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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

)	CASE NO. CV 11-05379 MMM (AGR _x)
)	
)	ORDER DENYING PLAINTIFFS’
)	MOTION FOR CLASS CERTIFICATION;
IN RE CONAGRA FOODS, INC.)	GRANTING IN PART AND DENYING IN
)	PART DEFENDANTS’ MOTION TO
)	STRIKE
)	
)	
)	

On June 28, 2011, Robert Briseno filed a complaint against ConAgra.¹ Between October and December 2011, the court consolidated several cases filed against ConAgra under the caption indicated above.² On January 12, 2012, plaintiffs filed a First Consolidated Amended Complaint.³

¹Complaint, Docket No. 1 (June 28, 2011).

²Minutes (In Chambers): Order Taking Off Calendar and Denying as Moot Motion of Plaintiffs Briseno and Toomer to Consolidate Related Actions and Designate Interim Class Counsel, Docket No. 33 (Oct. 6, 2011); Order Consolidating Cases, Docket No. 56 (Nov. 28, 2011); Order Re Stipulation to Consolidate Related Actions, Docket No. 59 (Dec. 9, 2011); Amended Order Granting Stipulation Re Amended Consolidated Complaint, Response to Amended Consolidated Complaint, and Consolidation of Additional Action, Docket No. 61 (Dec. 9, 2011). The consolidated cases are *Robert Briseno v. Conagra Foods, Inc.*, CV 11-05379 MMM(AGR_x); *Christi Toomer v. Conagra Foods, Inc.*, CV 11-06127 MMM(AGR_x); *Kelly McFadden v.*

1 On February 24, 2012, ConAgra filed a motion to dismiss,⁴ which the court granted in part and
2 denied in part on November 15, 2012.⁵ On December 19, 2012, plaintiffs filed a Second
3 Consolidated Amended Complaint.⁶ On February 20, 2014, they filed a motion seeking an order
4 permitting the withdrawal of several named plaintiffs and the dismissal of their claims;⁷ the court
5 granted this motion on May 5, 2014.⁸ That same day, plaintiffs filed a motion for class
6 certification,⁹ which ConAgra opposes.¹⁰ On June 2, 2014, ConAgra filed a motion to strike the
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11 *Conagra Foods, Inc.*, CV 11-06402 MMM(AGR_x); *Janeth Ruiz v. Conagra Foods, Inc.*, CV
12 11-06480 MMM(AGR_x); *Brenda Krein v. Conagra Foods, Inc.*, CV 11-07097 MMM(AGR_x);
13 *Phyllis Scarpelli, et al. v. Conagra Foods, Inc.*, Case No. CV 11-05813 MMM (AGR_x); *Michele*
14 *Andrade v. ConAgra Foods Inc.*, CV 11-09208 MMM (AGR_x); and *Lil Marie Virr v. Conagra*
15 *Foods, Inc.*, CV 11-08421 MMM (AGR_x).

16
17 ³Consolidated Amended Class Action Complaint, Docket No. 80 (Jan. 12, 2012).

18 ⁴Motion to Dismiss, Docket No. 84 (Feb. 24, 2012).

19 ⁵Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss, Docket No.
20 138 (Nov. 15, 2012).

21 ⁶Second Amended Class Action Complaint (“SAC”), Docket No. 143 (Dec. 19, 2012).

22 ⁷Motion for Order for Allowing Withdrawal and Voluntary Dismissal, Docket No. 190
23 (Feb. 20, 2014). See also Corrected Memorandum of Points and Authorities in Support of
24 Plaintiffs’ Motion for Order Allowing Withdrawal and Voluntary Dismissal (“Motion”), Docket
25 No. 191 (Feb. 20, 2014) at 4, 5, 6.

26 ⁸Order Granting Plaintiffs’ Motion for Withdrawal and Voluntary Dismissal of Individual
27 Claims, Docket No. 238 (May 2, 2014). Following the court’s order, no named plaintiffs remain
28 who reside in Washington or Wyoming; this required dismissal of the claims asserted by the
putative Washington and Wyoming classes. (*Id.*)

⁹Motion to Certify Class, Docket No. 241 (May 5, 2014). See also Memorandum of Points
and Authorities in Support (“Cert. Motion”), Docket No. 241-1 (May 5, 2014).

¹⁰Opposition to Plaintiffs’ Motion for Class Certification (“Opp. Cert.”), Docket No. 265
(June 2, 2014).

1 declarations of plaintiffs’ experts, Colin B. Weir and Charles M. Benbrook.¹¹ Plaintiffs oppose
2 ConAgra’s motion.¹²

3
4 **I. BACKGROUND**

5 Plaintiffs are consumers residing in twelve different states who purchased Wesson Oils
6 between January 2007 and their entry into this case.¹³ They allege that from at least June 27, 2007
7 to the present, ConAgra Foods, Inc. (“ConAgra”) deceptively and misleadingly marketed its
8 Wesson brand cooking oils, made from genetically-modified organisms (“GMO”), as “100%
9 Natural.” Throughout the proposed class period, every bottle of Wesson Oil carried a front label
10 stating that the product was “100% Natural.”¹⁴

11 Plaintiffs propose certification of twelve separate statewide classes as follows:

12 “All persons who reside in the States of California, Colorado, Florida, Illinois,
13 Indiana, Nebraska, New Jersey, New York, Ohio, Oregon, South Dakota, or Texas
14 who have purchased Wesson Oils within the applicable statute of limitations period
15 established by the laws of their state of residence (the ‘Class Period’) through the
16 final disposition of this and any and all related actions.”¹⁵

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¹¹Motion to Strike, Docket No. 262 (June 2, 2014).

20 ¹²Opposition to Motion to Strike (“Opp. Motion to Strike”), Docket No. 280 (June 26,
21 2014).

22 ¹³Although Bonnie McDonald of Massachusetts is presently a named plaintiff, plaintiffs do
23 not ask that the court appoint her as a class representative, and they have filed a motion to permit
24 her to withdraw as a plaintiff. Plaintiffs also seek an order permitting Phyllis Scarpelli of New
25 Jersey to withdraw as a plaintiff. Her withdrawal will not affect the putative New Jersey class,
26 however, because another plaintiff from New Jersey, Brenda Krein, remains a named plaintiff.
(Cert. Motion at 11 n. 35; Motion to Withdraw Individual Claims of Plaintiffs McDonald and
Scarpelli, Docket No. 273 (June 3, 2014).)

27 ¹⁴Answer to Amended Complaint, Docket No. 145 (Jan. 16, 2013), ¶¶ 2, 11-31.

28 ¹⁵Cert. Motion at 11-12.

1 Plaintiffs allege claims for violation of state consumer protection laws, breach of express
2 warranty, breach of the implied warranty of merchantability, and unjust enrichment. Specifically,
3 they plead the following claims:

- 4 • California: (1) California Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750,
5 *et seq.* and California Unfair Competition Law, CAL. BUS. & PROF. CODE §§
6 17200, *et seq.* and §§ 17500, *et seq.*; (2) CAL. COM. CODE § 2313; CAL. COM.
7 CODE § 2314.
- 8 • Colorado: (1) Colorado Consumer Protection Act, COLO. REV. STAT. §§ 6-1-101,
9 *et seq.*; (2) COLO. REV. STAT. § 4-2-313; (2) COLO. REV. STAT. § 4-2-314;
10 (4) Unjust Enrichment.
- 11 • Florida: (1) Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN.
12 §§ 501.201, *et seq.*; (2) Unjust Enrichment.
- 13 • Illinois: (1) Illinois Consumer Fraud and Deceptive Business Practices Act, 815
14 ILCS §§ 505/1, *et seq.*; (2) Unjust Enrichment.
- 15 • Indiana: (1) IND. CODE § 26-1-2-313; (2) IND. CODE § 26-1-2-314; (3) Unjust
16 Enrichment.
- 17 • Nebraska: (1) Nebraska Consumer Protection Act, NEB. REV. STAT. §§ 59-1601,
18 *et seq.*; (2) NEB. REV. STAT. § 2-313; (3) NEB. REV. STAT. § 2-314; (4) Unjust
19 Enrichment.
- 20 • New Jersey: (1) New Jersey Consumer Fraud Act, N.J. STAT. ANN. §§ 56:8-1, *et*
21 *seq.*; (2) N.J. STAT. ANN. § 12A:2-313; (3) N.J. STAT. ANN. § 12A:2-314;
- 22 • New York: (1) New York Consumer Protection Act, N.Y. GEN. BUS. LAW §§ 349,
23 *et seq.*; (2) N.Y. U.C.C. Law § 2-313; (3) Unjust Enrichment.
- 24 • Ohio: (1) Ohio Consumer Sales Practices Act, OHIO REV. CODE §§ 1345.01, *et*
25 *seq.*; (2) Unjust Enrichment.
- 26 • Oregon: (1) Oregon Unfair Trade Practices Act, OR. REV. STAT. §§ 646.605, *et*
27 *seq.*; (2) OR. REV. STAT. § 72-3130; (3) Unjust Enrichment.
- 28 • South Dakota: (1) South Dakota Deceptive Trade Practices and Consumer

1 Protection Law, S.D. COD. LAWS §§ 37 24 1, *et seq.*; (2) S.D. COD. LAWS § 57A-
2 2-313; (3) S.D. COD. LAWS § 57A-2-314; (4) Unjust Enrichment.

- 3 • Texas: (1) Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS.
4 & COM. CODE §§ 17.41, *et seq.*; (2) Unjust Enrichment.¹⁶

6 II. DISCUSSION

7 A. Evidentiary Objections to the Testimony of the Parties' Respective Experts

8 Before addressing the merits of the certification motion, the court must consider the parties'
9 challenges to their opponent's experts. While courts in this circuit had previously concluded that
10 expert testimony was admissible in evaluating class certification motions without conducting a
11 rigorous analysis under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993),
12 the Supreme Court in *Dukes* expressed "doubt that this [was] so." *Wal-Mart Stores, Inc. v.*
13 *Dukes*, 131 S. Ct. 2541, 2554 (2011). After *Dukes*, the Ninth Circuit approved the application
14 of *Daubert* to expert testimony presented in support of or opposition to a motion for class
15 certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) ("In its analysis
16 of Costco's motions to strike, the district court correctly applied the evidentiary standard set forth
17 in *Daubert*. . ."). As a result, the court applies that standard to the parties' expert witnesses.¹⁷

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19 ¹⁶SAC, ¶¶ 64-103.

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21 ¹⁷Citing *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), plaintiffs
22 argue that the court need not conduct a full *Daubert* analysis at the class certification stage. (Opp.
23 Motion to Strike at 4-5.) In *Tait*, the court reviewed Ninth Circuit cases concerning consideration
24 of expert testimony at the class certification stage, both prior to and following the Supreme
25 Court's decision in *Dukes*. It held that "district courts must conduct an analysis tailored to
26 whether an expert's opinion was sufficiently reliable to admit for the purpose of proving or
27 disproving Rule 23 criteria, such as commonality and predominance." *Id.* at 495. See *id.* ("At
28 this early stage, robust gatekeeping of expert evidence is not required; rather, the court should ask
only if expert evidence is 'useful in evaluating whether class certification requirements have been
met.' This means that a district court need only conduct a 'tailored *Daubert* analysis' which
'scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and
the current state of the evidence,'" quoting *Ellis*, 657 F.3d at 982, and *In re Zurn Pex Plumbing
Products Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011)); *id.* at 496 ("Plaintiff responds that the

1 Under Rule 702,

2 “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact
3 to understand the evidence or to determine a fact in issue, a witness qualified as an
4 expert by knowledge, skill, experience, training, or education, may testify thereto
5 in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient
6 facts or data, (2) the testimony is the product of reliable principles and methods,
7 and (3) the witness has applied the principles and methods reliably to the facts of
8 the case.” FED.R.EVID. 702.

9 See also *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (“[Rule 702] consists of
10 three distinct but related requirements: (1) the subject matter at issue must be beyond the common
11 knowledge of the average layman; (2) the witness must have sufficient expertise; and (3) the state
12 of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion”); *Sterner*
13 *v. U.S. Drug Enforcement Agency*, 467 F.Supp.2d 1017, 1033 (S.D. Cal. 2006) (“There are three
14 basic requirements that must be met before expert testimony can be admitted. First, the evidence
15 must be useful to a finder of fact. Second, the expert witness must be qualified to provide this
16 testimony. Third, the proposed evidence must be reliable or trustworthy” (citations omitted)).

17 Before admitting expert testimony, the trial court must make “a preliminary assessment of
18 whether the reasoning or methodology underlying the testimony is scientifically valid and of
19 whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*,
20 509 U.S. at 592-93; see also *Ellis*, 657 F.3d at 982 (“Under *Daubert*, the trial court must act as

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22 Court’s analysis of Expert Clark’s opinion at the class certification stage must be limited to the
23 purpose for which it is presented, namely, to establish the Rule 23(a) requirement of commonality
24 by showing that the issue of whether the class members’ Washers had a propensity to develop
25 BMFO is susceptible to common proof. . . . [T]he Court agrees”). The court does not interpret
26 the motions to strike the parties have filed as motions to exclude expert testimony at trial.
27 Consequently, the court evaluates the admissibility of the expert testimony under *Daubert* in light
28 of the purpose for which it is offered – i.e., to demonstrate that it is appropriate to certify a class
under Rule 23. “Any determination the court makes regarding the admissibility of expert
testimony (other than a finding that an expert is not qualified), is not a final conclusion that will
control the admissibility of the expert’s testimony at trial.” *Cholakyan v. Mercedes-Benz, USA,*
LLC, 281 F.R.D. 534, 542 n. 53 (C.D. Cal. 2012).

1 a ‘gatekeeper’ to exclude junk science that does not meet Federal Rule of Evidence 702’s
2 reliability standards by making a preliminary determination that the expert’s testimony is
3 reliable”). In conducting this preliminary assessment, the trial court is vested with broad
4 discretion. See, e.g., *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997); *United States v.*
5 *Espinosa*, 827 F.2d 604, 611 (9th Cir. 1987) (“The decision to admit expert testimony is
6 committed to the discretion of the district court and will not be disturbed unless manifestly
7 erroneous”).

8 “The party offering the expert bears the burden of establishing that Rule 702 is satisfied.”
9 *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, No. CV 02-2258 JM (AJB), 2007 WL
10 935703, *4 (S.D. Cal. Mar. 7, 2007) (citing *Allison v. McGhan Medical Corp.*, 184 F.3d 1300,
11 1306 (11th Cir. 1999) (in turn citing *Daubert*, 509 U.S. at 592 n. 10)); see also *Walker v. Contra*
12 *Costa County*, No. C 03-3723 THE, 2006 WL 3371438, *1 (N.D. Cal. Nov. 21, 2006) (same,
13 citing *Bourjaily v. United States*, 483 U.S. 171, 172 (1987), and *In re Paoli R.R. Yard PCB*
14 *Litig.*, 35 F.3d 717, 744 (3d Cir. 1994)).¹⁸

15 “In determining whether expert testimony is admissible under Rule 702, the district court
16 must keep in mind [the rule’s] broad parameters of reliability, relevancy, and assistance to the trier
17 of fact.” *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1134 (9th Cir. 1998) (internal quotation
18 marks omitted); see also *Jinro Am. Inc. v. Secure Invests., Inc.*, 266 F.3d 993, 1004 (9th Cir.
19 2001) (“Rule 702 is applied consistent with the ‘liberal thrust’ of the Federal Rules and their
20 general approach of relaxing the traditional barriers to opinion testimony” (internal quotation
21 marks omitted)). On a motion for class certification, it is not necessary that expert testimony
22 resolve factual disputes going to the merits of plaintiff’s claims; instead, the testimony must be
23 relevant in assessing “whether there was a common pattern and practice that could affect the class
24 as a whole.” *Ellis*, 657 F.3d at 983.

27 ¹⁸This showing must be by a preponderance of the evidence. See *Daubert*, 509 U.S. at 594
28 n. 10 (citing *Bourjaily*, 483 U.S. at 175-76).

1 **1. Plaintiffs' Expert: Colin B. Weir**

2 Colin Weir is plaintiffs' economic expert. Weir is Vice President of Economics and
3 Technology, Inc. (ETI), a research and consulting firm specializing in economics, statistics,
4 regulation, and public policy, where he has worked for eleven years.¹⁹ Weir holds an MBA from
5 the High Technology program at Northeastern University, and a BA in Business Economics from
6 the College of Wooster.²⁰ Weir's academic studies included work on hedonic regression analysis
7 and conjoint analysis.²¹ His work at ETI involves econometric and statistical analysis, multiple
8 linear regression, statistical sampling, micro and macroeconomic modeling and other economic
9 analyses.²² Weir has given expert testimony in federal and state courts, and before the Federal
10 Communications Commission and state regulatory commissions.²³ He has also consulted on a
11 variety of consumer and wholesale products cases, calculating damages related to household
12 appliances, herbal remedies, HBC products, food products, electronics, and computers.²⁴

13 Weir opines that it is possible to determine damages attributable to plaintiffs' claims on a
14 classwide basis by determining whether class members paid a "price premium" – i.e., an
15 additional amount paid for Wesson Oils as a result of the 100% Natural Claim – using ConAgra's
16 available business records, market research data concerning retail prices for the products at issue
17 and a series of benchmark products, and consumer survey data.²⁵ Weir discusses two techniques
18 that purportedly allow for the comparison of prices across sales channels, retailers, geographies,
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21 ¹⁹Expert Declaration of Colin B. Weir ("Weir Decl."), Docket No. 243 (July 14, 2014) at
22 3; Opp. Motion to Strike, Exh. C ("Weir Depo.") at 47:8-12.

23 ²⁰*Id.*

24 ²¹*Id.* at 9:20-10:21; 13:13-14:7.

25 ²²*Id.*, Exh. 1 at 1.

26 ²³Weir Decl. at 3.

27 ²⁴*Id.*

28 ²⁵*Id.*, ¶ 9 & nn. 5-6.

1 time periods, and various other product attributes.²⁶ The first technique, hedonic regression, is
2 used to isolate the effect of one or more product attributes on the price of a product.²⁷ Weir states
3 that the data necessary for this analysis “should be easily obtained” from ConAgra’s business
4 records and market research data from companies like IRI and Nielsen, or independent market
5 research.²⁸ The second technique, conjoint analysis, is used to assess the relative importance of
6 product attributes, and their price components.²⁹ Unlike hedonic regression, conjoint analysis does
7 not require use of existing data, but instead relies on data generated through a survey process.³⁰
8 Weir states that the data necessary to select the survey sample and conduct the conjoint analysis
9 are easily obtainable from one of several sources, including ConAgra’s business records, market
10 research data from companies such as IRI and Nielsen, and independent research.³¹ Although he
11 describes hedonic regression and conjoint analysis, Weir does not actually perform either analysis
12 or describe in any detail their specific application to this case.

13 ConAgra first moves to exclude Weir’s testimony on the basis that he lacks relevant
14 training and experience, and is therefore not qualified to opine on methodologies of conducting
15 a damages analysis.³² It argues that Weir lacks the requisite experience to offer an expert opinion
16 on hedonic regression or conjoint analysis because he has never previously calculated and testified
17 to damages in a case employing these methodologies.³³ ConAgra asserts that Weir also lacks the
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20 ²⁶*Id.*, ¶ 11.

21 ²⁷*Id.*, ¶ 12.

22 ²⁸*Id.*, ¶ 33.

23 ²⁹*Id.*, ¶ 13.

24 ³⁰*Id.*, ¶ 46.

25 ³¹*Id.*

26 ³²Motion to Strike at 3.

27 ³³*Id.*

1 requisite training because he does not have a Ph.D., and did not complete a particular
2 concentration when obtaining an MBA that would prepare him to conduct such analyses.³⁴

3 In the Ninth Circuit, an expert may be qualified to offer a particular opinion either as a
4 result of practical training or academic experience. *Thomas v. Newton Int'l Enterprises*, 42 F.3d
5 1266, 1269 (9th Cir. 1994) (“[T]he advisory committee notes emphasize that Rule 702 is broadly
6 phrased and intended to embrace more than a narrow definition of qualified expert”); *Rogers v.*
7 *Raymark Industries, Inc.*, 922 F.2d 1426, 1429 (9th Cir.1991) (“A witness can qualify as an
8 expert through practical experience in a particular field, not just through academic training”). See
9 also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) (“[N]o one denies that an expert
10 might draw a conclusion from a set of observations based on extensive and specialized
11 experience”).

12 “The threshold for qualification is low for purposes of admissibility; minimal foundation
13 of knowledge, skill, and experience suffices.” *PixArt Imaging, Inc. v. Avago Tech. Gen. IP*
14 *(Singapore) Pte. Ltd.*, No. C 10–00544 JW, 2011 WL 5417090, *4 (N.D. Cal. Oct. 27, 2011).
15 Prior experience need not consist of prior expert witness testimony on the same issue. See *Matuez*
16 *v. Lewis*, No. CV 11-7411-JVS (JPR), 2012 WL 13582122, *8 (C.D. Cal. May 9, 2012), report
17 and recommendation adopted by 2012 WL 3582629 (C.D. Cal. Aug 20, 2012) (“If witnesses
18 could not testify for the first time as experts, we would have no experts”).

19 The court concludes that Weir’s academic training and practical experience qualify him to
20 testify to the calculation of damages using hedonic regression and conjoint analysis. First, Weir’s
21 academic training is directly relevant to his testimony. He holds an MBA; his undergraduate
22 course work specifically included hedonic regression and conjoint analysis, the two models he
23 wishes to utilize here. Weir also has many years of practical experience with economic modeling
24 and regression analysis. In addition, he has served as an expert witness in numerous cases,
25 including *Ebin v. Kangadis Foods, Inc.*, 297 F.R.D. 561, 571 (S.D.N.Y. 2014), a class action
26 in which the court cited with approval his expert report that “detail[ed] several models for
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28 ³⁴*Id.* at 4 n. 1.

1 calculating damages for [defendant’s] alleged misrepresentation.” This combination of educational
2 training and professional experience suffices to qualify him under Rule 702. *Kingsbury v. U.S.*
3 *Greenfiber, LLC*, No. CV 08–00151 DSF (AGRx), 2013 WL 7018657 (C.D. Cal. Nov. 5, 2013),
4 a case cited by ConAgra, is not to the contrary.³⁵ In *Kingsbury*, the court found that a real estate
5 salesman who was designated an expert witness was not qualified to offer an opinion on a
6 developer’s duty to disclose to purchasers the use of a particular insulation product at the property
7 because he “had never heard of” the product prior to the litigation, had never sold a home
8 containing it, and had encountered a disclosure issue involving insulation less than six times in his
9 career. Weir, by contrast, has prior knowledge of, and experience with, the subject of his
10 testimony because he studied and worked with the analytical models forming the basis for his
11 opinion prior to the commencement of this action.

12 ConAgra next argues that Weir’s testimony lacks a reliable factual foundation because he
13 provides an incomplete description of hedonic regression.³⁶ Specifically, it asserts that Weir’s
14 hedonic regression analysis is unreliable because he fails (1) to identify or define the variables –
15 including the relevant attributes of Wesson products – that he plans to use in his econometric
16 model, (2) to confirm that the data required to execute the planned regression analysis exist or are
17 obtainable, (3) to identify the set of comparator products he would include in his analysis, and
18 (4) to determine the portion of any calculated price premium attributable to interpreting the “100 %
19 Natural” label statement as “GMO-free” as opposed to other possible interpretations that are not
20 challenged, e.g., “free of synthetic chemicals” or “free of preservatives.”³⁷

21 ConAgra contends that Weir’s alternate model of calculating damages, conjoint analysis,
22 is likewise unreliable because Weir has not determined the characteristics of the survey sample
23 he would use in the analysis, the list of relevant product attributes, the sample size of the survey,
24 or whether he would conduct separate surveys in each proposed class state or one large multi-state

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26 ³⁵Reply to Motion to Strike, Docket No. 296 (July 3, 2014) at 6.

27 ³⁶Motion at Strike at 5.

28 ³⁷*Id.* at 5, 7-8.

1 survey.³⁸ It asserts that Weir fails to provide a concrete methodology for converting output from
2 a conjoint analysis to an actual price premium paid by putative class members, and likewise fails
3 to provide an exhaustive list of product features that he would include in his proposed conjoint
4 survey.³⁹ ConAgra also contends that Weir’s methodology cannot reliably account for any
5 changes in consumer perceptions of the “100% Natural” statement over the several years of the
6 class period, and cannot demonstrate that consumer perceptions measured at the time the analysis
7 is conducted will reliably reflect perceptions that existed at the beginning of the putative class
8 period.⁴⁰

9 Plaintiffs counter that a damages expert’s testimony at the class certification stage need not
10 be complete, so long as the expert proposes a “reasonable” method of calculating damages.⁴¹
11 They argue that Weir’s declaration satisfies this standard by offering a basic description of the
12 manner in which hedonic regression and conjoint analysis operate, and assert that the exact
13 specifications Weir will use will be solidified as discovery progresses.⁴² They state that any
14 shortcomings in Weir’s methodology go only to the merits of his final damages calculation and
15 are not properly considered at the class certification stage.⁴³

16 The court finds plaintiffs’ argument unavailing, and the authorities they cite distinguishable.
17 In *Ralston v. Mortg. Investors Grp., Inc.*, No. 08–536–JF (PSG), 2011 WL 6002640, *9 (N.D.
18 Cal. Nov. 30, 2011), defendant Countrywide moved to exclude testimony by Ralston’s damages
19 expert, Lyons, on the grounds that his report “offers nothing more than a simplistic spreadsheet
20 amortization table that lacks justification for its assumptions, and furthermore offers only
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22 ³⁸*Id.* at 5-6.

23 ³⁹*Id.* at 8.

24 ⁴⁰*Id.*

25 ⁴¹Opp. Motion to Strike at 12.

26 ⁴²*Id.* at 13.

27 ⁴³*Id.* at 15.

1 conclusory assurances that missing functionality can be added with ease.” The court disagreed,
2 noting that Lyons had provided “two tables showing hypothetical loan amortization schedules
3 based on whether the additional payment amounts during years 2 through 5 of the loans (due to
4 the annual payment increase included in the loan terms) are applied either to interest only or to
5 principal only.” *Id.* at *3, 9. It concluded that Lyons’ report “present[ed] a structure or
6 framework [that could be used] to analyze the actual loan data eventually provided to plaintiffs.”
7 *Id.* at *9.

8 In *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174 (9th Cir. 2002), the court affirmed the
9 admission of a damages expert’s testimony over the opposing party’s objection. The expert’s
10 regression analysis focused on criteria including employee experience, but did not include criteria
11 such as the employee’s qualifications, education level, and preferences. *Id.* at 1188. The
12 defendant argued that the analysis should have been excluded because, *inter alia*, it did not
13 “eliminate all of the possible legitimate nondiscriminatory factors” leading to lower wages and less
14 frequent promotions for the female plaintiffs as compared to their male counterparts. *Id.* The
15 circuit court noted that plaintiff’s expert offered a regression analysis that used the “best available
16 data, which [came] from the [defendant] itself.” *Id.* at 1189. It also observed that the defendant
17 had not proved at trial that any of the factors it contended on appeal should have been included
18 in the model were actually important in the promotion or compensation process. *Id.* at 1188. The
19 court explained that “[n]ormally, failure to include variables will affect the analysis’
20 probativeness, not its admissibility,” *id.* at 1188 (quoting *Bazemore v. Friday*, 478 U.S. 385, 400
21 (1986)), but that in some cases, “the analysis may be ‘so incomplete as to be inadmissible as
22 irrelevant.’” *Id.* (quoting *Bazemore*, 478 U.S. at 400 n. 10).

23 Here, unlike the experts in *Ralston* or *Hemmings*, Weir does not provide a damages model
24 that lacks certain variables or functionality. Rather, he provides no damages model at all.
25 Although the methodologies he describes may very well be capable of calculating damages in this
26 action, Weir has made no showing that this is the case. He does not identify any variables he
27 intends to build into the models, nor does he identify any data presently in his possession to which
28 the models can be applied. The court is thus left with only Weir’s assurance that he can build a

1 model to calculate damages. Stated differently, his declaration is “so incomplete as to be
2 inadmissible as irrelevant.” *Hemmings*, 285 F.3d at 1188 (quoting *Bazemore*, 478 U.S. at 400
3 n. 10). See *Building Indus. Ass’n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144,
4 1154 (9th Cir. 2012) (district court did not abuse its discretion in rejecting the declaration of an
5 expert who “offered unsupported assertions” with “no data forming the basis for [the expert’s]
6 assumptions or conclusions”); see *id.* (“The party offering expert testimony has the burden of
7 establishing its admissibility”). Accordingly, the court finds that Weir’s declaration does not
8 satisfy the requirements of Rule 702. The court therefore grants ConAgra’s motion to strike
9 Weir’s declaration, and will not consider his testimony in deciding the certification motion.

10 **2. Plaintiff’s Expert: Charles M. Benbrook, Ph.D**

11 ConAgra next moves to strike the declaration of Dr. Charles M. Benbrook.⁴⁴ Dr.
12 Benbrook has more than thirty years of experience working on the impact of agricultural
13 technology and regulations on pesticides, and the risks they pose to food quality and safety.⁴⁵
14 From 1981 to 1983, Dr. Benbrook served as the staff director for the House subcommittee with
15 jurisdiction over the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁴⁶ He served
16 as chief scientist for the Organic Center from 2006-2012, and was responsible for tracing
17 developments in the scientific literature, government agencies, food industry, and non-profit
18 organizations with the potential to impact consumer understanding of, and confidence in, the
19 official U.S. Department of Agriculture “certified organic” seal appearing on labels of certified
20 organic food products.⁴⁷ He served on the USDA’s AC-21 Agricultural Biotechnology Advisory
21 Committee, which issued a report in 2013 on coexistence between farmers planting fields of
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24 ⁴⁴Motion to Strike at 8.

25 ⁴⁵Declaration of Charles M. Benbrook, Ph.D. (“Benbrook Decl.”), Docket No. 242 (May
26 5, 2014), ¶ 14.

27 ⁴⁶Benbrook Decl., ¶ 15.

28 ⁴⁷*Id.*, ¶ 17.

1 organic, conventional non-GE (genetically engineered), and those planting GE crops.⁴⁸ Dr.
2 Benbrook has also served on the technical standards committee of the Non-GMO Project, which
3 manages a labeling program that verifies the absence of GE content in food products.⁴⁹ Since
4 1990, he has served as president of Benbrook Consulting Services, a small consulting firm that
5 conducts projects on agricultural technology, food safety and quality, and pesticide use and
6 regulation. He has published a peer-reviewed paper on the impact of GE crops on pesticide use
7 in the United States,⁵⁰ and has studied and written extensively on the impact of the
8 commercialization of GE crops on pesticide use and efficacy, as well as their impact on human
9 health and the environment.⁵¹

10 Dr. Benbrook opines that GMOs and the food manufactured from them, such as Wesson
11 Oil products, cannot be considered and represented as “natural,” based on the definitions, usage,
12 and meaning ascribed to “natural” in various food- and agriculture-related contexts, including
13 consumer surveys.⁵² He bases this opinion on his review of the facts of the case, as well as his
14 analysis of the impacts of the genetic engineering process on the genetic integrity and composition
15 of raw agricultural products, including those from which Wesson Oils are extracted.⁵³

16 ConAgra argues that Dr. Benbrook’s testimony is unreliable because it is not based on
17 scientific methods or data, but is merely rhetorical, and therefore incapable of being tested.⁵⁴ It
18 asserts that Dr. Benbrook simply cites the opinions of various governmental agencies, and
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21 ⁴⁸*Id.*, ¶ 19.

22 ⁴⁹*Id.*, ¶ 20.

23 ⁵⁰*Id.*, ¶ 27.

24 ⁵¹*Id.*, ¶ 23.

25 ⁵²*Id.*, ¶¶ 1-2, 4.

26 ⁵³*Id.*, ¶ 5.

27 ⁵⁴Motion to Strike at 9.

1 definitions of industry groups, to support his semantic conclusion that GMOs are not “natural.”⁵⁵
2 This testimony, ConAgra contends, does not assist the trier of fact because it largely discusses and
3 describes widely available facts, including basic genetic terminology and processes.⁵⁶

4 The mere fact that Dr. Benbrook does not rely on a testable methodology does not render
5 his testimony inadmissible under *Daubert*. The Supreme Court has repeatedly clarified that the
6 “factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on
7 the nature of the issue. . . .” *Kumho Tire*, 526 U.S. at 150. The *Daubert* factors are not
8 exhaustive, and the Court’s task is not to apply *Daubert* as “a definitive checklist or test,” but to
9 “make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that
10 characterizes the practice of an expert in the field.” *Id.* at 152. See *Boyd v. City and County of*
11 *San Francisco*, 576 F.3d 938, 945 n. 4 (9th Cir. 2009) (noting that *Daubert*’s list of factors
12 neither necessarily nor exclusively applies to all experts in every case); *Liberty Life Ins. Co. v.*
13 *Myers*, No. CV 10–2024–PHX–JAT, 2013 WL 524587, *3 (D. Ariz. Feb. 11, 2013) (“It is also
14 well-settled that the four *Daubert* factors – testing, peer review, error rates, and acceptability in
15 the relevant scientific community – are merely illustrative, not exhaustive, and may be
16 inapplicable in a given case”). While courts often focus on whether an expert’s methodology can
17 be tested, see, e.g., *Daubert*, 43 F.3d 1311, 1319 (9th Cir. 1995) (holding that expert testimony
18 was inadmissible under Rule 702 where the expert offered “no tested or testable theory to explain
19 how, from [] limited information, he was able to eliminate all other potential causes”); *In re*
20 *Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability*
21 *Litigation*, 978 F.Supp.2d 1053, 1077 (C.D. Cal. 2013) (“Muckenhirn may not testify regarding
22 the existence or effect of the software bug identified as the FTB, nor may any other expert”
23 because “although the FTB was testable, it had not been tested”), this is not an absolute. Rather,
24 some expert testimony is properly based on relevant knowledge and experience of a type that
25 cannot be tested. See, e.g., *Speicher v. Union Pacific R.R.*, No. C07–05524 RBL, 2009 WL

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27 ⁵⁵*Id.* at 10.

28 ⁵⁶*Id.* at 11.

1 250026, *3 (W.D. Wash. Feb. 2, 2009) (“General views about railroad operations and safety
2 cannot be tested, are not appropriate subjects of peer review, and do not have a known potential
3 rate of error. Further, no relevant scientific community exists to accept the views. . . . Due to
4 the generic nature of Mr. Beall’s testimony, an intense, methodical investigation of its merits is
5 unnecessary. The Court is satisfied merely to evaluate whether Mr. Beall’s testimony is properly
6 grounded in relevant experience and knowledge”).

7 Given the wide variety of expert testimony that is offered in cases pending in federal court,
8 a district court has broad discretion in determining the relevant factors to employ in assessing the
9 reliability of expert testimony. *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000)
10 (“Indeed, not only must the trial court be given broad discretion to decide whether to admit expert
11 testimony, it ‘must have the same kind of latitude in deciding how to test an expert’s reliability’”).
12 Here, the bulk of Dr. Benbrook’s declaration focuses on the process of genetic engineering, the
13 impacts of that process on GE crops and the products derived therefrom, and whether those
14 impacts occur – or could occur – absent the application of GE techniques. These opinions are
15 testable because they can be independently verified or objectively challenged. See FED.R.EVID.
16 702 Advisory Committee Notes (*Daubert*’s testability factor means capable of being “challenged
17 in some objective sense”). Consequently, the court finds these opinions sufficiently reliable.

18 The court also concludes that Dr. Benbrook’s testimony regarding the processes used to
19 create GE foods, and whether the crops created through genetic engineering could develop in
20 nature and absent genetic engineering, will assist the trier of fact. “Encompassed in the
21 determination of whether expert testimony is relevant is whether it is helpful to the jury, which
22 is the ‘central concern’ of Rule 702.” *Mukhtar v. California State Univ.*, 299 F.3d 1053, 1063
23 n. 7 (9th Cir. 2002). Rule 702 states that “[i]f scientific, technical, or other specialized
24 knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,”
25 an expert “may testify thereto.” FED.R.EVID. 702. “Expert testimony assists the trier of fact
26 when it provides information beyond the common knowledge of the trier of fact.” *United States*
27 *v. Finley*, 301 F.3d 1000, 1008 (9th Cir. 2002). Here, the genetic engineering process described
28 by Dr. Benbrook is highly technical and certainly cannot be considered common knowledge. The

1 same can be said of Dr. Benbrook’s testimony regarding the increase in the production of GE
2 crops.

3 The court reaches a different conclusion, however, regarding Dr. Benbrook’s opinions
4 regarding the meaning of the word “natural.” “Natural” is a commonly understood term, and
5 it is questionable that the jury needs any help defining it. That this is so is confirmed by the
6 dictionary definitions and government communications and regulations he cites, all of which
7 employ a common sense definition of “natural” – i.e., existing in nature, and nothing artificial or
8 synthetic. The court does not believe that jurors need assistance defining “natural” because it is
9 not a matter that is beyond their ordinary competence or experience. See *United States v.*
10 *Seschillie*, 310 F.3d 1208, 1212 (9th Cir. 2012) (“A district court does not abuse its discretion
11 when it refuses expert testimony where the subject does not need expert ‘illumination’ and the
12 proponent is otherwise able to elicit testimony about the subject,” quoting *United States v.*
13 *Ortland*, 109 F.3d 539, 545 (9th Cir. 1997)). Accordingly, the court strikes those portions of Dr.
14 Benbrook’s declaration that discuss the meaning of the word natural as found in dictionaries and
15 government communications or regulations. As noted *infra*, however, based on his understanding
16 of the process used to make genetically engineered foods, Dr. Benbrook can testify that in his
17 opinion, foods that contain genetically engineered ingredients are not natural. If this opinion is
18 challenged on the basis that he is interpreting natural in an unusual or abnormal way, Dr.
19 Benbrook can testify to the sources on which he relied in formulating his definition of the term
20 “natural.”

21 ConAgra moves specifically to strike Dr. Benbrook’s opinions concerning consumers
22 understanding of “natural” based on consumer surveys he has read.⁵⁷ In particular, it seeks to
23 strike his opinion that “[t]here is considerable agreement across surveys on the core elements of
24 what a ‘natural’ food product is, and the most frequently cited core attributes of a ‘natural’ food
25 typically include minimally processed, no use of pesticides, no added synthetic or artificial
26 ingredients, and ‘not genetically engineered’ (in the case of fresh, whole foods), or ‘not derived
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28 ⁵⁷*Id.* at 14. See Benbrook Decl., ¶¶ 35-45.

1 from a genetically engineered crop’ (in surveys encompassing processed foods).”⁵⁸ ConAgra
2 argues that Dr. Benbrook is not qualified to testify regarding consumer surveys because he lacks
3 any marketing experience or expertise.⁵⁹ It asserts his opinion that “[t]here is considerable
4 agreement across surveys” that “natural food products” are not made of, or derived from,
5 genetically engineered crops is based on two surveys only, neither of which supports his opinion.⁶⁰
6 Furthermore, it contends the opinion is not reliable because Dr. Benbrook has not read the surveys
7 he purportedly interprets, as the exhibit to his declaration that identifies references cited in his
8 report or on which he relied lists only partial summaries of the studies.⁶¹ Because he has not
9 reviewed the full surveys, ConAgra argues, Dr. Benbrook cannot evaluate the study methodology
10 or determine the relevance of the studies’ findings.⁶² ConAgra asserts the opinions should be
11 stricken for the additional reason that Benbrook merely repeats numbers from documents, which
12 will not assist the trier of fact.⁶³

13 So long as the surveys are relevant and reliable, Dr. Benbrook need not be an expert in
14 survey methodology to incorporate the results of surveys into his work. See *Cook v. Rockwell*
15 *Intern. Corp.*, 580 F.Supp.2d 1071, 1138 n. 72 (D. Colo. 2006) (“Defendants contend Mr.
16 Hunsperger is not qualified to use the survey results in any fashion because he is not an expert in
17 designing, administering or interpreting raw data from public opinion surveys. Mr. Hunsperger,
18 however, need not be qualified as an expert in these matters in order to incorporate the
19 Flynn/Slovic survey results in his own work, particularly when I have already found that the
20 survey is relevant, reliable and admissible in its own right”). As the court has already concluded,
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22 ⁵⁸Motion to Strike at 14; Benbrook Decl., ¶ 36.

23 ⁵⁹Motion to Strike at 14.

24 ⁶⁰*Id.*; Benbrook Decl., ¶ 36.

25 ⁶¹Motion to Strike at 15.

26 ⁶²*Id.*

27 ⁶³*Id.* at 16.

1 however, the general meaning of “natural” is not a subject as to which jurors need assistance.
2 Jurors might benefit from assistance as to whether consumers generally equate “natural” with an
3 absence of genetically modified ingredients, however. Nonetheless, the court has no means of
4 judging the reliability of the two surveys Dr. Benbrook cites, since neither is before the court.
5 Compare *id.* at 1124-29. Thus, the court cannot determine that it was appropriate for Dr.
6 Benbrook to rely on the survey results. Moreover, Dr. Benbrook’s rather sweeping conclusion
7 that “[t]here is considerable agreement across surveys,”⁶⁴ when he relies on only two does not
8 seem to be a reliable opinion.

9 ConAgra asserts that Dr. Benbrook’s testimony regarding survey data consists merely of
10 repeating figures generated by studies conducted by other experts. An expert’s sole or primary
11 reliance on the opinions of other experts raises serious reliability questions. See *Fosmire v.*
12 *Progressive Max Ins. Co.*, 277 F.R.D. 625, 629 (W.D. Wash. 2011) (“Dr. Polissar’s expert
13 report is deficient in several ways. First, although his opinions are based on Dr. Siskin’s data and
14 methodology, there is nothing in the record to indicate that Dr. Polissar has tested Dr. Siskin’s
15 underlying data to ensure its reliability or that Dr. Polissar even has access to Dr. Siskin’s
16 underlying data”); *In re Imperial Credit Indus., Inc. Securities Litig.*, 252 F.Supp.2d 1005, 1012
17 (C.D. Cal. 2003) (“The rules do not permit an expert to rely upon excerpts from opinions
18 developed by another expert for the purposes of litigation”); see also *Tokio Marine & Fire Ins.*
19 *Co., Ltd. v. Norfolk & Western Ry. Co.*, No. 98–1050, 98–1077, 1999 WL 12931, *4 (4th Cir.
20 Jan. 14, 1999) (Unpub. Disp.) (“[O]ne expert may not give the opinion of another expert who
21 does not testify”); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1580 (11th Cir.
22 1985) (“Expert opinions ordinarily cannot be based upon the opinions of others whether those
23 opinions are in evidence or not”).

24 By contrast, an expert can appropriately rely on the opinions of others if other evidence
25 supports his opinion and the record demonstrates that the expert conducted an independent
26 evaluation of that evidence. See *Jerpe v. Aerospatiale*, No. CIV. S–03–555 LKK/DAD, 2007 WL

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28 ⁶⁴Benbrook Decl., ¶ 36.

1 1394969, *6 (E.D. Cal. May 10, 2007) (crediting an expert’s declaration that he “independently
2 arrived” at his opinions despite “deposition testimony [that] was somewhat ambiguous on the issue
3 of whether [expert] was merely relying on the same underlying data set produced at the direction
4 of [another expert]”); *Gray v. United States*, No. 05cv1893 J(BLM), 2007 WL 4644736, *8 (S.D.
5 Cal. Mar. 17, 2007) (“Ms. Hyland[] . . . states that she considered all of the input and also
6 considered information from the San Diego County Medical Society and from a compendium of
7 physician compensation studies. In light of Ms. Hyland’s indication that she has interviewed Dr.
8 Gray, reviewed medical records, as well as consulted with search firms, the Court declines to, at
9 this time, take the drastic measure of excluding her report and testimony”).

10 As proof that Dr. Benbrook is merely “parroting” the opinions of other experts and
11 presenting them as his own, ConAgra cites a sentence Benbrook copied verbatim from the
12 Leatherhead article, *Do “natural” claims cut the mustard?* It states that “Leatherhead Food
13 Research delivers integrated scientific expertise, international regulatory advice and independent
14 market insights to the global food, drink and related industries.”⁶⁵ While Dr. Benbrook appears
15 to have copied this statement from Leatherhead’s materials, it is merely a description of
16 Leatherhead’s business, not an opinion relevant to the issues raised by this litigation. ConAgra
17 cites no other portions of Benbrook’s declaration that have been lifted from source materials.
18 Nonetheless, as Dr. Benbrook has no expertise in marketing or consumer reactions, the fact that
19 he offers opinions concerning consumers’ interpretation of the word “natural” based on two
20 market surveys indicates that he has merely reviewed the surveys prepared by marketing experts
21 and is reporting what they found. There is no indication in his declaration that he has
22 independently tested or evaluated the results of the surveys or otherwise personally researched
23 what consumers believe “natural” in terms of the presence of absence of genetically modified
24 organisms or GMO ingredients. Consequently, the court concludes that Dr. Benbrook cannot
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27 ⁶⁵Compare Benbrook Decl., ¶ 39, with Declaration of Henry J. Kelston (“Kelston Decl.”),
28 Docket No. 244 (May 5, 2014), Exh. 23 at 3.

1 offer an expert opinion concerning whether or not consumers believe that a food labeled “natural”
2 contains GMO ingredients.⁶⁶

3 ConAgra argues finally that Dr. Benbrook’s declaration includes opinions on the ultimate
4 issue in this case: whether the “100% Natural” label on Wesson Oil products is fraudulent and
5 misleads consumers. It asserts that as a result, his opinion constitutes an improper legal
6 conclusion.⁶⁷ Specifically, ConAgra contends that the following opinions Dr. Benbrook offers are
7 legal conclusions, and must be stricken:

8 1. “It is my opinion, based on my preliminary examination of the facts in this case, that, since
9 1997, an increasing share of Wesson Oils were extracted from GE corn, soybeans, or
10 canola, thus rendering it impossible for ConAgra to honestly represent that the Wesson Oil
11 products at issue in this litigation are ‘natural[.]’”⁶⁸

12 2. “[F]ood ingredients and products derived from such GE crops are not natural[.]”,⁶⁹

16 ⁶⁶ConAgra also contends that Dr. Benbrook did not review full versions of the studies he
17 cites. Plaintiffs acknowledge that Dr. Benbrook did not have access to the full 2010 Hartman
18 report, *Beyond Natural and Organic*, at the time he prepared his declaration, but state that he has
19 access to it now, has reviewed it, and is prepared to testify regarding its contents. Plaintiffs
20 proffer no declaration by Dr. Benbrook to this effect, however. Thus, this statement is merely
21 attorney argument, and is not evidence the court can consider in determining the reliability of Dr.
22 Benbrook’s testimony. Plaintiffs further state, however, that the data set forth in paragraphs 43
23 and 44 of Dr. Benbrook’s declaration, which discusses the Hartman Report, are extracted from
24 another study referenced in Appendix D, *Consumer confusion about the difference: “Natural” and
25 “Organic” product claims*, a White Paper by the Canada Organic Trade Organization. Even had
26 Dr. Benbrook reviewed full copies of both surveys, the court would exclude his opinion
27 concerning consumer interpretation of the term “natural” for the reasons stated in text.

28 Because the court reaches this conclusion, it need not consider ConAgra’s argument that
other surveys contradict the findings of the Leatherhead and Hartman surveys.

⁶⁷Motion to Strike at 12.

⁶⁸Benbrook Decl., ¶ 7.

⁶⁹*Id.*, ¶ 8(c).

1 3. “[T]he attributes in a food product that consumers seek when they choose a product, like
2 Wesson Oil, that is labeled ‘100% Natural’ are inherently inconsistent with that product’s
3 derivation from GE crops.”⁷⁰

4 4. “Regardless of the specific methods used to create a given GE event within an existing,
5 commercial corn, soybean, or canola variety, the process relied upon is inherently artificial
6 and unnatural.”⁷¹

7 5. “Biotechnology industry leaders have issued formal statements and definitions discussing
8 the nature of food produced from GE crops that confirm the unnatural nature thereof.”⁷²

9 6. “Accordingly, based on my expert understanding of the genetic engineering process and
10 my experience in this field, it is my opinion that the evidence summarized above
11 demonstrates that the Wesson Oils that ConAgra, during the Class Period, represented and
12 sold as being ‘100% Natural’ were falsely and deceptively labeled, in that they
13 unquestionably contained oils derived from unnatural GE corn, soybeans, and canola.”⁷³

14 While an expert witness may not testify to a legal conclusion, he may testify to an ultimate
15 issue of fact. *Mukhtar*, 299 F.3d at 1066 n. 10 (“[A]n expert witness cannot give an opinion as
16 to her legal conclusion, i.e., an opinion on an ultimate issue of law”); *Wiles v. Dep’t of Educ.*,
17 Nos. 04-00442 ACK-BMK, 05-00247 ACK-BMK, 2008 WL 4225846, *1 (D. Haw. Sept. 11,
18 2008) (“[W]hile an expert witness generally may give opinion testimony that embraces an ultimate
19 issue to be decided by the trier of fact, that expert may not express a legal opinion as to the
20 ultimate legal issue”); see FED.R.EVID. 704(a) (“An opinion is not objectionable just because it
21 embraces an ultimate issue”); see also *id.*, 1972 Advisory Committee Notes (“The basic approach
22 to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In
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24 ⁷⁰*Id.*, ¶ 8(e).

25 ⁷¹*Id.*, ¶ 141.

26 ⁷²*Id.*, ¶ 196.

27 ⁷³*Id.*, ¶ 320.

1 order to render this approach fully effective and to allay any doubt on the subject, the so-called
2 ‘ultimate issue’ rule is specifically abolished by the instant rule”).

3 “Courts have held that expert witnesses’ use of ‘judicially defined terms,’ ‘terms that
4 derived their definitions from judicial interpretations,’ and ‘legally specialized terms’ . . .
5 constitute[s] [an] expression of opinion as to the ultimate legal conclusion.” *Wiles*, 2008 WL
6 4225846 at *1. Dr. Benbrook’s opinions that Wesson Oil products are not natural go only to the
7 ultimate issue of fact, and are therefore admissible. The same can not be said, however, regarding
8 his opinion that ConAgra “falsely and deceptively labeled” its products. “False” and “deceptive”
9 are judicially defined terms. Accordingly, his use of these terms constitutes the offering of an
10 improper legal opinion that usurps the role of the court. See *S.E.C. v. Leslie*, No. C 07-3444,
11 2010 WL 2991038, *9 (N.D. Cal. July 29, 2010) (excluding expert’s opinion because “it is for
12 the jury to determine whether Defendants’ statements in fact were misleading”); *F.T.C. v.*
13 *Stefanchik*, No. C04-1852RSM, 2007 WL 4570879, *1 (W.D. Wash. Feb. 15, 2007) (expert’s
14 opinion that defendant’s materials are not unfair, false, misleading or deceptive was an
15 impermissible legal conclusion).⁷⁴

17 ⁷⁴ConAgra also argues more broadly that because plaintiffs argued in their opposition to
18 its motion to dismiss that no expert testimony would be necessary to determine whether the “100 %
19 Natural” claim is misleading, they are now judicially estopped from offering expert testimony on
20 the subject. “Judicial estoppel is an equitable doctrine that precludes a party from gaining an
21 advantage by asserting one position, and then later seeking an advantage by taking a clearly
22 inconsistent position.” *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.
23 2001). “Th[e] court invokes judicial estoppel not only to prevent a party from gaining an
24 advantage by taking inconsistent positions, but also because of ‘general consideration[s] of the
25 orderly administration of justice and regard for the dignity of judicial proceedings,’ and to ‘protect
26 against a litigant playing fast and loose with the courts.’” *Id.* (quoting *Russell v. Rolfs*, 893 F.2d
27 1033, 1037 (9th Cir. 1990)).

28 In determining whether to find that a party is judicially estopped, courts consider
(1) whether the party’s later position is “clearly inconsistent” with its earlier position; (2) whether
the party succeeded in persuading the court to accept the earlier position, such that judicial
acceptance of a later inconsistent position would create “the perception that either the first or
second [time the] court was misled”; and (3) whether the party seeking to assert an inconsistent
position would derive an unfair advantage or impose an unfair detriment on the opposing party
if not estopped. *Id.* at 782-83 (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001)). See also

1 For all of these reasons, the court grants ConAgra’s motion to strike Dr. Benbrook’s
2 testimony regarding definitions of the word “natural” on the grounds that it will not assist the trier
3 of fact. The court also strikes Dr. Benbrook’s testimony concerning consumer surveys regarding
4 the meaning on the word “natural” and whether it encompasses genetically modified organisms
5 or GMO ingredients. Finally, the court strikes Dr. Benbrook’s opinion that ConAgra “falsely and
6 deceptively labeled” its products. The court declines to strike Dr. Benbrook’s testimony regarding
7 GE processes, their impact on crops and food products, and whether those impacts occur in nature
8 without the application of GE techniques. It also declines to strike his opinion, based on his
9 understanding of the process used to make genetically engineered foods, that foods that contain
10 genetically engineered ingredients are not natural.

11 **3. ConAgra’s Expert Dominique M. Hanssens, Ph.D**

12 Dr. Dominique M. Hanssens is a professor of marketing at the UCLA Anderson School
13 of Management, where he has served on the faculty since 1977.⁷⁵ He has taught course on
14 Elements of Marketing, Marketing Strategy & Planning, and Customer Information Strategy.⁷⁶
15 His research focuses on strategic marketing problems involving data-analytic methods such as
16 econometrics and time-series analysis.⁷⁷ From July 2005 to June 2007 he served as the Executive
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20 *Ceja-Corona v. CVS Pharm., Inc.*, No. 1:12-cv-01703-AWI-SAB, 2014 WL 1679410, *9 (E.D.
Cal. Apr. 28, 2014) (listing factors).

21 In opposing ConAgra’s motion to dismiss, plaintiffs argued that the action should not be
22 stayed or dismissed under the “primary jurisdiction” doctrine because FDA agency expertise was
23 not required to determine whether the “100% Natural” claim is misleading. Here, plaintiffs
24 proffer Dr. Benbrook’s testimony under Rule 702, which requires only that expert testimony
25 “assist the trier of fact to understand the evidence or to determine a fact in issue.” FED.R.EVID.
702. The two positions are not “clearly inconsistent”; rather, they are compatible. Accordingly,
the court concludes that judicial estoppel does not apply to bar Dr. Benbrook’s testimony.

26 ⁷⁵Hanssens Decl., ¶ 1.

27 ⁷⁶*Id.*, ¶ 1.

28 ⁷⁷*Id.*, ¶ 2.

1 Director of the Marketing Science Institute in Cambridge, Massachusetts.⁷⁸ He is also a founding
2 partner of MarketShare, a global marketing analytics firm.⁷⁹

3 Dr. Hanssens opines that there is a high degree of heterogeneity in the consumer purchase
4 process, and that consumer purchase decisions are influenced by a variety of factors upon which
5 consumers place different weights.⁸⁰ Dr. Hanssens opines that the term “100% Natural” has no
6 fixed or universal meaning, and that the sources on which Dr. Benbrook relied in forming his
7 opinion are not to the contrary.⁸¹ Dr. Hanssens conducted a survey in which participants were
8 divided between a “Test Group” and a “Control Group.” The former were shown an actual
9 Wesson Vegetable Oil label, while the latter were shown the same label but with all references to
10 “100% Natural” removed.⁸² Participants were asked: “Assuming you were intending to buy
11 vegetable oil today, how likely would you be to buy this product based on the information you’ve
12 been provided?” The two groups’ responses differed by just 1.1%, an amount that is not
13 statistically significant.⁸³ When asked whether they believed the product was free of GMO
14 ingredients, 40.3% and 35.7% of respondents in each group respectively answered “yes,” a
15 difference of 4.6%, which likewise is not statistically significant.⁸⁴ Dr. Hanssens opines that the
16 survey’s results show that the “100% Natural” label on Wesson cooking oils does not have a
17 material effect on consumer purchasing intent, or on consumer beliefs as to whether Wesson
18 cooking oils are free of GMO ingredients.⁸⁵

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20 ⁷⁸*Id.*, ¶ 3.

21 ⁷⁹*Id.*, ¶ 4.

22 ⁸⁰*Id.*, ¶ 12.

23 ⁸¹*Id.*, ¶¶ 15-16.

24 ⁸²*Id.*, ¶ 42.

25 ⁸³*Id.*, ¶¶ 51-52.

26 ⁸⁴*Id.*, ¶ 58.

27 ⁸⁵*Id.*, ¶¶ 13-14.
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1 Plaintiffs argue that Dr. Hanssens failed to use an acceptable survey design, and that his
2 findings are rebutted by surveys conducted by other organizations as well as by ConAgra's own
3 market research.⁸⁶ They proffer the declaration of Dr. Elizabeth Howlett, who opines that Dr.
4 Hanssens' survey suffers from "a number of shortcomings and fatal methodological flaws that
5 render the survey results meaningless."⁸⁷ The methodological flaws she identified include (1) a

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7 ⁸⁶Objections to Declaration of Dominique M. Hanssens ("Obj. to Hanssens Decl."), Docket
8 No. 282 (June 30, 2014) at 2.

9 ⁸⁷Declaration of Dr. Elizabeth Howlett ("Howlett Decl."), Docket No. 288 (June 30,
10 2014), ¶ 17. Dr. Howlett also opines on the level of importance consumers attach to "natural"
11 claims on food products in general and to the "100% Natural" label on Wesson Oils in particular.
12 She also discusses a survey conducted for plaintiffs by Dr. John C. Kozup that was designed to
13 measure consumer perceptions as to whether a "100% Natural" claim is consistent with the use
14 of GMO ingredients. (*Id.*, ¶ 1; Declaration of Adam J. Levitt ("Levitt Decl."), Docket No. 287
15 (June 30, 2014), Exh. J (Kozup Survey).) ConAgra objects that Dr. Howlett's declaration is
16 untimely and that the court should not consider evidence offered for the first time in reply. (Reply
17 to Motion to Strike at 13-14.) In general, a court will not consider evidence submitted for the first
18 time in reply without giving the opposing party an opportunity to respond. *Provenz v. Miller*, 102
19 F.3d 1478, 1483 (9th Cir. 1996) (district court should not consider new evidence presented in a
20 reply without giving the non-movant an opportunity to respond); see *Green v. Baca*, 219 F.R.D.
21 485, 487 n. 1 (C.D. Cal. 2003) (exercising discretion to consider evidence presented in reply but
22 affording plaintiff an opportunity to depose a key declarant). Evidence submitted in direct
23 response to evidence raised in the opposition, however, is not "new." *Edwards v. Toys "R" US*,
24 527 F.Supp.2d 1197, 1205 n. 31 (C.D. Cal. 2007) ("Evidence is not 'new,' however, if it is
25 submitted in direct response to proof adduced in opposition to a motion"); see *Terrell v. Contra*
26 *Costa County*, 232 Fed. Appx. 626, 629 n. 2 (9th Cir. Apr. 16, 2007) (Unpub. Disp.) (evidence
27 adduced in reply was not new where "[t]he Reply Brief addressed the same set of facts supplied
28 in Terrell's opposition to the motion but provides the full context to Terrell's selected recitation
of the facts"). Here, Dr. Howlett's opinions regarding Dr. Hanssens' survey respond directly to
evidence adduced by ConAgra in its opposition to plaintiffs' class certification motion. Dr.
Howlett's testimony on this topic, therefore, is not "new," and the court will consider it deciding
plaintiffs' motion. The same cannot be said for Dr. Howlett's other opinions, which either
constitute additional evidence supporting arguments plaintiffs raised in their motion or constitute
completely new evidence offered for the first time in reply, e.g., Dr. Kozup's survey. The court
therefore declines to consider Dr. Howlett's opinions regarding the importance consumers attach
to "natural" claims on food products and the Kozup survey.

On July 11, 2014 – the Friday before the Monday hearing on plaintiffs' motion – plaintiffs
filed a response to ConAgra's evidentiary objections to Howlett's declaration and the Kozup
survey, as well as to a rebuttal declaration filed by Weir (see *infra* n. 133). (Plaintiffs' Response
to Defendant ConAgra Foods, Inc.'s Evidentiary Objections to New Evidence Submitted for the

1 failure to adduce any evidence Test Group participants actually perceived the “100% Natural”
2 label, (2) a failure to control for participants’ prior knowledge and pre-existing beliefs, (3) a
3 failure to control for participants’ confusion regarding the meaning of “GMO,” (4) a failure to
4 include measures to ensure participants are paying attention to the survey, (5) a failure to screen
5 for contradictory or meaningless responses, (6) a failure accurately to interpret open-ended
6 answers, (7) a failure to utilize a representative sample, (8) a failure to analyze non-response and
7 dropout rates, and (9) a failure to control for bias.⁸⁸

8 While plaintiffs are correct that *Daubert* governs the admissibility of survey data, the Ninth
9 Circuit has held that “[c]hallenges to survey methodology go to the weight given the survey, not
10 its admissibility.” *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). See *Southland*
11 *Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n. 8 (9th Cir. 1997) (“However, ‘as long as
12 they are conducted according to accepted principles,’ survey evidence should ordinarily be found
13 sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to
14 determine whether asserted technical deficiencies undermine a survey’s probative value,” quoting
15 *Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992)); *id.* at 1143 (the fact that
16 a survey that was conducted only in the southern portion of the state and asked leading questions
17 went to the weight of the evidence, not the admissibility of the survey); see also *Clicks Billiards*,

18 _____
19 First Time on Reply in Support of Plaintiffs’ Motion for Class Certification (“Reply Evidence
20 Response”), Docket No. 299 (July 11, 2014).) Plaintiffs argued that Kozup’s survey was rebuttal
21 evidence because it was proffered in response to Hanssens’ survey. (*Id.* at 10.) For the reasons
22 already stated, the court does not agree with this characterization of plaintiffs’ evidence. Citing
23 *Smith v. Microsoft Corp.*, No. 11-CV-1958 JLS (BGS), 2013 WL 6497073 (S.D. Cal. Dec. 10,
24 2013) and *All Star Seed v. Nationwide Agribusiness Ins. Co.*, No. 12cv146 L(BLM), 2014 WL
25 1286561 (S.D. Cal. Mar. 31, 2014), plaintiffs contended that even if the filings do not qualify as
26 rebuttal evidence, the court should still consider them, afford ConAgra an opportunity “orally [to]
27 rebut the new evidence during [the] hearing,” or construe ConAgra’s objections as a legally
28 sufficient response. (*Id.* at 8.) The court finds the cases cited distinguishable, as the *Smith* and
All Star courts each determined that evidence or argument submitted for the first time in reply was
not “new.” Moreover, given the technical nature of the new evidence plaintiffs have adduced,
affording ConAgra an opportunity to rebut it orally or considering ConAgra’s evidentiary
objections a sufficient response would prejudice ConAgra.

⁸⁸Howlett Decl., ¶¶ 48-63.

1 *Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001) (“Treatment of surveys is a
2 two-step process. First, is the survey admissible? That is, is there a proper foundation for
3 admissibility, and is it relevant and conducted according to accepted principles? This threshold
4 question may be determined by the judge. Once the survey is admitted, however, follow-on issues
5 of methodology, survey design, reliability, the experience and reputation of the expert, critique
6 of conclusions, and the like go to the weight of the survey rather than its admissibility. These are
7 issues for a jury or, in a bench trial, the judge”); *Alcantar v. Hobart Serv.*, No. ED CV 11-1600
8 PSG (SPx), 2013 WL 156530, *4 (C.D. Cal. Jan. 15, 2013) (“[A]ny problems with the response
9 rate affect the weight, and not the admissibility of the study”); *Microsoft Corp. v. Motorola Inc.*,
10 904 F.Supp.2d 1109, 1120 (W.D. Wash. 2012) (criticisms of a conjoint analysis concerned
11 “issues of methodology, survey design, reliability, and critique of conclusions, and therefore
12 [went] to the weight of the survey rather than admissibility”); *Harris v. Vector Marketing Corp.*,
13 753 F.Supp.2d 996, 1001-02 (N.D. Cal. 2010) (“[Plaintiff] criticizes the content of the survey
14 conducted and prepared by [defendant’s expert] as well as the response rate to the survey. The
15 problem for [Plaintiff] is that, as she herself admits in her brief, even challenges to defects in
16 methodology normally affect the weight to be accorded the survey and not its admissibility”);
17 *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F.Supp. 1283, 1296 (N.D. Cal.1991)
18 (holding that the alleged under-inclusiveness of a survey in a copyright infringement action
19 affected “the weight of the survey, not its admissibility”), *aff’d*, 964 F.2d 965 (9th Cir. 1992),
20 *cert. denied*, 507 U.S. 985 (1993).

21 Plaintiffs do not challenge Dr. Hanssens’ expertise, nor does it appear they could, given
22 his extensive experience. As for the relevance of the survey results, Dr. Hanssens’ findings
23 regarding the impact the “100% Natural” label has on consumer purchasing decisions, and
24 whether consumers associate “100% Natural” with products free of GMO ingredients, are
25 probative as to whether the label misleads consumers and causes them to believe Wesson Oil
26 products do not contain GMO ingredients. The court has some concerns regarding the survey
27 design, particularly Dr. Hanssens’ decision to utilize a sample consisting of unequal proportions
28 of females in the Test Group and Control Group – 62.9% and 52.9% respectively. Both of these

1 percentages fall below the 80% ConAgra requires in the marketing studies it commissions,
2 suggesting that it believes women make up approximately 80% of its consumers.⁸⁹ The court
3 concludes, however, that such concerns go to the weight of Dr. Hanssens' survey, and do not
4 render it inadmissible under Rule 702.⁹⁰

5 Plaintiffs also urge the court to exclude the survey as unduly prejudicial under Rule 403
6 of the Federal Rules of Evidence. Rule 403 requires the court to exclude relevant evidence "if
7 its probative value is substantially outweighed by a danger of one or more of the following: unfair
8 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly
9 presenting cumulative evidence." FED.R.EVID. 403. Although the survey is prejudicial to
10 plaintiffs' position, the prejudice is not "unfair." See *Hankey*, 203 F.3d at 1172 (evidence is
11 unfairly prejudicial only if it has "an undue tendency to suggest decision on an improper basis,
12 commonly, though not necessarily, an emotional one," citing FED. R. EVID. 403, Advisory
13 Committee Notes); see also *Old Chief v. United States*, 519 U.S. 172, 179 (1997) ("The term
14 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant
15 evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the
16 offense charged" (citation omitted)). Nor does any prejudice substantially outweigh the probative
17 value of the evidence. The court therefore declines to strike Dr. Hanssens' testimony.

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21 ⁸⁹Hanssens Decl., Exh. 5.1 at 107; Howlett Decl. at 15; Levitt Decl., Exh. F at 3706.

22 ⁹⁰Dr. Howlett's other criticisms likewise go to the weight of the survey data, but do not
23 render it inadmissible. He asserts, for example, that the survey fails to ensure respondents
24 actually viewed the "100% Natural" label, because the survey did not obtain data concerning the
25 length of time respondents viewed the label, did not ask whether the label said "100% Natural,"
26 and did not include attention checks to ensure respondents were paying attention. She also states
27 that the survey failed to consider respondents' prior knowledge and beliefs. While these purported
28 deficiencies may affect the weight to be given to the survey's conclusions about consumer attitudes
toward the "100% Natural" label, they are proper subjects for cross-examination, not a basis for
excluding Dr. Hanssens' testimony regarding the survey. See *Wendt*, 125 F.3d at 814; *Southland
Sod Farms*, 108 F.3d at 1143 n. 8.

1 **B. Legal Standard Governing Class Certification**

2 A district court may certify a class only if:

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

7 FED.R.CIV.PROC. 23(a).

8 In addition, a district court must also find either that at least one of the several conditions
9 set forth in Rule 23(b) is met. “Rule 23(b)(1) allows a class to be maintained where ‘prosecuting
10 separate actions by or against individual class members would create a risk of’ either ‘(A)
11 inconsistent or varying adjudications,’ or ‘(B) adjudications . . . that, as a practical matter, would
12 be dispositive of the interests of the other members not parties to the individual adjudications or
13 would substantially impair or impede[] their ability to protect their interests.’” *Wal-Mart Stores,*
14 *Inc. v. Dukes*, 131 S. Ct. 2541, 2549 n. 2 (2011).

15 Rule 23(b)(2) allows class treatment when “the party opposing the class has acted or
16 refused to act on grounds that apply generally to the class, so that final injunctive relief or
17 corresponding declaratory relief is appropriate respecting the class as a whole.” FED.R.CIV.PROC.
18 23(b)(2). The Supreme Court has not yet decided whether this rule “applies only to requests for
19 such injunctive or declaratory relief and does not authorize the class certification of monetary
20 claims at all.” *Dukes*, 131 S. Ct. at 2557. It has concluded, however, “that, at a minimum,
21 claims for individualized relief . . . do not satisfy the Rule.” *Id.* Thus, “it does not authorize
22 class certification when each class member would be entitled to an individualized award of
23 monetary damages.” *Id.*

24 “Rule 23(b)(3) states that a class may be maintained where ‘questions of law or fact
25 common to class members predominate over any questions affecting only individual members,’
26 and a class action would be ‘superior to other available methods for fairly and efficiently
27 adjudicating the controversy.’” *Id.* at 2549 n. 2.

1 “Rule 23 does not set forth a mere pleading standard. A party seeking class certification
2 must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to
3 prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”
4 *Id.* at 2551. Thus, “[t]he party seeking certification bears the burden of showing that each of the
5 four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met.”
6 *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir.), amended, 273 F.3d
7 1266 (9th Cir. 2001)); see also *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).
8 A class can be certified only if the court “is satisfied, after a rigorous analysis, that the
9 prerequisites of Rule 23(a) have been satisfied.” *General Telephone Co. of Southwest v. Falcon*,
10 457 U.S. 147, 160-61 (1982). As the Supreme Court has noted, “[f]requently . . . ‘rigorous
11 analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim.” *Dukes*, 131
12 S. Ct. at 2551.

13 Plaintiffs seeks to certify the following twelve separate statewide classes:

14 All persons who reside in the States of California, Colorado, Florida, Illinois,
15 Indiana, Nebraska, New Jersey, New York, Ohio, Oregon, South Dakota, or Texas
16 who have purchased Wesson Oils within the applicable statute of limitations periods
17 established by the laws of their state of residence (the “Class Period”) through the
18 final disposition of this and any and all related actions.⁹¹

19 **C. Whether the Proposed Class Should Be Certified**

20 **1. Standing**

21 As a threshold matter, ConAgra contends that the named plaintiffs lack standing because
22 they have suffered no injury.⁹² Specifically, ConAgra argues that after filing the lawsuit, plaintiffs
23 continued to purchase cooking oils and other products that were labeled “natural” but contained
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27 ⁹¹Motion at 11-12.

28 ⁹²Opp. Cert. at 15.

1 non-organic GMO ingredients.⁹³ It asserts plaintiffs cannot prove measurable damages because
2 although they allege they paid a premium for Wesson Oils because it was labeled “100% Natural,”
3 they are unable determine the price they paid for Wesson products and have no means of acquiring
4 this information.⁹⁴

5 The court finds these arguments unavailing. First, each plaintiff testified that he or she
6 purchased Wesson Oil during the class period.⁹⁵ Plaintiffs contend they were damaged because

8 ⁹³*Id.*

9 ⁹⁴*Id.*

10 ⁹⁵ConAgra argues that plaintiff Pauline Michael testified she did not purchase Wesson Oil
11 products during the three-year limitations period for consumer protection claims in Illinois, 815
12 ILCS §§ 505/1 *et seq.*, and that she accordingly lacks standing to represent an Illinois class on this
13 claim. (“Q. Have you bought any Wesson Oil since June 27, 2007? A. No, I don’t believe so.”
14 (Declaration of Robert B. Hawk (“Hawk Decl.”), Docket No. 269 (June 2, 2014), Exh. D at
15 80:1-4.)) With their reply, plaintiffs submitted Michael’s declaration, in which she states that she
16 incorrectly recalled the date of her last purchase of Wesson Oil during her deposition, and that she
17 in fact has in fact purchased the product since June 27, 2007. (Reply Declaration of Plaintiff
18 Pauline Michael (“Michael Decl.”), Docket No. 286 (June 30, 2014), ¶¶ 6-8.) Although
19 submitted in reply, this evidence responds directly to the deposition testimony ConAgra adduced
20 in support of its opposition. Accordingly, Michael’s reply declaration is not “new” and the court
21 will not decline to consider it on this basis. Ordinarily, however, when a declaration directly
22 contradicts prior deposition testimony, the deposition testimony controls and the declaration must
23 be disregarded. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (“The
24 general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit
25 contradicting his prior deposition testimony”). To determine whether such a declaration can be
26 considered, the court must make a factual determination as to whether the declaration is a “sham.”
27 *Id.* at 266-67 (limiting the rule first articulated in *Radobenko v. Automated Equip. Corp.*, 520
28 F.2d 540, 543-44 (9th Cir. 1975)). An affidavit is not a sham if: (1) it “merely elaborat[es] upon,
explain[s] or clarif[ies] prior testimony,” *Messnick v. Horizon Industries, Inc.*, 62 F.3d 1227,
1231 (9th Cir. 1995); (2) if “the witness was confused at that time of the earlier testimony and
provides an explanation for the confusion,” *Pacific Ins. Co. v. Kent*, 120 F.Supp.2d 1205, 1213
(C.D. Cal. 2000) (citing *Kennedy*, 952 F.2d at 266); or (3) if the declaration concerns newly
discovered evidence, *id.* See also *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 998-99 (9th
Cir. 2009) (“the inconsistency between a party’s deposition testimony and subsequent affidavit
must be clear and unambiguous to justify striking the affidavit”); *id.* at 999 (“minor
inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence
afford no basis for excluding an opposition affidavit”); *Kennedy*, 952 F.2d at 267 (before
testimony is designated “sham,” it must “flatly contradict[] earlier testimony”). Michaels states

1 ConAgra misleadingly labeled the products “100% Natural,” which “caus[ed] them to pay higher
2 market prices for those Wesson Oils than [they] would have otherwise paid . . . without that
3 claim.”⁹⁶ Although plaintiffs’ purchases of other products labeled “natural” and containing GMO
4 ingredients may seriously undercut their claim that their purchasing decision was influenced by
5 ConAgra’s “100% Natural” label, the purchases do not deprive plaintiffs of standing to assert the
6 claims they plead in this action. Moreover, although the court has stricken Weir’s declaration for
7 purposes of this proceeding, it notes that plaintiffs can prove damages without recalling the price
8 they paid for Wesson Oils or producing documentation of their purchases. Data from Information
9 Resources, Inc. may well permit plaintiffs to determine the price range of Wesson Oil in their
10 region of the country during the class period or at the times they recall purchasing the product.⁹⁷

11 _____
12 that she was asked repeatedly during her deposition when she last purchased Wesson, and had
13 trouble recalling the date. (Michael Decl., ¶ 5.) She states that she stopped purchasing Wesson
14 Oils after making changes to her diet, and that she estimated the year of her last purchase by
15 estimating the year when she altered her diet; she based her estimate on her probable age at the
16 time of the dietary changes. (*Id.*, ¶¶6-7.) She explains she later realized that because the dietary
17 changes were prompted by a car accident that occurred in September 2008, her last purchase of
18 Wesson Oils must have occurred after June 27, 2007. (*Id.*, ¶ 8.) The court is satisfied by
19 Michaels’ explanation and concludes that the contradictory testimony was the result of an honest
20 discrepancy or mistake. See *Van Asdale*, 577 F.3d at 999; *Calloway v. Contra Costa County Jail*
21 *Correctional Officers*, No. C 01-2689 SBA, 2007 WL 134581, *17 (N.D. Cal. Jan. 16, 2007)
22 (“Defendants offer many instances from Plaintiff’s deposition testimony where he was unable to
23 remember dates, but the *Kennedy* court was clear that discrepancies due to honest mistake do not
24 constitute ‘sham’ testimony. The Court declines to exclude the declaration as a sham”).
25 Accordingly, the court declines to strike the declaration, and finds that Michaels has standing to
26 represent the Illinois class on the consumer protection claim.

27 ⁹⁶Reply in Support of Motion to Certify Class (“Reply”), Docket No. 284 (June 30, 2014)
28 at 12-13.

29 ⁹⁷The court is cognizant that due to market factors, prices for the same product may vary
30 widely. See, e.g., *Werdebaugh v. Blue Diamond Growers*, Case No.: 12-CV-2724-LHK, 2014
31 WL 2191901, *23 (N.D. Cal. May 23, 2014) (“Werdebaugh testified that consumers typically pay
32 a premium simply by purchasing from Whole Foods, a distinction for which Dr. Capps does not
33 account in his Price Premium Model”); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ.
34 8742(DLC), 2011 WL 196930, *3 (S.D.N.Y. Jan. 21, 2011) (“[P]laintiffs have offered no
35 evidence of the prices of competing or comparable beverages that did not contain the alleged
36 mislabeling, much less the prices of such beverages at locations and periods of time that

1 This, coupled with evidence concerning the portion of that price that constituted a “premium” for
2 the product’s “100% Natural” ingredients would suffice to send the question of damages to the
3 jury. See *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10–4387 PJH, 2014 WL 60097, *12
4 (N.D. Cal. Jan. 7, 2014) (“One method of quantifying the amount of restitution to be awarded is
5 computing the effect of unlawful conduct on the market price of a product purchased by the class.
6 This measure of restitution contemplates the production of evidence that attaches a dollar value
7 to the ‘consumer impact or advantage’ caused by the unlawful business practices. Restitution can
8 then be calculated by taking the difference between the market price actually paid by consumers
9 and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business
10 practices. Expert testimony may be necessary to determine the amount of price inflation
11 attributable to the challenged practice” (internal citations omitted)). Compare *Colgan v.*
12 *Leatherman Tool Grp., Inc.*, 135 Cal.App.4th 663, 700 (2006) (“There was expert testimony that
13 ‘Made in U.S.A.’ claims have a significant positive impact on consumers and that Leatherman
14 realized a ‘substantial advantage’ by using a ‘Made in U.S.A.’ representation; however, the expert
15 did not attempt to quantify either the dollar value of the consumer impact or the advantage realized
16 by Leatherman. The record therefore contains no evidence concerning the amount of restitution
17 necessary to restore purchasers to the status quo ante”). At least on the basis of the present
18 record, the court is unwilling to conclude that lack standing to sue because they cannot prove they
19 suffered a concrete injury. Whether plaintiffs’ failure to present evidence that Weir has
20 constructed a model that adequately accounts for all variables, and that isolates the effect of the

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22 approximate those at which the two plaintiffs purchased Snapple. Again, this would be a difficult
23 task since it is undisputed that the prices of beverages in the retail market vary widely and are
24 affected by the nature and location of the outlet in which they are sold, and the availability of
25 discounts, among many other factors”). ConAgra asserts that the price of Wesson Oil and its
26 competitors’ products is set by retailers and varied widely during the class period. It proffers the
27 declaration of its expert, Keith Ugone, as evidence of this. (See Declaration of Keith R. Ugone,
28 Docket No. 268 (June 2, 2014), ¶ 50 and App. E.) Without further information concerning the
nature of the data available through Information Resources, Inc. or from other sources, however,
the court is unwilling at this point to conclude that no plaintiff could show that he or she suffered
in injury in fact for Article III purposes.

1 “100% Natural” label on the price of Wesson Oils undercuts their ability to show that damages
2 are susceptible of measurement across the class such that common questions of fact predominate
3 under Rule 23(b)(3) is another question altogether.

4 **2. Rule 23(a) Requirements**

5 **a. Whether Plaintiffs Have Identified an Ascertainable Class**

6 Although not specifically mentioned in Rule 23, plaintiffs must, in addition to showing
7 numerosity, commonality, typicality and adequacy, demonstrate that the members of the class are
8 ascertainable. See, e.g., *Lukovsky v. San Francisco*, No. C 05-00389 WHA, 2006 WL 140574,
9 *2 (N.D. Cal. Jan. 17, 2006) (“Although there is no explicit requirement concerning the class
10 definition in FRCP 23, courts have held that the class must be adequately defined and clearly
11 ascertainable before a class action may proceed,” quoting *Schwartz v. Upper Deck Co.*, 183
12 F.R.D. 672, 679-80 (S.D. Cal. 1999)); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives*
13 *& Composites, Inc.*, 209 F.R.D. 159, 163 (C.D. Cal. 2002) (“Prior to class certification,
14 plaintiffs must first define an ascertainable and identifiable class. Once an ascertainable and
15 identifiable class has been defined, plaintiffs must show that they meet the four requirements of
16 Rule 23(a), and the two requirements of Rule 23(b)(3)” (citation and footnote omitted)); *O’Connor*
17 *v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (holding that a class
18 definition must be “precise, objective and presently ascertainable”); *Bishop v. Saab Automobile*
19 *A.B.*, No. CV 95-0721 JGD (JR_x), 1996 WL 33150020, *4 (C.D. Cal. Feb. 16, 1996) (“To file
20 an action on behalf of a class, the named plaintiffs must be members of the class that they purport
21 to represent at the time the class action is certified. The named plaintiffs must also demonstrate
22 that the class is ascertainable” (citation omitted)).

23 A class is sufficiently defined and ascertainable if it is “administratively feasible for the
24 court to determine whether a particular individual is a member.” *O’Connor*, 184 F.R.D. at 319;
25 accord *Davoll v. Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995); see also *Buford v. H & R Block,*
26 *Inc.*, 168 F.R.D. 340, 347 (S.D. Ga. 1996) (“[T]he ‘description of the class must be sufficiently
27 definite to enable the court to determine if a particular individual is a member of the proposed
28 class,’” quoting *Pottinger v. Miami*, 720 F.Supp. 955, 957 (S.D. Fla. 1989)).

1 Plaintiffs argue that the classes they propose are ascertainable because membership in each
2 is governed by a single objective criterion – whether the individual purchased Wesson Oils during
3 the class period.⁹⁸ ConAgra counters that the classes are not ascertainable because it has no way
4 of determining the identity of consumers who purchased its products,⁹⁹ and that the vast majority
5 of possible class members will be unable to self-identify. Specifically, it asserts, it is unlikely
6 consumers retained receipts, and given the product’s relatively low purchase price, they will be
7 unlikely to recall the quantity, type, and date of purchases made during the class period.¹⁰⁰

8 District courts in this circuit are split as to whether the inability to identify the specific
9 members of a putative class of consumers of low priced products makes the class unascertainable.
10 Some courts have concluded that it does. See *Sethavanish v. ZonePerfect Nutrition Co.*, No.
11 12–2907–SC, 2014 WL 580696, *5-6 (N.D. Cal. Feb. 13, 2014) (“Plaintiff has yet to present any
12 method for determining class membership, let alone an administratively feasible method. It is
13 unclear how Plaintiff intends to determine who purchased ZonePerfect bars during the proposed
14 class period, or how many ZonePerfect bars each of these putative class members purchased. It
15 is also unclear how Plaintiff intends to weed out inaccurate or fraudulent claims. Without more,
16 the Court cannot find that the proposed class is ascertainable”); see also *Carrera v. Bayer Corp.*,
17 727 F.3d 300, 308-11 (3d Cir. 2013) (holding a putative class of consumers who purchased a diet
18 supplement was not ascertainable because (1) there was insufficient evidence to show that retailer
19 records could be used to identify class members, (2) the use of affidavits to identify class members
20 would deprive defendant of the opportunity to challenge class membership, (3) a proposed
21 screening model to ensure the affidavits are reliable was not shown to be reliable for certification
22 purposes, and (4) the inclusion of fraudulent or inaccurate claims could dilute the recovery of
23 absent class members, who could then argue they were not adequately represented and thus not
24 bound by the judgment); *In re POM Wonderful LLC*, No. ML 10–02199 DDP (RZX), 2014 WL

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26 ⁹⁸Cert. Motion at 19.

27 ⁹⁹Opp. Cert. at 12.

28 ¹⁰⁰*Id.* at 12-13.

1 1225184, *6 (C.D. Cal. Mar. 25, 2014) (observing that “[i]n situations where purported class
2 members purchase an inexpensive product for a variety of reasons, and are unlikely to retain
3 receipts or other transaction records, class actions may present such daunting administrative
4 challenges that class treatment is not feasible,” and holding that a class of consumers of a juice
5 product was not ascertainable, particularly where “[n]o bottle, label, or package included any of
6 the alleged misrepresentations”).

7 Other courts have rejected the reasoning underlying such decisions as effectively
8 foreclosing class actions involving low priced consumer goods. See *Forcellati v. Hyland’s, Inc.*,
9 No. CV 12–1983–GHK (MRWx), 2014 WL 1410264, *5 (C.D. Cal. Apr. 9, 2014) (rejecting an
10 argument that a putative class of consumers of children’s cold/flu products was not ascertainable,
11 and stating that “[g]iven that facilitating small claims is ‘[t]he policy at the very core of the class
12 action mechanism,’ we decline to follow *Carrera*,” quoting *Amchem Prods., Inc. v. Windsor*, 521
13 U.S. 591, 617 (1997)); *McCrary v. Elations Co., LLC*, No. EDCV 13–00242 JGB (OPx), 2014
14 WL 1779243, *8 (C.D. Cal. Jan. 13, 2014) (“*Carrera* eviscerates low purchase price consumer
15 class actions in the Third Circuit. It appears that pursuant to *Carrera* in any case where the
16 consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer
17 or seller does not keep a record of buyers, *Carrera* prohibits certification of the class. While this
18 may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit. In this
19 Circuit, it is enough that the class definition describes ‘a set of common characteristics sufficient
20 to allow’ a prospective plaintiff to ‘identify himself or herself as having a right to recover based
21 on the description. As discussed above, the class definition clearly defines the characteristics of
22 a class member by providing a description of the allegedly offending product and the eligible dates
23 of purchase. A prospective plaintiff would have sufficient information to determine whether he
24 or she was an Elations customer who viewed the specified label during the stated time period,”
25 quoting *Moreno v. AutoZone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008) (citations omitted));
26 *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (“Defendants’ real
27 concern with the proposed class definition appears to be that members of the class do not have
28 actual proof that they are in the class. Defendants suggest that simply because most members of

1 the proposed class will not have retained all of their receipts for AriZona Iced Tea over the past
2 few years, the administration of this class will require ‘fact-intensive mini trials’ to establish
3 whether each purported class member had in fact made a purchase entitling them to class
4 membership. This is simply not the case. If it were, there would be no such thing as a consumer
5 class action. There is no requirement that ‘the identity of the class members . . . be known at the
6 time of certification’”).

7 The court agrees with those courts that have found such classes ascertainable and follows
8 their reasoning. ConAgra’s argument would effectively prohibit class actions involving low priced
9 consumer goods – the very type of claims that would not be filed individually – thereby upending
10 “[t]he policy at the very core of the class action mechanism.” *Amchem Prods.*, 521 U.S. at 617;
11 see *Ebin v. Kangadis Food, Inc.*, 297 F.R.D. 561, 567 (S.D. N.Y. 2014) (“Yet the class action
12 device, at its very core, is designed for cases like this where a large number of consumers have
13 been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing
14 an individual lawsuit. Against this background, the ascertainability difficulties, while formidable,
15 should not be made into a device for defeating the action”).

16 Here, the class definition identifies putative class members by objective characteristics; this
17 is the mark of an ascertainable class. See *Forcellati*, 2014 WL 1410264 at *5 (“‘The requirement
18 of an ascertainable class is met as long as the class can be defined through objective criteria,’”
19 quoting *Guido v. L’Oreal, USA, Inc.*, Nos. CV CV 11–1067 CAS (JCx), CV 11–5465 CAS
20 (JCx), 2013 WL 335385, *18 (C.D. Cal. July 1, 2013)); *id.* (“A class is sufficiently ascertainable
21 if ‘the proposed class definition allows prospective plaintiffs to determine whether they are class
22 members with a potential right to recover,’” quoting *Parkinson v. Hyundai Motor America*, 258
23 F.R.D. 580, 593–94 (C.D. Cal. 2008)). While it is true that identifying class members may well
24 require the creation of a claim form or declaration that those asserting membership in the class
25 must submit (likely under penalty of perjury), courts have concluded that such a procedure makes
26 the class ascertainable, at least where the alleged mislabeling occurred throughout the class period,
27 and on a single product or narrow group of products. See, e.g., *Werdebaugh*, 2014 WL 2191901
28 at *11; *Brazil v. Dole Packaged Foods, LLC*, Case No.: 12–CV–01831–LHK, 2014 WL 2466559,

1 *4-6 (N.D. Cal. May 30, 2014) (certifying a class of consumers who purchased Dole fruit
2 products allegedly mislabeled “All Natural” during the class period and finding that the
3 submission of consumer affidavits as a means of identifying class members was likely to produce
4 reliable affidavits because all products included in the class definition contained the alleged
5 mislabeling consistently throughout the class period). ConAgra may also be able to test an
6 individual’s claim that he or she is a class member by comparing information about the
7 individual’s purchase with information it maintains concerning the retailers that sold its products
8 during the class period or other similar information. See *Galvan v. KDI Distribution Inc.*, SACV
9 08-0999-JVS (ANx), 2011 WL 5116585, *4 (C.D. Cal. Oct.25, 2011)

10 ConAgra next argues that the classes are not ascertainable for the additional reason that
11 they include individuals who were not injured, i.e., consumers who did not read or notice the
12 “100% Natural” claim and thus could not have been deceived by it.¹⁰¹ ConAgra cites *Diacakis*
13 *v. Comcase Corp.*, No. C 11-3002 SBA, 2013 WL 1878921, *1 (N.D. Cal. May 3, 2013), in
14 support of this argument. There, plaintiff filed a putative class action alleging six state law claims,
15 and moved to certify a class that included all purchasers of a Triple Play package (which bundles
16 internet, television and telephone services) from Comcast who were charged rental or lease fees.
17 Citing the Seventh Circuit’s decision in *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006),
18 the court held the class was not ascertainable because proof of plaintiff’s claims required consumer
19 deception, and the class included all individuals who purchased a Triple Play package, whether
20 or not the consumer was deceived by Comcast’s alleged failure to disclose the existence of
21 additional modem charges. *Id.* at *4.

22 Plaintiffs counter that the inclusion of uninjured class members does not necessarily render
23 a class unascertainable, citing *Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 WL
24 988992, (N.D. Cal. Mar. 10, 2014). There, plaintiff moved to certify a nationwide class of all
25 persons who registered to purchase groceries through Safeway.com, and who purchased groceries
26 that were subject to a price markup. *Id.* at *15. Safeway argued that the class was not
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28 ¹⁰¹Opp. Cert. at 13-14.

1 ascertainable because it included individuals who, for various reasons, did not have viable claims
2 or who could not prove damages. *Id.* The court rejected this argument, noting that such a rule
3 would effectively require a plaintiff to plead a “fail-safe” class. *Id.* See 7A Wright & Miller,
4 FEDERAL PRACTICE & PROCEDURE CIVIL § 1760 (3d ed.) (“Some courts also have considered
5 whether the class definition must exclude anyone who does not have a viable claim. In effect, this
6 interpretation means that plaintiffs must plead what effectively is a ‘fail-safe’ class”).¹⁰²

7 Other courts in this circuit have reached similar conclusions, see *Rodman*, 2014 WL
8 988992 at *15 (collecting cases), and the Seventh and Tenth Circuits are in accord. See *Kohen*
9 *v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (the fact that a proposed class
10 “will often include persons who have not been injured by the defendant’s conduct . . . does not
11 preclude class certification,” but it is also the case that “a class should not be certified if it is
12 apparent that it contains a great many persons who have suffered no injury at the hands of the
13 defendant”); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) (“That a
14 class possibly or even likely includes persons unharmed by a defendant’s conduct should not
15 preclude certification”). The *Rodman* court concluded that while “[t]here is a place in the Rule
16 23 analysis for considering whether a class definition is sufficiently ‘overbroad’ as to preclude
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21 ¹⁰²“Fail-safe classes are defined by the merits of their legal claims, and are therefore
22 unascertainable prior to a finding of liability in the plaintiffs’ favor.” *Velasquez v. HSBC Finance*
23 *Corp.*, No. 08-4592 SC, 2009 WL 112919, *4 (N.D. Cal. Jan. 16, 2009); see also *Boucher v.*
24 *First American Title Ins. Co.*, No. C10-199RAJ, 2011 WL 1655598, *5 (W.D. Wash. May 2,
25 2011) (“Second, the definition conditions a customer’s class membership on a finding that First
26 American is liable to him or her. . . . So, for example, if the court certified the class and later
27 determined on summary judgment that First American correctly discounted all class members’
28 premiums, then the class would have no members. A ‘fail-safe class’ like this ensures that a
defendant cannot prevail against the class, because if the defendant prevails, the class will not
exist”); *Lewis v. First American Title Ins. Co.*, 265 F.R.D. 536, 551 (D. Idaho 2010) (defining
a fail-safe class as one that “impermissibly determines membership based upon a determination
of liability”).

1 certification,” the issue was better analyzed as part of the commonality inquiry. 2014 WL 988992
2 at *16.¹⁰³

3 Moreover, “[c]onsumer action classes that have been found to be overbroad generally
4 include members who were never exposed to the alleged misrepresentations at all.” *Algrain v.*
5 *Maybelline LLC*, __ F.R.D. __, 2014 WL 1883772, *7 (S.D. Cal. May 12, 2014). See *id.* (“In
6 the instant case, Plaintiffs have alleged a widespread advertising campaign promoting the alleged
7 misrepresentations as well as uniform labeling for each of the Class Products. That the proposed
8 class may include purchasers who did not rely on the misrepresentations and/or were satisfied with
9 the products does not render the class ‘overbroad’ where Maybelline has failed to demonstrate a
10 lack of exposure as to some class members”); compare *Red v. Kraft Foods, Inc.*, No. CV
11 10-1028-GW (AGRx), 2012 WL 8019257, * 5 (C.D. Cal. Apr.12, 2012) (finding a class that
12 included consumers who were not exposed to the misleading statements overbroad); *Sevidal v.*
13 *Target Corp.*, 189 Cal.App.4th 905, 926-28 (2010) (finding a class overbroad where a majority
14 of class members were never exposed to the alleged misrepresentations and there was absolutely
15 no likelihood they were deceived by the allegedly false advertising).

16 Here, every putative class member has been exposed to the alleged misrepresentation,
17 because every bottle of Wesson Oil sold during the class period was labeled “100% Natural.” The
18 court therefore finds the class ascertainable, and agrees with the *Stearns* and *Rodman* courts that
19 the inclusion of uninjured class members is more properly analyzed under Rule 23(a)(2) or
20 23(b)(3).¹⁰⁴

23 ¹⁰³*Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), a case cited by ConAgra,
24 is not to the contrary. In *Stearns*, plaintiffs alleged a website induced people to purchase
25 inadvertently services they neither expected, wanted, or used. The court held that the proposed
26 class was overbroad under Rule 23(b)(3), because it included members who were not misled and
27 who intentionally signed up for the services. *Id.* at 1022, 1024. Thus, while finding the presence
of uninjured class members defeated predominance, the court did not conclude that this fact
rendered the class unascertainable.

28 ¹⁰⁴ConAgra raises this argument with respect to Rule 23(b)(3), but not Rule 23(a)(2).

1 **b. Numerosity**

2 Before a class can be certified under the Federal Rules of Civil Procedure, the court must
3 determine that it is “so numerous that joinder of all members is impracticable.” See
4 FED.R.CIV.PROC. 23(a)(1). “Impracticability does not mean impossibility, [however,] . . . only
5 . . . difficulty or inconvenience in joining all members of the class.” *Harris v. Palm Springs*
6 *Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (internal quotations omitted). There
7 is no set numerical cutoff used to determine whether a class is sufficiently numerous; courts must
8 examine the specific facts of each case to evaluate whether the requirement has been satisfied.
9 See *General Tel. Co. v. EEOC*, 446 U.S. 318, 329-30 (1980). “As a general rule, [however,]
10 classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the
11 circumstances of each case, and classes of 40 or more are numerous enough.” *Ikonen v. Hartz*
12 *Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (citing 3B J. Moore & J. Kennedy,
13 MOORE’S FEDERAL PRACTICE ¶ 23-05[1] (2d ed. 1987)). Here, ConAgra admits that millions of
14 consumers purchased Wesson Oil products during the class period.¹⁰⁵ Consequently, plaintiffs
15 have met their burden of demonstrating that the proposed classes are sufficiently numerous.¹⁰⁶

16 **c. Commonality**

17 Commonality requires “questions of law or fact common to the class.” See
18 FED.R.CIV.PROC. 23(a)(2). The commonality requirement is construed liberally, and the
19 existence of some common legal and factual issues is sufficient. *Jordan v. County of Los Angeles*,
20 669 F.2d 1311, 1320 (9th Cir. 1982); accord *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
21 Cir. 1998) (“The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion
22 requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively”); see also,
23 e.g., *Ventura v. New York City Health & Hosps. Corp.*, 125 F.R.D. 595, 600 (S.D.N.Y. 1989)
24 (“Unlike the ‘predominance’ requirement of Rule 23(b)(3), Rule 23(a)(2) requires only that the
25 class movant show that a common question of law or fact exists; the movant need not show, at this

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27 ¹⁰⁵Answer to Amended Complaint, ¶ 57.

28 ¹⁰⁶ConAgra does not dispute plaintiffs’ showing as to this requirement.

1 stage, that the common question overwhelms the individual questions of law or fact which may
2 be present within the class”). As the Ninth Circuit has noted: “All questions of fact and law need
3 not be common to satisfy the rule. The existence of shared legal issues with divergent factual
4 predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies
5 within the class.” *Hanlon*, 150 F.3d at 1019.

6 That said, the putative class’s “claims must depend upon a common contention – for
7 example, the assertion of discriminatory bias on the part of the same supervisor. That common
8 contention, moreover, must be of such a nature that it is capable of classwide resolution – which
9 means that determination of its truth or falsity will resolve an issue that is central to the validity
10 of each one of the claims in one stroke.” *Dukes*, 131 S. Ct. at 2551. Although for purposes of
11 Rule 23(a)(2) even a single common question will do, *id.* at 2556, “[w]hat matters to class
12 certification . . . is not the raising of common ‘questions’ – even in droves – but, rather the
13 capacity of a classwide proceeding to generate common answers apt to drive the resolution of the
14 litigation. Dissimilarities within the proposed class are what have the potential to impede the
15 generation of common answers.” *Id.* at 2551 (citing Richard A. Nagareda, *Class Certification*
16 *in the Age of Aggregate Proof*, 84 N.Y.U.L.REV. 97, 132 (2009)). As the Ninth Circuit recently
17 articulated by way of example, “it is insufficient to merely allege any common question, for
18 example, ‘Were Plaintiffs passed over for promotion?’ Instead, they must pose a question that
19 ‘will produce a common answer to the crucial question why was I disfavored.’” *Ellis*, 657 F.3d
20 at 981 (quoting *Dukes*, 131 S. Ct. at 2552).

21 Plaintiffs argue the commonality element is satisfied for all classes because their claims
22 pose a common question – whether ConAgra’s “100% Natural” marketing and labeling of Wesson
23 Oil products was false, unfair, deceptive, and/or misleading.¹⁰⁷ Because all class members were
24 exposed to the statement and purchased Wesson Oil products, there is “a common core of salient
25 facts.” *Hanlon*, 150 F.3d at 1019. Indeed, courts routinely find commonality satisfied in false
26 advertising cases such as the case at bar. See, e.g., *Ries*, 287 F.R.D. at 537 (“[H]ere, variation
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28 ¹⁰⁷Cert. Motion at 15.

1 among class members in their motivation for purchasing the product, the factual circumstances
2 behind their purchase, or the price that they paid does not defeat the relatively ‘minimal’ showing
3 required to establish commonality”); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365,
4 377 (N.D. Cal. 2010) (holding that the commonality requirement was satisfied by allegations that
5 the defendant beverage supplier’s “packaging and marketing materials are unlawful, unfair,
6 deceptive or misleading to a reasonable consumer”). Accordingly, the court finds the
7 commonality requirement satisfied.¹⁰⁸

8 **d. Typicality**

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

16 “The test of typicality is whether other members have the same or similar injury, whether
17 the action is based on conduct which is not unique to the named plaintiffs, and whether other class
18 members have been injured by the same course of conduct.” *Hanon*, 976 F.2d at 508 (citation
19 and internal quotations omitted). Typicality, like commonality, is a “permissive standard[].”
20 *Hanlon*, 150 F.3d at 1020. Indeed, in practice, “[t]he commonality and typicality requirements
21 of Rule 23(a) tend to merge.” *Falcon*, 457 U.S. at 157-58 n. 13. See also *Dukes*, 131 S. Ct. at
22

23 ¹⁰⁸Once again, ConAgra does not dispute that this requirement is satisfied. Plaintiffs assert
24 that additional common questions include: (a) whether ConAgra acted knowingly or recklessly;
25 (b) whether ConAgra’s practices violate applicable law; (c) whether Plaintiffs and the other
26 members of the Classes are entitled to actual, statutory, or other forms of damages, and other
27 monetary relief; and (d) whether Plaintiffs and the other members of the Classes are entitled to
28 equitable relief, including but not limited to injunctive relief and restitution. (Cert. Motion at 15.)
Because whether ConAgra’s “100% Natural” assertion in the marketing and sale of its Wesson
Oils is false, unfair, deceptive, and/or misleading satisfies the commonality requirement, the court
need not address plaintiffs’ other asserted bases for establishing commonality.

1 2551 n. 5 (“We have previously stated in this context that “[t]he commonality and typicality
2 requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether
3 under the particular circumstances maintenance of a class action is economical and whether the
4 named plaintiff’s claim and the class claims are so interrelated that the interests of the class
5 members will be fairly and adequately protected in their absence. Those requirements therefore
6 also tend to merge with the adequacy-of-representation requirement, although the latter
7 requirement also raises concerns about the competency of class counsel and conflicts of interest,”
8 citing *Falcon*, 457 U.S. at 158 n. 13).

9 Typicality may be lacking “if ‘there is a danger that absent class members will suffer if
10 their representative is preoccupied with defenses unique to it.’” *Hanon*, 976 F.2d at 508 (quoting
11 *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180
12 (2d Cir. 1990)); see also *J.H. Cohn & Co. v. Am. Appraisal Assoc., Inc.*, 628 F.2d 994, 999 (7th
13 Cir. 1980) (“[E]ven an arguable defense peculiar to the named plaintiff or a small subset of the
14 plaintiff class may destroy the required typicality of the class as well as bring into question the
15 adequacy of the named plaintiff’s representation”). To be typical, a class representative need not
16 prove that she is immune from any possible defense, or that her claim will fail only if every other
17 class member’s claim also fails. Instead, she must establish that she is not subject to a defense that
18 is not “typical of the defenses which may be raised against other members of the proposed class.”
19 *Id.*; see also *Ellis*, 657 F.3d at 984.

20 The named plaintiffs argue that the typicality requirement is satisfied because they allege
21 a common pattern of wrongdoing – i.e., ConAgra’s labeling of all Wesson Oils as “100%
22 Natural.” As a consequence, they contend, each class member was exposed to the same allegedly
23 false advertising on the Wesson Oils labels. Plaintiffs also assert that they have alleged the “100%
24 Natural” label was a factor in their decision to purchase the products, and that the same evidence
25 supports their claims as supports other class members’ claims.¹⁰⁹ ConAgra counters that plaintiffs’
26 claims are not typical because the record evidence demonstrates that the “100% Natural” label was
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28 ¹⁰⁹Cert. Motion at 16.

1 not a significant factor driving purchases of Wesson Oil.¹¹⁰ It cites Dr. Hanssens' finding that
2 there is no statistically significant difference between the purchasing decisions of survey
3 respondents shown a "100% Natural" label and those who saw a label without the phrase. It also
4 cites Dr. Hanssens' finding that only 5-6% of respondents who saw the "100% Natural" label
5 mentioned "natural" ingredients when describing why they would or would not buy a Wesson Oil
6 product, and what factors were important to them when purchasing cooking oil.¹¹¹

7 Plaintiffs assert that Dr. Hanssens' findings are contradicted by ConAgra's own documents,
8 which show the materiality of the "100% Natural" claim.¹¹² Plaintiffs proffer documents detailing
9 the results of ConAgra's marketing research; they contend this research demonstrates that pure
10 and natural claims play a significant role in consumer purchasing decisions. Because the
11 documents were filed under seal, the court does not detail the findings here. It concurs, however,
12 in plaintiffs' description of the documents.¹¹³

13 While the evidence concerning the materiality of the "100% Natural" label is in dispute,
14 the question is whether under the applicable law, the fact that the "100% Natural" label may not
15 have been a significant factor in the purchasing decision of all class members makes plaintiffs'
16 claims atypical. Plaintiffs argue that the court need not address materiality in determining whether

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18 ¹¹⁰Opp. Cert. at 16.

19 ¹¹¹Opp. Cert. at 16. ConAgra further contends that the named plaintiffs' lack standing
20 renders them atypical. (*Id.* at 17 n. 14.) The court has already rejected ConAgra's standing
21 argument, however, and need not address it again here.

22 ¹¹²Reply at 32-33. Plaintiffs also cite the Kozup survey and a Consumer Reports survey
23 as additional evidence supporting their contention that the "100% Natural" claim is material. (*Id.*
24 at 33.) Because plaintiffs submitted the Kozup survey for the first time in reply, the court will not
25 consider it because ConAgra has had no opportunity to respond. See *Provenz*, 102 F.3d at 1483;
Green, 219 F.R.D. at 487 n. 1. Nor will the court consider the Consumer Reports survey, which
26 was similarly filed in support of plaintiffs' reply. (See Levitt Decl., Exh. A.)

27 ¹¹³While the reports suggest that "pure and natural" claims are significant factors
28 motivating consumer purchasing decisions regarding cooking oils, (Declaration of Henry J.
Kelston ("Kelston Decl."), Docket No. 244 (May 5, 2014), Exh. 3 at 1944, Exh. 10 at 2546;
Levitt Decl., Exh. M), none of the studies directly addresses whether consumers equate "natural"
or "100% Natural" with the absence of genetically modified organisms or GMO ingredients.

1 to certify the proposed classes, because materiality is determined according to a “reasonable
2 consumer” standard and should be resolved at the merits stage. It is true that for claims brought
3 under California’s CLRA and UCL, causation can be proved on a classwide basis by showing that
4 the manufacturer’s representation was material. This is true because the CLRA employs a
5 “reasonable consumer” standard to determine materiality. See, e.g., *Falk v. Gen. Motors Corp.*,
6 496 F.Supp.2d 1088, 1095 (N.D. Cal. 2007) (“Materiality, for CLRA claims, is judged by the
7 effect on a ‘reasonable consumer,’ ” citing *Consumer Advocates v. Echostar Satellite Corp.*, 113
8 Cal.App.4th 1351, 1360 (2003)). Under the UCL, the court asks whether “‘members of the
9 public are likely to [have] be[en] deceived.’” *Shein v. Canon U.S.A., Inc.*, No. CV 08-7323 CAS
10 (Ex), 2010 WL 3170788, *7 (C.D. Cal. Aug. 10, 2010) (quoting *In re Tobacco II*, 46 Cal.4th
11 298, 312 (2009)). Thus, plaintiffs are entitled to a classwide inference of reliance if they can
12 show (1) that uniform misrepresentations were made to the class, and (2) that those
13 misrepresentations were material. *Id.* (stating that “relief under [the] UCL is available without
14 individualized proof” if plaintiff can show that defendant employed “‘uniform conduct to mislead
15 the entire class’” and “the alleged misrepresentation was material,” citing *Kaldenback v. Mut. of*
16 *Omaha Life Ins. Co.*, 178 Cal.App.4th 830, 850 (2009), and *Kingsbury v. U.S. Greenfiber, LLC*,
17 No. CV 08-00151 AHM (JTLx), 2009 WL 2997389, *10 (C.D. Cal. Sept.14, 2009)). See also
18 *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 669 (C.D. Cal. 2009) (“Courts have found that an
19 inference of reliance may be appropriate for claims for violations of the UCL and the CLRA. .
20 . . . For a class action, an inference of reliance arises as to the entire class only if the material
21 misrepresentations were made to all class members,” citing *Vasquez v. Superior Court*, 4 Cal.3d
22 800, 805 (1971) (“It is sufficient for our present purposes to hold that if the trial court finds
23 material misrepresentations were made to the class members, at least an inference of reliance
24 would arise as to the entire class”). There is no suggestion here that the “100% Natural” claim
25 was not uniformly made to members of the class. Thus, as respects plaintiffs’ CLRA and UCL
26 claims, the fact that the “100% Natural” label may not have been a significant factor in the
27 purchasing decision of all class members, as it purportedly was in plaintiffs’ purchasing decision,
28 does not make plaintiffs’ claims atypical of the class.

1 Plaintiffs, however, fail to address whether individualized reliance and an individualized
2 showing of causation are elements of the balance of their claims. They do not demonstrate, for
3 example, that the reasonable consumer standard applies to their California express warranty
4 claim.¹¹⁴ Nor do they adequately address the claims they assert under Colorado, Florida, Illinois,
5 Indiana, Nebraska, New Jersey, New York, Ohio, Oregon, South Dakota, and Texas law; as
6 discussed *infra*, plaintiffs' appendix of legal authority does not demonstrate that no individualized
7 showing of reliance and/or causation is required to prove the common law and statutory claims
8 the proposed state classes plead.

9 Because the typicality requirement focuses on whether the named plaintiffs' claims arise
10 from the same course of conduct as the class members' claims, and whether *the named plaintiffs*
11 are subject to unique defenses, however, and because it is not an onerous requirement, the court
12 concludes that the fact that some *class members* may not have relied on the "100% Natural" label
13 in purchasing Wesson Oils does not render the named plaintiffs' claims atypical. Stated
14 differently, if the named plaintiffs' claims were subject to the unique defense that they did *not* rely
15 on the "100% Natural" label in purchasing Wesson Oils, then as to any claims that require proof
16 of individualized reliance, there might be a concern about typicality. The situation posited by
17 ConAgra is the converse of that, however. The concerns it raises concerning the need for
18 individualized proof of reliance or causation, moreover, are better addressed in assessing whether
19

21 ¹¹⁴In this regard, there is some authority for the proposition that a breach of express
22 warranty claim under the California Commercial Code does not require proof of reliance on
23 specific promises made by the seller. See *Weinstat v. Dentsply International, Inc.*, 180
24 Cal.App.4th 1213, 1226-28 (2010) (noting, however, that the California Supreme Court has
25 declined to resolve the issue). Several courts, however, have held that to the extent *Weinstat*
26 correctly reflects the state of California law, it is limited to situations in which a plaintiff is in
27 privity with the manufacturer of the product. See, e.g., *Coleman v. Boston Scientific Corp.*,
28 1:10-CV-01968, 2011 WL 3813173, *4 (E.D. Cal. Aug. 29, 2011) (stating that *Weinstat* did not
support "[p]laintiff's erroneous contention that reliance is not required where privity is absent");
id. at *5 (stating that "reliance (or some other substitute for privity) is required for an express
warranty claim against a non-selling manufacturer of a product"). Here, it would not appear that
plaintiffs are in privity with ConAgra.

1 Rule 23(b)(3)'s predominance requirement is met. Consequently, the court finds the typicality
2 requirement satisfied.

3 **e. Adequacy**

4 The adequacy of representation requirement set forth in Rule 23(a)(4) involves a two-part
5 inquiry: "(1) do the named plaintiff[] and [her] counsel have any conflicts of interest with other
6 class members and (2) will the named plaintiff[] and [her] counsel prosecute the action vigorously
7 on behalf of the class?" *Hanlon*, 150 F.3d at 1020; accord *Staton v. Boeing Co.*, 327 F.3d 938,
8 957 (9th Cir. 2003). "Adequate representation depends on, among other factors, an absence of
9 antagonism between representatives and absentees, and a sharing of interest between
10 representatives and absentees." *Ellis*, 657 F.3d at 985. Individuals are not adequate
11 representatives of a class when "it appears that they have abdicated any role in the case beyond
12 that of furnishing their names as plaintiffs." *Helfand v. Cenco, Inc.*, 80 F.R.D. 1, 7 (N.D. Ill.
13 1977). ConAgra challenges the adequacy of the named plaintiffs on the same grounds that it
14 challenges the typicality of their claims. Because the court was not persuaded by those arguments,
15 it cannot conclude that plaintiffs are not adequate class representatives.

16 ConAgra also asserts that class counsel cannot adequately represent the interests of the
17 class. The adequacy of representation turns on the competence of class counsel and the absence
18 of conflicts of interest. *Falcon*, 457 U.S. at 157. ConAgra argues that counsel "have proven
19 unequal to the task of representing a class."¹¹⁵ It notes that counsel will be unable to attempt to
20 certify four state classes that were originally identified in their complaint because the named
21 plaintiffs representing those classes withdrew "with no real explanation" as to why withdrawal was
22 necessary and "with no timely move by counsel to replace the withdrawing . . . [plaintiffs]"
23 demonstrates that counsel are inadequate.¹¹⁶ ConAgra also cites the court's observation in a recent
24 order that "plaintiffs ha[d] done little to prepare for class certification proceedings or move the
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27 ¹¹⁵Opp. Cert. at 17.

28 ¹¹⁶*Id.*

1 case forward.”¹¹⁷ It notes the court’s comment that plaintiffs’ “approach to discovery in this case
2 has been dilatory. . . ,”¹¹⁸ its statement that “[t]o the extent [counsel permitted] the withdrawing
3 plaintiffs [not to comply with a discovery order issued by Judge Rosenberg], they ha[d] violated
4 [Judge Rosenberg’s] order, subjecting [their clients] to sanctions.”¹¹⁹ While courts have held that
5 counsel who have delayed in seeking class certification or have not diligently sought discovery are
6 not adequate to represent the interests of the class, see, e.g., *Colby v. J.C. Penney Co.*, 128
7 F.R.D. 247, 250 (N.D. Ill. 1989) (decertifying a class based, *inter alia*, on counsel’s lack of
8 diligence in conducting discovery), *aff’d* on other grounds, 926 F.2d 645 (7th Cir. 1991); *Lau v.*
9 *Standard Oil Co. of California*, 70 F.R.D. 526, 527-28 (N.D. Cal. 1975) (three year delay in
10 seeking class certification), the court cannot say that class counsel’s problems in this case rise to
11 the level that would support such a finding here, particularly given their background in class action
12 litigation. Nor does the court discern any conflict of interest affecting the representation.
13 Consequently, the court finds that the named plaintiffs and class counsel satisfy the adequacy
14 requirement.

15 3. Rule 23(b) Requirements

16 Having concluded that the Rule 23(a) requirements are met, the court turns to Rule 23(b).
17 Plaintiffs seek to certify the proposed classes separately for purposes of injunctive relief and
18 damages under Rule 23(b)(2) and 23(b)(3). In its decision in *Dukes v. Wal-Mart Stores, Inc.*, 603
19 F.3d 571 (9th Cir. 2010), *rev’d*, 131 S. Ct. 2541 (2011) (en banc), the Ninth Circuit noted that
20 the district court had the option of certifying a Rule 23(b)(2) equitable relief class and a separate
21 Rule 23(b)(3) class for damages if it concluded that it could not certify a single Rule 23(b)(2) class
22 because monetary relief predominated over the equitable relief sought. *Id.* at 620. The Supreme
23 Court later “rejected the ‘predominance’ test for determining whether monetary damages may be
24 included in a 23(b)(2) certification.” *Ellis*, 657 F.3d at 986. Subsequent to the Supreme Court’s

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26 ¹¹⁷*Id.* at 18.

27 ¹¹⁸*Id.*

28 ¹¹⁹*Id.* at 9.

1 decision in *Dukes*, however, the Ninth Circuit has suggested on multiple occasions that district
2 courts consider certifying separate Rule 23(b)(2) and 23(b)(3) classes. See *id.* at 988 (“[T]he
3 district court must consider how best to define the class(es) to ensure that all class members have
4 standing to seek the requested relief. See, e.g., *Dukes*, 603 F.2d at 620 (suggesting the court
5 certify a ‘Rule 23(b)(2) class for equitable relief and a separate Rule 23(b)(3) class for
6 damages’”); see also *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013)
7 (“Plaintiffs concede that class certification for their monetary claims under Rule 23(b)(2) cannot
8 stand in light of *Wal-Mart*. However, the possibility of a Rule 23(b)(2) class seeking injunctive
9 relief remains. Rule 23(b)(2) applies ‘when a single injunction or declaratory judgment would
10 provide relief to each member of the class.’ . . . [S]ee . . . *Ellis*, 657 F.3d at 987 (indicating that
11 the court could certify a Rule 23(b)(2) class for injunctive relief and a separate Rule 23(b)(3) class
12 for damages”). Consequently, and contrary to ConAgra’s argument,¹²⁰ it does not appear to be
13 the case that the court can certify a Rule 23(b)(2) class only if the monetary relief sought is purely
14 incidental to the injunctive relief. Rather, Ninth Circuit precedent indicates that the court can
15 separately certify an injunctive relief class and if appropriate, also certify a Rule 23(b)(3) damages
16 class. Consequently, the court turns to consideration of the requirements for certification under
17 Rule 23(b)(2).

18 **a. Rule 23(b)(2)**

19 An injunctive relief class can be certified under Rule 23(b)(2) when “the party opposing
20 the class has acted or refused to act on grounds that apply generally to the class, so that final
21 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”
22 FED.R.CIV.PROC. 23(b)(2). As a threshold matter, the court must determine whether the named
23 plaintiffs have standing to seek an injunction requiring ConAgra to cease marketing Wesson Oils
24 as “100% Natural.” ConAgra asserts there is no evidence that any named plaintiff would
25 purchase Wesson Oils in the future, and that this is fatal to their ability to secure injunctive relief.
26 Several courts have reached this conclusion. See, e.g., *Werdebaugh*, 2014 WL 2191901 at *9
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28 ¹²⁰Opp. Cert. at 38.

1 (“[B]ecause Werdebaugh has not alleged, let alone provided evidentiary proof, that he intends or
2 desires to purchase Blue Diamond almond milk products in the future, there is no likelihood of
3 future injury to Plaintiff that is redressable through injunctive relief, and Plaintiff lacks standing
4 to pursue that remedy”); *Forcellati*, 2014 WL 1410264 at *13 (“Plaintiffs do not suggest that they
5 are likely to purchase Defendants’ products in the future. Instead, they contend that the Article
6 III standing requirement for injunctive relief does not apply in the consumer protection context.
7 Some district courts in this Circuit have taken this approach, holding that a plaintiff in a false
8 advertising case retains standing to pursue injunctive relief so long as the products continue to be
9 deceptively marketed and sold by the defendant. These courts have reasoned that to hold
10 otherwise would severely undermine the efficacy of California’s consumer protection laws. We
11 decline to adopt this approach. We find more persuasive the courts that have insisted that it is
12 improper to carve out an exception to Article III’s standing requirements to further the purpose
13 of California consumer protection laws” (internal quotation marks and citation omitted); *Rahman*
14 *v. Mott’s LLP*, No. 13–3482, 2014 WL 325241, *10 (N.D. Cal. Jan. 29, 2014) (“to establish
15 standing, [a plaintiff] must allege that he intends to purchase the products at issue in the future”);
16 *Jou v. Kimberly–Clark Corp.*, No. 13–3075, 2013 WL 6491158, *13 (N.D. Cal. Dec. 10, 2013)
17 (rejecting “[p]laintiffs’ contention that it is unnecessary for them to maintain any interest in
18 purchasing the products in the future” in order to establish standing to sue for injunctive relief);
19 *Ries*, 287 F.R.D. at 533–34 (finding that plaintiffs had standing to pursue injunctive relief where
20 they alleged an intention to purchase the products at issue in the future); *Delarosa v. Boiron, Inc.*,
21 No. 10–1569, 2012 WL 8716658, *3–6 (N.D. Cal. Dec. 28, 2012) (finding that plaintiff lacked
22 standing to sue for injunctive relief where she did not dispute she had no intention to purchase
23 product in the future); *Wang v. OCZ Tech. Group, Inc.*, 276 F.R.D. 618, 626 (N.D. Cal. 2011);
24 see also *Mason v. Nature’s Innovation, Inc.*, No. 12–3019, 2013 WL 1969957, *4 (S.D. Cal.
25 May 13, 2013) (collecting cases and concluding that “[g]uided by the Ninth Circuit’s interpretation
26 of Article III’s standing requirements, this Court agrees with the courts that hold that a plaintiff
27 does not have standing to seek prospective injunctive relief against a manufacturer or seller
28 engaging in false or misleading advertising unless there is a likelihood that the plaintiff would

1 suffer future harm from the defendant’s conduct – i.e., the plaintiff is still interested in purchasing
2 the product in question”); *Moheb v. Nutramax Labs., Inc.*, No. 12–3633, 2012 WL 6951904, *6
3 (C.D. Cal. Sept. 4, 2012) (“Plaintiff and other members of the Class no longer buy Cosamin and,
4 thus, will obtain no benefit from an injunction concerning Defendant’s advertising because they
5 cannot demonstrate a probability of future injury”).

6 There are a number of cases that reach the opposite result, however. See, e.g., *Rasmussen*
7 *v. Apple Inc.*, __ F.Supp.2d __, 2014 WL 1047091 (N.D. Cal. Mar. 14, 2014) (declining to reach
8 the issue, but noting that “[s]ome courts have disagreed with th[e] reasoning [of the cases cited
9 above], correctly recognizing the limitation this places on federal courts to enforce California’s
10 consumer laws”); *Lanovaz v. Twinings N. Am., Inc.*, C-12-02646, 2014 WL 46822, *10 (N.D.
11 Cal. Jan. 6, 2014) (“The court finds the reasoning of *Henderson v. Gruma* and the cases following
12 it more convincing and accordingly finds that [plaintiff] has standing to seek injunctive relief”);
13 *Koehler v. Litehouse, Inc.*, No. CV 12–04055 SI, 2012 WL 6217635, *6 (N.D. Cal. Dec. 13,
14 2012) (“If the Court were to construe Article III standing as narrowly as Defendant advocates,
15 federal courts would be precluded from enjoining false advertising under California consumer laws
16 because a plaintiff who had been injured would always be deemed to avoid the cause of the injury
17 thereafter . . . and would never have Article III standing. . . . While Plaintiffs may not purchase
18 the same Gruma products as they purchased during the class period, because they are now aware
19 of the true content of the products, to prevent them from bringing suit would surely thwart the
20 objective of California's consumer protection laws,” quoting *Henderson v. Gruma Corp.*, 2011
21 WL 1362188, *7-8 (C.D. Cal. Apr. 11, 2011)); *Ries*, 287 F.R.D. at 533 (“were the Court to
22 accept the suggestion that plaintiffs’ mere recognition of the alleged deception operates to defeat
23 standing for an injunction, then injunctive relief would never be available in false advertising
24 cases, a wholly unrealistic result”).

25 The court agrees with Judge Moskowitz that Article III’s standing requirements take
26 precedence over enforcement of state consumer protection laws. See *Mason*, 2013 WL 1969957
27 at *4 (“Guided by the Ninth Circuit’s interpretation of Article III’s standing requirements, this
28 Court agrees with the courts that hold that a plaintiff does not have standing to seek prospective

1 injunctive relief against a manufacturer or seller engaging in false or misleading advertising unless
2 there is a likelihood that the plaintiff would suffer future harm from the defendant's conduct – i.e.,
3 the plaintiff is still interested in purchasing the product in question. . . . If an ADA plaintiff must
4 demonstrate likely injury in the future, consumer plaintiffs such as the one in this case must as
5 well. There is no likelihood of injury in the future if a plaintiff has no interest in purchasing the
6 product at issue again because it does not work or does not perform as advertised”); see also
7 *Garrison v. Whole Foods Mkt. Grp., Inc.*, No. 13–5222, 2014 WL 2451290, *5 (N.D. Cal. June
8 2, 2014) (“It may very well be that the legislative intent behind California's consumer protection
9 statutes would be best served by enjoining deceptive labeling.... But the power of federal courts
10 is limited, and that power does not expand to accommodate the policy objectives underlying state
11 law”). It does not agree, moreover, with those courts that have concluded that applying Article
12 III’s standing requirements will preclude all enforcement of state consumer protection laws. First,
13 plaintiffs can sue in state court for injunctive relief. Second, as this very case demonstrates, it is
14 not impossible that a plaintiff or plaintiffs will express a desire to purchase the product at issue
15 in the future. See *Werdebaugh*, 2014 WL 2191901 at *9.

16 Applying Article III’s requirements, the court agrees with Judge Breyer that a plaintiff does
17 not lack standing simply because “he has learned that a label is misleading and therefore will not
18 be fooled by it again.” Rather, a plaintiff lacks standing if he has not “express[ed] an intent to
19 purchase the products in the future.” *Jones v. ConAgra Foods, Inc.*, No. C 12–01633 CRB,
20 2014 WL 2702726, *12 (N.D. Cal. June 13, 2014). Plaintiffs argue that two of the named
21 plaintiffs – Pauline Michael and Maureen Towey – have expressed an intent to purchase Wesson
22 Oils in the future.¹²¹ Although they cite page 128 of Michael’s deposition, that page does not
23 contain any testimony concerning Michael’s desire to purchase Wesson Oils in the future.¹²²
24 ConAgra, moreover, has proffered portions of Michael’s deposition testimony in which she stated
25 that she stopped purchasing Wesson Oils approximately five or six years ago because her eating
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27 ¹²¹Reply at 38.

28 ¹²²Levitt Decl., Exh. P at 2.

1 habits changed.¹²³ Although Michael has submitted a declaration stating that she testified
2 erroneously that she had not purchased Wesson Oils since June 27, 2007, and that she continued
3 to purchase Wesson Oils until she was in a car accident in September 2008, which prompted the
4 dietary changes about which she earlier testified, she nowhere states that she wishes to purchase
5 Wesson Oils in the future. Indeed, both her deposition testimony and her declaration indicates that
6 due to dietary changes, she no longer buys the product.

7 With respect to plaintiff Maureen Towey, plaintiffs cite page 132 of her deposition. That
8 page, however, does not contain a statement by Towey that she wishes to purchase Wesson Oils
9 in the future.¹²⁴ ConAgra, moreover, has submitted excerpts of Towey's deposition in which she
10 states that the only purchase of a Wesson Oil she can recall making was in 2010.¹²⁵
11 Consequently, the court cannot conclude that either Michael or Towey has expressed a desire to
12 purchase Wesson Oils in the future. As a result, the court concludes that none of the named
13 plaintiffs has standing to sue for injunctive relief. It declines to certify classes under Rule 23(b)(2)
14 as a result.

15 **b. Rule 23(b)(3)**

16 **i. Whether Common Issues Predominate**

17 **(a) Reliance and Causation**

18 Certifying a class under Rule 23(b)(3) requires “that the questions of law or fact common
19 to the members of the class predominate over any questions affecting only individual members,
20 and that a class action is superior to other available methods for the fair and efficient adjudication
21 of the controversy.” FED.R.CIV.PROC. 23(b)(3); see *Poulos v. Caesars World, Inc.*, 379 F.3d
22 654, 664 (9th Cir. 2004). The predominance requirement is “far more demanding” than the
23 commonality requirement of Rule 23(a). *Amchem Products*, 521 U.S. at 623-24. If common
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25 ¹²³Declaration of Robert B. Hawk in Opposition to Motion for Class Certification (“Hawk
26 Decl.”), Docket No. 269 (June 2, 2014), Exh. D at 36-37.

27 ¹²⁴Levitt Decl., Exh. P at 3.

28 ¹²⁵Hawk Decl., Exh. F at 41, 45.

1 questions “present a significant aspect of the case and they can be resolved for all members of the
2 class in a single adjudication,” then “there is clear justification for handling the dispute on a
3 representative rather than on an individual basis,” and the predominance test is satisfied. *Hanlon*,
4 150 F.3d at 1022. “[I]f the main issues in a case require the separate adjudication of each class
5 member’s individual claim or defense, [however,] a Rule 23(b)(3) action would be
6 inappropriate.” *Zinser*, 253 F.3d at 1190 (quoting 7A Charles Alan Wright, Arthur R. Miller
7 & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778, at 535-39 (1986)).
8 This is because, *inter alia*, “the economy and efficiency of class action treatment are lost and the
9 need for judicial supervision and the risk of confusion are magnified.” *Id.*

10 Plaintiffs’ motion asserts that predominance is easily satisfied because there is a single
11 common question that will have a single answer – whether labeling Wesson Oils – which are made
12 from or contain genetically modified organisms – is false, unfair, deceptive and/or misleading.¹²⁶
13 In this regard, they contend that they will be able to show that the “100% Natural” claim was
14 material to a reasonable consumer and thus that they will be entitled to a classwide inference of
15 reliance and causation.¹²⁷ ConAgra counters that individual issues predominate because reliance
16 and causation cannot be determined on a classwide basis.¹²⁸

17 Although plaintiff submitted a document they denominate Appendix 1, which purports to
18 address the laws of the various states for which they seek to certify classes,¹²⁹ the document does
19 not demonstrate that reliance and causation can be proved on a classwide basis with respect to each
20 of the claims plaintiffs assert, and each of the classes they propose. Appendix 1, for example,
21 does not address in any way the putative California class’ breach of express warranty claim. For
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23 ¹²⁶Cert. Motion at 21.

24 ¹²⁷*Id.* at 22.

25 ¹²⁸Opp. Cert. at 19.

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27 ¹²⁹This document violates the Local Rules and expanded page limitations that the court
28 authorized in this case, as it is, effectively, legal argument and citations that should have been
included in plaintiff’s memorandum of points and authorities.

1 the most part, moreover, the citations provided with respect to classes to be certified under other
2 states' laws do not – at least as represented by plaintiffs – address, on a cause of action by cause
3 of action basis, whether the laws of those states require individualized proof of reliance and/or
4 causation. ConAgra, for its part, cites several cases suggesting that such proof is required in at
5 least certain of the states at issue. Based on plaintiffs's submission, the court simply cannot find
6 that they have met their burden of showing that common issues predominate over individual
7 questions because they have not demonstrated that with respect to all claims and all classes, they
8 are entitled to a classwide inference of reliance and causation upon adducing appropriate proof.

9 Even had plaintiffs adequately shown that a classwide inference of reliance and causation
10 is available for all claims and all classes, the court would not be able to find on the present record
11 that they had demonstrated an entitlement to such an inference. Citing California law, the Ninth
12 Circuit has held that if a misrepresentation is not material as to all class members, the issue of
13 reliance “var[ies] from consumer to consumer,” and no classwide inference arises. *Stearns v.*
14 *Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011) (citing *In re Vioxx Class Cases*, 180
15 Cal.App.4th 116, 129 (2009)). Here, as the court noted earlier, the evidence regarding the
16 materiality of “100% Natural” is in conflict. The evidence plaintiffs proffer to show materiality,
17 moreover, is weak at best. First, plaintiffs adduce no survey evidence concerning the actual
18 reaction of consumers to the “100% Natural” label on Wesson Oils specifically or the presence
19 of such a label on cooking oils generally.¹³⁰ The portions of ConAgra's market research on which
20 they rely, moreover, do not link consumers' understanding of “100% Natural” to the specific
21 issue raised in this case – i.e., whether consumers believe the label means the product contains
22 no genetically modified organisms or GMO ingredients. Although plaintiffs' expert, Dr.
23 Benbrook, cites the November 2011 Leatherhead survey and the 2010 Hartman Group survey, it
24 appears that at the time Dr. Benbrook prepared his declaration, he had not read a complete version
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28 ¹³⁰Although plaintiffs submitted the survey conducted by Dr. Kozup in reply, the court has declined to consider it for the reasons stated in note 88 *supra*.

1 of at least one of the reports he cites. The surveys themselves, moreover, have not been
2 submitted.¹³¹ Consequently, the court has difficulty according them great weight.¹³²

3 **(b) Damages**

4 Putting aside issues of reliance and causation, Rule 23(b)(3) is satisfied only if plaintiffs
5 establish that “damages are capable of measurement on a classwide basis.” *Comcast Corp. v.*
6 *Behrend*, 133 S. Ct. 1426, 1433 (2013). While plaintiffs have submitted Colin Weir’s declaration
7 in which he states that it is possible to determine damages on a classwide basis, Weir has made
8 no attempt to do so. Although Weir describes the methods he would use to make the calculation
9 – hedonic regression and conjoint analysis – he does not report that he has actually employed them
10 to identify the price premium he believes will provide the classwide measure of relief.¹³³ This
11

12 ¹³¹Plaintiffs request that, in the event the court grants ConAgra’s motion to strike Dr.
13 Benbrook’s declaration, it take judicial notice of various of the documents he discusses, including
14 the Leatherhead and Hartman Group surveys. (Request for Judicial Notice, Docket No. 292 (July
15 1, 2014), Exhs. 8, 28.) Under Rule 201, the court can judicially notice “[o]fficial acts of the
16 legislative, executive, and judicial departments of the United States,” and “[f]acts and propositions
17 that are not reasonably subject to dispute and are capable of immediate and accurate determination
18 by resort to sources of reasonably indisputable accuracy.” The contents of the Leatherhead and
19 Hartman Group surveys are not capable of immediate and accurate determination. Moreover,
20 plaintiffs ask only that the court take judicial notice “of the fact that the respective agencies,
21 industry groups, and scientific journals published these reports to consumers.” (*Id.* at 2.)
22 Granting plaintiffs’ request thus would not provide a basis on which to accept, or even evaluate,
23 the contents of the surveys.

24 ¹³²The court also notes that the Leatherhead survey involved respondents from Italy,
25 France, Germany and the United Kingdom in addition to the United States. (Benbrook Decl.,
26 ¶ 38; Hanssens Decl., ¶ 75.) As Dr. Hanssens notes, the survey authors commented on the fact
27 that the term natural was less important to U.S. consumers than to European consumers.
28 (Hanssens Decl., ¶ 75.) Thus, results based on both U.S. and European consumers may have
skewed the outcome of the survey. Hanssens also asserts that the survey data do not specifically
address genetically modified organisms, and that 61% of respondents did not equate “natural”
with “coming from nature.” (*Id.*, ¶ 76.)

¹³³Weir Decl., ¶ 9; Hawk Decl., Exh. G at 113-14. Weir submitted a rebuttal declaration
with plaintiffs’ reply, which states that he conducted a preliminary hedonic regression analysis.
(Rebuttal Declaration of Colin B. Weir, Docket No. 285 (June 30, 2014), ¶¶ 10, 87-93.) Because
Weir’s preliminary analysis is new evidence submitted for the first time in reply, the court declines
to consider it. *Provenz*, 102 F.3d at 1483. Plaintiffs contend that Weir was unable to complete

1 alone suffices to support a finding that plaintiffs have not shown that damages can be calculated
2 on a classwide basis.¹³⁴ See, e.g., *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 25
3 (2012) (“Defendant also argues that the methodology offered by [plaintiff’s expert] Capps is too
4 vague for the Court to even evaluate. The Court concurs. Capps says he plans to run a regression
5 analysis to determine which products increased in price and by how much as a result of the
6 merger. Yet, admittedly, he cannot simply compare before-and-after prices; instead, he has to
7 account for other non-merger factors that may have affected price. Capps’s expert report
8 mentions some ‘possible explanatory factors’ that he might use in his regression . . . but his
9 proposal is tentative at best. He notes that ‘[t]he result of merits discovery may further refine this
10 assessment and provide the basis for including additional explanatory factors to be considered as

11 _____
12 his preliminary analysis by the class certification deadline because ConAgra did not produce
13 Nielsen data until April 28, 2014, four weeks after the March 31, 2014 deadline for production
14 set by Judge Rosenberg, and one week prior to the class certification deadline. (Reply Evidence
15 Response at 14.) Plaintiffs assert they should not be held responsible for failing to request a
16 continuance because they had previously filed an *ex parte* application seeking an extension of the
17 class certification deadline, which ConAgra opposed. (*Id.* at 15.) The application to which
18 plaintiffs refer was filed on March 16, 2014. (*Ex Parte* Application to Modify Scheduling Order
19 or, in the Alternative, for Expedited Scheduling Conference, Docket No. 220 (Mar. 16, 2014).)
20 The court issued an order on March 28, 2014, *inter alia*, continuing the class certification deadline
21 to May 5, 2014. (Order Granting Plaintiffs’ *Ex Parte* Application to Modify Scheduling Order,
22 Docket No. 230 (Mar. 28, 2014) at 7.) Thus, plaintiffs’ application, and the court’s order,
23 predate the events about which plaintiffs complain. Accordingly, they should have brought
24 ConAgra’s failure to comply with the March 31 production deadline to the court’s attention and
25 requested appropriate relief.

26 ¹³⁴At the hearing, plaintiffs cited *Werdebaugh*, 2014 WL 2191901 at *25, for the
27 proposition that they were not required to produce a regression analysis and provide final results
28 at the class certification stage. The case is distinguishable. There, plaintiffs’ damages expert, Dr.
Capps, proposed a regression model to isolate damages arising from defendant’s allegedly
misleading label claims. The court determined that the proposed model satisfied Rule 23(b)(3),
noting that it identified various factors Dr. Capps sought to isolate in order to calculate the price
differential resulting from the mislabeling; these included “regional price variance, price changes
that result from increasing or decreasing demand for complementary products, and inflation.” *Id.*
at *26. Here, by contrast, Weir has identified no factors he seeks to isolate in the models he
proposes to create for this litigation. Moreover, in contrast to the expert in *Werdebaugh*, the court
has stricken Weir’s declaration under Rule 702 of the Federal Rules of Evidence, and thus is
unable to consider even his proposed methodology in deciding plaintiffs’ motion.

1 part of any regression model.’ In other words, not only had Capps not yet performed a single
2 regression, but also he could not even tell the Court the precise analyses he intended to
3 undertake”); *Weiner*, 2010 WL 3119452 at *8 (concluding that plaintiffs had not demonstrated that
4 damages could be proved on a classwide basis because their expert, “Goedde[,] himself concedes
5 that he has done nothing to confirm that his proposed approaches would be workable in this case.
6 For instance, Goedde admits that if he is unable to identify comparable products for Snapple’s ‘All
7 Natural’ beverages, then his ‘yardstick’ approach will not work. And yet, Goedde has not even
8 attempted to identify any comparable products to be used in his analysis. Nor has Goedde
9 attempted to use his two approaches to actually build an empirical algorithm to determine whether
10 a price premium was paid for Snapple’s beverages as a result of the ‘All Natural’ labeling. He
11 has stated that he will not do so until after a decision on class certification”),

12 More fundamentally, *Comcast* stands for the proposition that plaintiffs’ method of proving
13 damages must be tied to their theory of liability. *Comcast*, 133 S. Ct. at 1433 (“If respondents
14 prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder
15 competition, since that is the only theory of antitrust impact accepted for class-action treatment
16 by the District Court. It follows that a model purporting to serve as evidence of damages in this
17 class action must measure only those damages attributable to that theory. If the model does not
18 even attempt to do that, it cannot possibly establish that damages are susceptible of measurement
19 across the entire class for purposes of Rule 23(b)(3)”). Weir proposes to calculate the price
20 premium attributable to ConAgra’s use of the term “100% Natural.”¹³⁵ He concedes, however,
21 that “100% Natural” and “non-GMO” are not equivalent. Specifically, he testified at his
22 deposition that he did not believe the terms were equivalent “because non-GMO is extremely
23 specific about one thing and I – my understanding of the general claim of “All Natural” is that it
24 has many implications.”¹³⁶ This is confirmed by the studies Benbrook cites, which list multiple
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27 ¹³⁵Weir Decl., ¶¶ 4, 9.

28 ¹³⁶Hawk Decl., Exh. G at 66.

1 possible characteristics that consumers associate with a “natural” label.¹³⁷ Plaintiffs’ specific
2 theory of liability in this case is that the “100% Natural” label misled consumers and caused them
3 to believe that Wesson Oils contained no genetically modified organisms or GMO ingredients.
4 Under *Comcast*, therefore, Weir must be able to isolate the price premium associated with
5 misleading consumers in that particular fashion. It does not appear from his declaration and
6 deposition testimony that he intends to do so. Rather, it appears he intends merely to calculate
7 the price premium attributable to use of the term “100% Natural” and all of the meanings
8 consumers ascribe to it. This does not suffice under *Comcast*. See *Vaccarino v. Midland Nat.*
9 *Life Ins. Co.*, No. 2:11-cv-05858-CAS(MANx), 2014 WL 572365, *7 (C.D. Cal. Feb. 3, 2014
10 (“In *Comcast*, the plaintiffs advanced four separate theories of antitrust violation, which
11 collectively resulted in subscribers overpaying for cable TV service. The district court only
12 accepted one of these four theories as susceptible of classwide proof. The plaintiffs’ method of
13 computing damages, however, did not segregate out the harm caused by each of the four theories
14 of antitrust violation proffered by the plaintiffs. The Supreme Court found that this damages
15 model did not satisfy the requirements of Rule 23(b)(3) because it conflated all four theories of
16 antitrust violation without differentiating between the harms caused by each theory” (citations
17 omitted)).

18 **(c) Conclusion Regarding Predominance**

19 For all of the reasons stated, the court concludes that plaintiffs have not shown that
20 common questions predominate over individualized questions.

21 **ii. Superiority**

22 The second requirement imposed by Rule 23(b)(3) is that a class action be superior to other
23 methods of resolving class members’ claims. “Under Rule 23(b)(3), the court must evaluate
24 whether a class action is superior by examining four factors: (1) the interest of each class member
25 in individually controlling the prosecution or defense of separate actions; (2) the extent and nature
26 of any litigation concerning the controversy already commenced by or against the class; (3) the
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28 ¹³⁷Benbrook Decl., ¶ 41.

1 desirability of concentrating the litigation of the claims in a particular forum; and (4) the
2 difficulties likely to be encountered in the management of a class action.” *Edwards v. City of*
3 *Long Beach*, 467 F.Supp.2d 986, 992 (C.D. Cal. 2006) (quoting *Leuthold v. Destination Am.,*
4 *Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004)).

5 “Where damages suffered by each putative class member are not large, th[e first] factor
6 weighs in favor of certifying a class action.” *Zinser*, 253 F.3d at 1190. Given the low average
7 price of a bottle of Wesson Oil,¹³⁸ the price premium attributable to consumers’ belief that “100 %
8 Natural” means the product contains no genetically modified organisms or GMO ingredients will,
9 if calculable, be quite small. Thus, even if an individual purchased Wesson Oils on a regular basis
10 during the class period, the damages he or she could recover in an individual suit would not be
11 sufficient to induce the class member to commence an action. The funds required to marshal the
12 type of evidence, including expert testimony, that would be necessary to pursue such a claim
13 against a well-represented corporate defendant would discourage individual class members from
14 filing suit when the expected return would be so small. See *Amchem Products*, 521 U.S. at 617
15 (“The policy at the very core of the class action mechanism is to overcome the problem that small
16 recoveries do not provide the incentive for any individual to bring a solo action prosecuting his
17 or her rights”).

18 The second factor likewise favors a finding that a class action is a superior means of
19 litigating these claims. The only litigation of which the court is aware raising the claims asserted
20 here are the cases that are presently pending before the court. These cases were either voluntarily
21 transferred to this jurisdiction by the parties or transferred here by the Panel on Multidistrict
22 Litigation. Given the small recovery that any individual plaintiff can expect, moreover,
23 concentrating the litigation in a single forum is appropriate. Thus, the third factor too favors a
24 finding of superiority.

27 ¹³⁸See, e.g., Ugone Decl., Exh. 11 at 309 (showing average retail cooking oil prices
28 generally in the \$3-5 range).

1 ConAgra does not address the first three factors. Rather, it focuses on the fourth – the
2 difficulties likely to be encountered in the management of a class action. ConAgra asserts that the
3 case will be unmanageable if the court certifies twelve different state classes, each of which alleges
4 multiple claims.¹³⁹ It contends that variations in state law would make a single trial unworkable,
5 as there would have to be different jury instructions and verdict forms for the claims of each state
6 class.¹⁴⁰ Plaintiffs counter that “courts frequently certify classes under the laws of multiple
7 jurisdictions.” *In re Static Random Access memory (SRAM) Antitrust Litigation*, 264 F.R.D. 603,
8 615 (N.D. Cal. 2009).¹⁴¹ Although ConAgra complains that plaintiffs have not submitted a
9 workable trial plan,¹⁴² the Ninth Circuit has held that “[n]othing in the Advisory Committee Notes
10 [to Rule 23] suggests grafting a requirement for a trial plan onto the rule.” *Chamberlain v. Ford*
11 *Motor Co.*, 402 F.3d 952, 961 n. 4 (9th Cir. 2005). The court notes, however, that it has
12 concerns about the manageability of any trial proceeding. Thus, if at some point it determines that
13 some or all of plaintiffs’ classes can be certified, it will direct plaintiffs to submit a trial plan for
14 its consideration.¹⁴³ See *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 441 (C.D. Cal. 2007)
15 (“Neither Plaintiff nor her counsel has provided any suggestions – much less a plan – to this Court
16 regarding managing the proposed class action”); see also *Zinser*, 253 F.3d at 1189 (“[The] court
17 cannot rely merely on assurances of counsel that any problems with predominance or superiority

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19 ¹³⁹Opp. Cert. at 36.

20 ¹⁴⁰*Id.* at 37.

21 ¹⁴¹Reply at 28.

22 ¹⁴²Opp. Cert. at 37 (citing *Zinser*, 253 F.3d at 1189)

23 ¹⁴³In their reply, plaintiffs offer some suggestions – (1) severing the claims of each of the
24 state classes, and having a “bellwether” trial as to the claims of one or more of the classes; (2)
25 having a single trial of the common elements of all twelve state classes’ claims; or (3) severing
26 the claims of each of the state classes and returning them to their respective jurisdictions for trial.
27 Plaintiffs do not clearly indicate which, if any, of these approaches they favor, although certain
28 of their comments suggest they believe a single trial would be workable. Because plaintiffs’
failure to satisfy other requirements of Rule 23 preclude certification, the court need not evaluate
at this time which, if any, of plaintiffs’ proposed methods of trying their claims would be
workable.

1 can be overcome”). Because the court is not in a position to certify classes now, it need not
2 address the question of a trial plan in any greater detail at this time. It notes simply that absent
3 the additional information concerning the variations in state law discussed elsewhere in this order,
4 it is not in a position to assess how manageable or unmanageable a trial of plaintiffs’ claims would
5 be.

6 **iii. Conclusion Regarding Rule 23(b)(3)**

7 Because plaintiffs have not demonstrated that common questions predominate over
8 individual issues, and because they have proffered insufficient information concerning variations
9 in the law of the twelve states in which they seek to certify classes to permit the court to determine
10 finally whether a class action is superior, they have not satisfied Rule 23(b)(3).

11 **4. Rule 23(c)(4)**

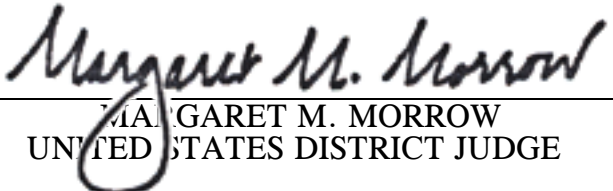
12 Plaintiffs argue alternatively that if the court determines that classes cannot be certified
13 under Rule 23(b), it should certify relevant issue classes under Rule 23(c)(4). This rule provides:
14 “When appropriate, an action may be brought or maintained as a class action with respect to
15 particular issues.” FED.R.CIV.PROC. 23(c)(4). The Ninth Circuit has endorsed the use of issue
16 classes where individualized questions predominate and make certification under Rule 23(b)(3)
17 inappropriate. See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (“Even
18 if the common questions do not predominate over the individual questions so that class
19 certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate
20 cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of
21 these particular issues”); see also *Dukes*, 603 F.3d at 620 n. 43 (“Relying on Rule 23(c)(4), our
22 own precedent also generally allows class treatment of common issues even when not all issues
23 may be treated on a class basis”). As Judge Wilson noted in *Amador v. Baca*, __ F.R.D. __, 2014
24 WL 1679013 (C.D. Cal. Mar. 12, 2014), the Ninth Circuit “did not explain which cases might
25 be ‘appropriate cases’ for severance of particular issues” because “[i]t was unnecessary to address
26 th[at] question in view of the numerous ‘deficiencies in th[e district court’s] certification [order].’”
27 *Id.* at *17.

1 Plaintiffs propose that the court certify an issue class to litigate “whether ConAgra has
2 misled consumers by labeling Wesson Oils as being ‘100% Natural’ when, in fact, they are made
3 from GMOs.”¹⁴⁴ While this is certainly an issue that is common to all members of all proposed
4 classes – as the court found above – it is unclear, at this stage, what ultimate objective certifying
5 a class to try this issue would advance. Specifically, if members of various of the state classes
6 must prove individualized reliance and causation – an issue the court cannot determine based on
7 the deficiencies in plaintiffs’ showing – certifying this type of issue class might simply consume
8 time and resources (both the parties’ and the court’s) without fundamentally advancing the
9 resolution of the litigation. Stated differently, trying this issue would not necessarily determine
10 even the question of ConAgra’s liability. Thus, the court presently declines to certify the issue
11 class plaintiffs have identified.

12
13 **III. CONCLUSION**

14 For the reasons stated, the court denies plaintiffs’ motion for class certification without
15 prejudice. If plaintiffs can address the deficiencies noted in this order, they can file an amended
16 motion for class certification within thirty (30) days of the date of this order.

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18 DATED: August 1, 2014


MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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¹⁴⁴Cert. Motion at 33.