental problem with Smart Balance's assertion that Yumul's allegedly unreasonable conduct renders her claim atypical. In *Miletak v. Allstate Ins. Co.*, No.

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[75]First Order at 14-15.

C 06-03778 JW, 2010 WL 809579, *11 (N.D. Cal. Mar. 5, 2010), a class action alleging that an insurer used misleading bills to obtain payment of insurance premiums thirty or more days before the renewal date, defendants argued that the "typicality requirement [was] not met because [p]laintiff did not read his policy documents or other notices." The court found "[d]efendants' contention unavailing because the Court applies an objective 'reasonable consumer' standard in determining whether [d]efendants' billing statements or other materials are fraudulent within the meaning of the UCL. . . . Plaintiff's alleged failure to carefully scrutinize the Statements is not relevant to establishing his claim or those of the absent class members [and thus his] . . . claims are typical of the proposed class." *Id.* See also *Menagerie Prods. v. Citysearch*, No. CV 08-4263 CAS (FMO), 2009 WL 3770668, *13 (C.D. Cal. Nov. 9, 2009) ("The Court agrees with plaintiffs that common issues predominate with regard to plaintiffs' claim of a common classwide omission under the 'fraudulent' prong of the UCL. This UCL claim will be adjudicated under the 'reasonable consumer' standard rather than by examining the individual circumstances of each plaintiff," citing *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 332-34 (1998)). Given these cases, the court concludes that Yumul's allegedly unreasonable conduct does not defeat typicality.

Having rejected Smart Balance's arguments, the court concludes that Yumul's claims are typical of the class. Yumul asserts that Smart Balance deceptively marketed Nucoa as "Cholesterol Free" and "healthy" to induce consumers to purchase the product, despite the fact that it contained a substantial amount of trans fat, which increased consumers' risk of cardiovascular and other disease. This claim is identical to the claims of other members of the class. See *Johnson*, 2011 WL 1514702 at *3 (finding typicality where "Johnson claims that he, like other reasonable consumers, purchased YoPlus in reliance on General Mills' representation that YoPlus promotes digestive health. He asserts that this representation was communicated by the packaging of YoPlus and by General Mills' marketing and advertising efforts including a television commercial that he saw. He further contends that YoPlus did not live up to this representation and that he suffered damages as a result"); *Kingsbury*, 2011 WL 2619231 at *5 ("Defendant contends Plaintiff does not meet this requirement, focusing its analysis on Plaintiff's claims involving oral representations and fraudulent or misleading advertising brochures. Those

arguments are unavailing. The Court finds Plaintiff has met the typicality requirement here insofar as each class member's claim arises from the same standard form purchase agreement" (record citations omitted)); *Chavez*, 268 F.R.D. at 377-78 ("Defendants argue that plaintiff's claims are not typical of the purported class. . . . Plaintiff's claims here arise out of the allegedly false statement, worded in several variations, made on every Blue Sky container indicating that the beverages are connected to Santa Fe, New Mexico and therefore arise from the same facts and legal theory. Because plaintiff alleges that all the Blue Sky beverages bore substantially the same misrepresentation, . . . , his claims are 'reasonably coextensive with those of absent members'" (citations omitted)).

G. Adequacy

The adequacy of representation requirement set forth in Rule 23(a)(4) involves a two-part inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020; accord *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Other than suggesting that her claims are atypical of those of other class members, Smart Balance does not argue that Yumul is not an adequate class representative.[76] Because the court has found that Yumul's claims are typical, it concludes that she is also an adequate class representative. Moreover, having reviewed the evidence Yumul has presented, the court finds that there is no apparent conflict between her and other members of the putative class, and that her counsel is competent and has diligently prosecuted the action. The court thus concludes that they are able adequately to represent the consumer class.[77]

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[76]See Opp. at 17 ("If a plaintiff is not a typical representative, she is also not an adequate representative.").

[77]In August 2010, the Weston Firm's ("Weston") former co-counsel, Beck & Lee, sought to have Weston disqualified from representing the putative class, alleging that Weston had engaged in unethical conduct, including the offering of kickbacks to named plaintiffs in other class actions. The court declined to disqualify Weston at that time, because none of the allegedly unethical conduct had taken place in this action, and because it concluded that the matter was more properly considered in the context of a motion for class certification. The court granted

H. Whether Plaintiff Has Satisfied the Requirements of Rule 23(b)(3)

Rule 23(b)(3) requires two separate inquiries: (1) do issues common to the class "predominate" over issues unique to individual class members, and (2) is the proposed class action "superior" to other methods available for adjudicating the controversy. See FED.R.CIV.PROC. 23(b)(3).

1. Predominance

The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a). *Amchem Products*, 521 U.S. at 623-24. 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," then "there is clear justification for handling the dispute on a representative rather than on an individual basis," and the predominance test is satisfied. *Hanlon*, 150 F.3d at 1022. "'[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, [however,] a Rule 23(b)(3) action would be inappropriate.'" *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778, at 535-39 (1986)). This is because, *inter alia*, "the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Id.*

Smart Balance asserts that individual issues predominate because the elements of Yumul's statutory claims and the statute of limitations raise predominating individual issues.[78]

a. Materiality

Smart Balance's request to modify the scheduling order to allow it to explore the alleged ethical breaches, so that it could present evidence relevant to them in opposition to any future class certification motion. As Smart Balance has not argued that either Yumul or Weston are inadequate due to their involvement in ethical violations in its opposition, the court concludes that Beck & Lee's allegations do not compel a finding that the adequacy requirement is not satisfied.

[78]Defendant also asserts that Article III standing requirements raise predominating individual issues. As the court addressed that "threshold" issue above, it need not repeat that analysis here.

Smart Balance first argues that a class cannot be certified under Rule 23(b)(3) "because causation and reliance will be subject to individual, not common, proof as to each proposed class member."[79] In support, it proffers the expert declaration of Professor Yoram Wind. Wind opines that the misrepresentations and FDCA violations alleged in Yumul's fourth amended complaint are the type of technical violation that is generally immaterial to consumers, because the violations do not deprive consumers of material information or mislead them in a material way.[80] On this basis, Smart Balance contends that whether a representation or FDCA violation is "material to a particular consumer is an individual issue[,]" and thus that the predominance requirement is not satisifed.

This argument is contrary to numerous decisions certifying class actions despite the fact that consumers' purchasing decisions may have been motivated by a number of factors, of which the alleged misrepresentation is only one. *Zeisel*, 2011 WL 2221113 at *10 (finding that the predominance requirement was satisfied, and stating: "Diamond's argument and evidence focus largely on its position that the disputed labels were not material to a reasonable consumer. That argument goes to the merits of Zeisel's claims, and Diamond does not argue persuasively that Zeisel w[ill] be unable to establish reliance by means of common proof. Similarly, Diamond fails to rebut Zeisel's argument that . . . whether the labels were misbranded and whether its conduct was 'unfair,' within the meaning of Section 17200, also are capable of resolution by common proof"); *Chavez*, 268 F.R.D. at 378-79 ("Defendants contend that not all potential class members relied on the Santa Fe representations and may have had other reasons to buy Blue Sky beverages. The state supreme court made clear, however, that '[t]he substantive right extended to the public by the UCL is the right to protection from fraud, deceit and unlawful conduct, and the focus of

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[79]Opp. at 20.

[80]*Id.* (citing Wind Decl., ¶¶ 5-7, 12-13)). Yumul objects to Wind's declaration on the basis that his opinions were not timely disclosed, that they are irrelevant, that they are speculative, and that they lack foundation. (Objection to Wind Declaration at 1-28.) As the court cannot accept Smart Balance's argument that individual issues of reliance and causation defeat certification, the court need not address Yumul's objections at this time.

the statute is on the defendant's conduct.' *Tobacco II*, 46 Cal.4th at 324[.] The court recognized the certified class as consisting of 'members of the public who were exposed to defendants' allegedly deceptive advertisements and misrepresentations and who were also consumers of defendants' products during a specific period of time.' *Id.* The class issues similarly predominate over individual issues here"); *Keilholtz*, 268 F.R.D. at 342 ("'The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all. Thus, it is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class.' Therefore, Plaintiffs may prove with generalized evidence that Defendants' conduct was 'likely to deceive' purchasers of their fireplaces," citing *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282, 1292-93 (2002)); *Johnson*, 2011 WL 1514702 at *4 ("In this case, common issues underlying Mr. Johnson's UCL and CLRA claims predominate. As explained, the central issues raised by this suit concern an allegedly overriding, material misrepresentation that YoPlus promotes digestive health in a way that ordinary yogurt does not. According to Mr. Johnson, this misrepresentation was communicated by the packaging of YoPlus and further amplified by General Mills' marketing including television, newspaper, magazine, and internet advertisements. . . . Contrary to General Mills' suggestion, individualized proof of deception and reliance are not necessary for Mr. Johnson to prevail on the class claims. Again, the common issue that predominates is whether General Mills' packaging and marketing communicated a persistent and material message that YoPlus promotes digestive health"); *Mass. Mut. Life Ins.*, 97 Cal.App.4th at 1294 (holding that the "ultimate question of whether the undisclosed information [is] material [is] a common question of fact suitable for treatment in a class action"). The court therefore finds that issues regarding causation and reliance do not defeat class certification.

b. Statute of Limitations

Next, Smart Balance contends that its "statute of limitations defense cannot be decided on

a class-wide basis."[81] Yumul disputes this, asserting that she can "submit common proof [from] which a jury could find [that the] delayed discovery [rule] . . . appl[ies]."[82] Yumul cites portions of her complaint alleging that although she is a "reasonably diligent consumer," she "lacked the means to discover [Smart Balance's deceptive] practices because; like nearly all consumers, she

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[81]Opp. at 23. Smart Balance does not argue this point in its opposition. Instead, it directs the court to the opposition it filed to Yumul's first class certification motion. This attempt to evade the page limitations set forth in the Local Rules is unacceptable. Indeed, courts in this circuit have repeatedly rejected this kind of "incorporation by reference." See *Cirulli v. Hyundai Motor Co.*, No. SACV 08-0854 AG (MLGx), 2009 WL 5788762, * 2 (C.D. Cal. June 12, 2009) ("Preliminarily, the Court notices that in the [motion] and [reply], Defendant makes a habit of incorporating filings related to its previous motion to dismiss. . . . For example, Defendant says: 'Rather than re-brief the same arguments herein, [Defendant] refers to and incorporates by reference those arguments raised in its prior briefs.'. . . In fact, in the Motion alone, Defendant uses this technique at least seven times. A more cynical court might view this 'incorporation by reference' as a thinly-veiled attempt to make an end-run around the page limits set forth in Local Rule 11-6, which says that "[n]o memorandum of points and authorities . . . shall exceed 25 pages in length ... unless permitted by order of the judge." This Court will simply note that this practice of 'incorporation by reference' disregards the spirit of the Local Rules and is unfair to Plaintiff. The Court orders Defendant not to use this practice in the future"); *AT&T Communications of California v. Pacific Bell*, No. C 96-1691 SBA, 1996 WL 940836, *11 n. 18 (N.D. Cal. July 3, 1996) ("This type of incorporation by reference is inadequate and unacceptable. The Court's Local Rules provide for a 25 page limit on any memorandum of points and authorities. Plaintiffs' motion used all 25 pages. Plaintiffs cannot avoid the page limitation by purporting to incorporate all arguments which were previously made in connection with other motions").

While the court will consider the merits of the argument, it places defense counsel on notice that should it engage in this practice in litigating further motions before this court, whether in this case or others, the court will disregard any arguments not contained within the 25-page memorandum counsel files. Should counsel need additional pages to address issues fully, he can make an appropriate application to the court.

The court notes, in the same vein, that Yumul too has not been entirely respectful of the court's rules regarding page limitations. On July 1, 2011, she filed an *ex parte* application seeking an increase in the page limits for her reply brief. The court granted the application in part because Yumul represented she would "incorporate the Supreme Court's recent treatment of class certification issues" in *Dukes [III]*, . . . which was issued after her opening brief." (Ex Parte, Docket No. 106 (July 1, 2011).) As noted, instead of addressing *Dukes III* in her reply, Yumul abandoned her request for certification under Rule 23(b)(2) and used the additional ten pages she had been granted arguing other issues.

[82]Reply at 13.

is not an expert on nutrition and does not typically read or have access to . . . scholarly journals such as The Journal of Nutrition, The European Journal of Clinical Nutrition, and The New England Journal of Medicine, where . . . scientific evidence on trans fat's dangers has been published:"[83]

Yumul also asserts that she will be able to offer common evidence suggesting that consumers "lacked knowledge and the means of obtaining knowledge of the claims" asserted because Smart Balance was "in a far superior position" to know of the purported misrepresentations and the injury they would cause, given its "specialized knowledge of the dangers of trans fat[,] . . . the degree to which *Cholesterol Free* and *healthy* advertisements influence consumer's purchases," and its violations of FDA regulations. Yumul contends that such matters were difficult for reasonable consumers to detect.[84]

To the extent Yumul contends that her delayed discovery was caused, in part, by Smart Balance's concealment of facts it was in a superior position to know, she is correct that her response to the statute of limitations defense will be subject to common proof. See *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 291, 310 (N.D. Cal. 2010) (certifying a class after finding that common issues predominated regarding the statute of limitations because the "critical inquiry" focused on defendant's behavior). Moreover, unlike *Keilholtz v. Lennox Hearth Products Inc.*, No. C 08-00836 CW, 2009 WL 2905960, *4 (N.D. Cal. Sept. 8, 2009), where the court found that plaintiffs had failed to show that the delayed discovery rule should be applied in favor of unnamed class members, Yumul affirmatively alleges that "the experiences of . . . unnamed class members [were] similar to [her] own." *Id.* She asserts that all class members were exposed to the same representations, that most consumers are not experts in nutrition, and that despite the fact that she was a "reasonably diligent consumer," she was not on notice of her claims until 2010. These allegations suggest that Yumul may be able to offer class-wide proof that Smart Balance had knowledge of facts that were not known and could not

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[83]FAC, ¶¶ 156-57.

[84]Reply at 15 (citation omitted).

reasonably be known to reasonable consumers in the exercise of reasonable diligence. Yumul asserts additionally that she will be able to show that class members discovered their claim when they received notice of the certification of this action.[85] Therefore, although questions regarding the statute of limitations and delayed discovery may raise some individualized inquiries, to the extent Yumul is typical of other class members, common issues will predominate.

Moreover, Yumul contends that, even if the court concludes that her delayed discovery allegations cannot be applied class-wide, "'individual issues relating to the statute of limitations do not bar certification where there is otherwise a sufficient showing of commonality.'"[86] This argument is supported by several decisions certifying a class despite the fact that the effect of the statute of limitations on the commencement of the class period remained an open question. See, e.g., *Bautista-Perez v. Holder*, No. C 07-4192 THE, 2009 WL 2031759, *7 (N.D. Cal. July 9, 2009) ("[W]hether [the class representative] and similarly situated class members . . . can prevail on the merits or are time-barred . . . is a question for a later stage of litigation. Their claims do not lack commonality simply because a legal question regarding the statute of limitations remains for resolution at the merits stage of litigation"); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 112 (N.D. Cal. 2008) (noting, in a class certification order, that "[i]t would be premature for the Court to make a determination on the merits of the tolling claim at this point in the litigation"); *Tussey v. ABB, Inc.*, No. 06-04305-CV-NKL, 2007 WL 4289694, *10 (W.D. Mo. Dec. 3, 2007) (certifying a class because "Tussey correctly argues that statute of limitations is an affirmative defense which has been raised by the parties in separate briefing," and which "is not yet properly before the Court"). To the extent that Yumul's class-wide delayed discovery allegations do not withstand a motion for summary judgment, therefore, the court will be free to alter the class period so as to include only claims that are not time-barred.

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[85] *Id.*

[86] *Id.* (quoting *In re Conseco Life Ins. Co. Lifetrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521, 531 n.8 (N.D. Cal. 2010) (citing *Cameron v. E.M. Adams & Co.*, 547 F.2d 473, 477-78 (9th Cir. 1976)).

For the reasons stated, the court concludes that common issues predominate in this action, and that this requirement of Rule 23(b)(3) is satisfied.

2. Superiority

"Under Rule 23(b)(3), the court must evaluate whether a class action is superior by examining four factors: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in a particular forum; and (4) the difficulties likely to be encountered in the management of a class action." *Edwards v. City of Long Beach*, 467 F.Supp.2d 986, 992 (C.D. Cal. 2006) (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004)).

On balance, these factors weigh in favor of certification. Yumul argues that her claims are the type that class members would not pursue individually and thus that they should be aggregated. The court agrees. Given that class members' damages are based on the purchase of a low cost product, most class members' recovery would be sufficiently small that they would not have a compelling interest in controlling the prosecution of separate actions. "[T]he modest amount at stake for each purchaser renders individual prosecution impractical. Thus, class treatment likely represents plaintiff's only chance for adjudication." *Pecover v. Elec. Arts Inc.*, No. C 08-2820 VRW, 2010 U.S. Dist. LEXIS 140632 (N.D. Cal. Dec. 21, 2010) (granting a motion to certify a class of video game purchasers). See *Amchem Products*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"); *Johnson*, 2011 WL 1514702 at *5 ("These factors clearly favor classwide resolution of Mr. Johnson's UCL and CLRA claims. In a consumer class action of this type involving the purchase of a relatively inexpensive food product, injured consumers are extremely unlikely to pursue their claims on an individual basis. That is especially true here given the great expense that would fall on individual class members if each class member had to provide scientific evidence and expert testimony in separate cases. Although there are similar YoPlus actions

pending against General Mills in other jurisdictions, it does not appear that those suits raise California state law claims on behalf of a class of California purchasers. This forum is appropriate for the resolution of such claims. Additionally, the likely difficulties of managing this suit on a classwide basis are manageable and should be undertaken in light of the significant common issues that exist and predominate over individual issues"); *Zeisel*, 2011 WL 2221113 at *11 (finding superiority where "[i]t [was] evident that there [were] potentially thousands of class members with small claims[,] t]here [were] no other actions pending that relate[d] to the issues raised[,] . . . and [t]here [was] nothing in the record to suggest that concentrating the litigation in this forum would be undesirable"); *Chamberlain v. Ford Motor Co.*, 223 F.R.D. 524, 527 (N.D. Cal. 2004) ("Here, few potential class members could afford to undertake individual litigation against Ford to recover the relatively modest damages at issue. Therefore, in the absence of a class action, few class members would have any meaningful redress against Ford as a practical matter. A class action is the superior method of resolving this controversy").

I. Whether to Apply California Law

Yumul seeks to apply California law to the claims of a nationwide class of consumers. Smart Balance contends that "there is no cognizable constitutional basis to apply California statutory law to the claims of non-California residents resulting from conduct originating outside of California."[87] "To apply California law to claims by a class of nonresidents without violating due process, the court must find that California has a '"significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair.'" *Keilholtz*, 268 F.R.D. at 339 (quoting *Phillips Petroleum, Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)). "'When considering fairness in this context, an important element is the expectation of the parties.'" *Id.* "[S]o long as the requisite significant contacts to

[87]Opp. at 25. The court notes that this argument is yet another example of defendant's unacceptable incorporation by reference strategy. (See *id.* at 24 ("As SBI demonstrated in its opposition to Plaintiff s initial motion for class certification, Plaintiff cannot sustain a nationwide class premised on the California statutory claims in this case.").)

California exist, a showing that is properly borne by the class action proponent, California may constitutionally require the other side to shoulder the burden of demonstrating that foreign law, rather than California law, should apply to class claims." *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906, 921 (2001) (rejecting amici curiae's argument that in a nationwide class action, the law of other states in which class members resided should govern their claims unless the proponent of class certification affirmatively demonstrated that California law was more properly applied).[88]

While Smart Balance is based in New Jersey and Nucoa is sold outside California, Yumul proffers undisputed evidence that Smart Balance derives the vast majority of its profit on sales of Nucoa from California. Documents produced by Smart Balance during discovery reveal that for the year ending January 25, 2009, California sales of Nucoa accounted for $2,010,426 of $2,127,000 total nationwide sales.[89] This means that California sales represented almost 94.5% of nationwide sales during that period. Smart Balance's Rule 30(b)(6) witness testified that Nucoa has always been exclusively sold on the west coast.[90] He also conceded that for the period from 1986 to 2007, Nucoa was produced at a plant in Los Angeles, California.[91] Given these contacts, the court concludes that applying California law to the claims of a nationwide class does not violate Smart Balance's due process rights. See *Keilholtz*, 268 F.R.D. at 339 (finding that "[o]verall, this class action involves a sufficient degree of contact between Defendants' alleged

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[88]In so concluding, the Court noted that "[a] number of federal courts ha[d] approved nationwide or multistate class action certification for pendent state law claims where the defendants [had] failed to show that foreign law [was] more properly applied to the claims of nonresident class members under California's governmental interest analysis." *Id.* (citing, *inter alia*, *Harmsen v. Smith*, 693 F.2d 932, 946-47 (9th Cir. 1982); *Roberts v. Heim*, 670 F.Supp. 1466, 1494 (N.D. Cal. 1987); *In re Pizza Time Theatre Securities Litigation*, 112 F.R.D. 15, 20-21 (N.D. Cal. 1986); *In re Computer Memories Securities Litigation*, 111 F.R.D. 675, 685 (N.D. Cal. 1986)).

[89]Weston Decl., Exh. L at 1.

[90]Weston Decl., Exh. C (Deposition of Robert Harris ("Harris Depo.")) at 45:15:18.

[91]*Id.* at 132:7-15.

conduct, the claims asserted and California to satisfy due process concerns" where nineteen percent of defendants' sales were made in California, and seventy-six percent of defendants' goods were partly manufactured, assembled or packaged at plants in California as well as partly in at least one other state); *Parkinson*, 258 F.R.D. at 597-98 ("Plaintiffs make a sufficient state contacts showing under *Shutts* to establish that application of California law comports with due process. . . . [P]laintiffs allege that defendant conducts substantial business in the state through its fifty California dealerships. Finally, given the volume of California automobile sales and the number of in-state dealerships, plaintiffs claim it is likely that more class members reside in California than any other state").

Because the court has found, as a threshold matter, that application of California law to the claims of the class does not violate due process, defendant bears the burden of showing that foreign law, rather than California law, should apply. *Keilholtz*, 268 F.R.D. at 340 (citing *Martin v. Dahlberg*, 156 F.R.D. 207, 218 (N.D. Cal. 1994); see *Church v. Consolidated Freightways*, No. C-90-2290 DLJ, 1992 WL 370829, *4 (N.D. Cal. Sept. 14, 1992) ("This Court generally presumed that California law will apply unless defendants demonstrate conclusively that the laws of the other states will apply")). Because Smart Balance has neither suggested a particular foreign law that should apply, nor presented evidence demonstrating that another state's law (1) is materially different from California's, (2) actually conflicts with California's, and (3) that that state has a greater interest in application of its law than California,[92] the court concludes that it has not met its burden of showing that the law of a jurisdiction other than California should

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[92]See *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 107-08 (2006) ("[T]he governmental interest approach generally involves three steps. First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied").

apply.[93]

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[93]In addition to the arguments opposing class certification that the court has addressed, Smart Balance attempts to reargue its prior motion to dismiss on preemption grounds. As the court informed counsel, orally at the telephonic status conference and in its April 12, 2011 order regarding the parties' scheduling stipulation, it "will not permit defendant to file a further motion to dismiss under Rule 12(b)(6) at this late stage in the litigation." (Order Re: Joint Scheduling Stipulation, Docket No. 80 (April 12, 2011 at 1.) The court therefore declines to address defendant's argument that the fourth amended complaint should be dismissed as preempted. Even if the court were to consider the merits of what amounts to defendant's fourth motion to dismiss, it would disagree that the claims are preempted. As the court found in its earlier order denying class certification, to the extent Yumul seeks to enforce federal food labeling regulations, and not to impose different or non-identical requirements, her claims are not preempted. (See Fourth Order at 15-23.) In her fourth amended complaint, Yumul alleges that Smart Balance violated several specific food labeling regulations and that this mislabeling rendered Nucoa's labels false and misleading. To the extent Yumul seeks to impose liability under the UCL, FAL, and CLRA for labeling or representations that contravened the FDCA regulations, the claims are not preempted.

The court rejects Smart Balance's argument that "[u]nder primary jurisdiction, the hyper technical labeling claim raised by [Yumul] . . . should, in the first instance, be reserved for the FDA, which has shown no previous concern about the labeling omission challenged . . . ." (Opp. at 16.) In *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 63-64 (1956), the Supreme Court explained that "[t]he doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* (citing *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)). Dismissal on primary jurisdiction grounds "does not speak to the jurisdictional power of the federal courts," but rather "structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." *United States v. Bessemer & L.E.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983).

As other courts that have considered this argument have found, "[t]he question whether defendants have violated FDA regulations and marketed a product that could mislead a reasonable consumer is one courts are well-equipped to handle, and is not an appropriate basis for invoking the primary jurisdiction doctrine. . . . [T]he FDA is aware of plaintiffs' concerns but lacks the resources to take enforcement action in every instance in which its policies are violated. . . . [T]he ultimate issue is whether consumers could reasonably be misled by the violations, a question that courts are well-equipped to handle. Finally, deferral to the FDA is unlikely to result in a

III. CONCLUSION

For the reasons stated, the court grants plaintiff's motion to certify a class comprised of all persons (excluding officers, directors, and employees of SBI) who purchased, on or after January 1, 2000 Nucoa Real Margarine in the United States for their own use, rather than resale or distribution; and a class of all persons (excluding officers, directors, and employees of SBI) who purchased, on or after February 8, 2006 Nucoa Real Margarine in the United States for their own use, rather than resale or distribution.

DATED: July 25, 2011

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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timely resolution of plaintiffs' claims. The FDCA does not provide a private right of action, and there is no reason to believe the plaintiffs could obtain a timely determination from the FDA concerning the merits of their claims." *Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG)(RML), 2010 WL 2925955, *14 (E.D.N.Y. July 21, 2010) (citing *Lockwood v. Conagra Foods, Inc.*, 597 F.Supp.2d 1028, 1035 (N.D. Cal. 2009) (denying a motion to dismiss a class action under the primary jurisdiction doctrine where plaintiff alleged that defendant's advertisement of a pasta sauce as "all natural" violated the UCL because the product included high fructose corn syrup, and noting that "this is not a technical area in which the FDA has greater technical expertise than the courts – every day courts decide whether conduct is misleading"); *Torres-Hernandez v. CVT Prepaid Solutions, Inc.*, No. 3:08-cv-1057 FLW, 2008 WL 5381227, *4 (D.N.J. Dec. 17, 2008) (declining to dismiss on primary jurisdiction grounds and observing that "the case at bar [simply] requires this Court to determine whether Plaintiff and those similarly situated received what they bargained for"); see also *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994) (noting, in considering primary jurisdiction, that "[t]here clearly is a public interest in reasonably prompt adjudication"); *In re Farm Raised Salmon Cases*, No. B 182901a, 2008 WL 2070612, *3-4 (Cal. App. 2008) (rejecting dismissal on primary jurisdiction grounds because an adequate administrative remedy was lacking under the FDCA)). The court therefore will not stay or dismiss the complaint so as to allow these issues to be presented to the FDA.