UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SARAH SAMET, et al.,

Plaintiffs,

v.

PROCTOR & GAMBLE COMPANY, et al.,

Defendants.

Case No. 12-cv-01891-RS

ORDER DENYING MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

This putative consumer class action joins the long list of cases challenging allegedly deceptive and misleading food product labels regarding trans fat and evaporated cane juice. Two products are at issue here: Pringles products and MorningStar Farms products. As to the former, Plaintiffs challenge the label "0g Trans Fat" as unlawful for failing to include an allegedly mandatory disclosure directing consumers to the nutrition facts regarding the total fat content of the product, thereby implying to consumers that the product is healthier than other comparable products. As to the latter, Plaintiffs challenge the listing of "Evaporated Cane Juice" in the ingredients list as misleading consumers to believe that the product did not contain added sugar. Plaintiffs seek certification for separate classes for each statement under both Rule 23(b)(2) and 23(b)(3). While Plaintiffs clear the hurdle on the bulk of Rule 23 factors, they stumble on providing a model by which to calculate their economic injury and on establishing their standing to injunctive relief. For those reasons, the motion is denied.

II. BACKGROUND

Plaintiffs Sarah Samet and Robert Figy (collectively, "Plaintiffs") bought Pringles and MorningStar Farms BBQ Riblets products, respectively, made and sold by Defendants Proctor & Gamble company ("P&G"), Kellogg Company ("Kellogg"), and Kellogg Sales Company ("Kellogg") (collectively, "Defendants"). In April 2012, Plaintiffs brought a class action suit, on behalf of themselves and others similarly situated, alleging that Defendants' Pringles and MorningStar Farms products contain deceptive and misleading information. Plaintiffs aver the use of "0g Trans Fat" on Pringles products, without a disclosure directing consumers to the nutrition facts listing the products' total fat content, mislead consumers to believe that Pringles products were healthier compared to other snack foods. Additionally, Plaintiffs allege that the "0g Trans Fat" label violated federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, regulations, such as the requirement that foods exceeding specified amounts of non-trans fats and other nutrients contain a statement directing consumers to the product's nutrition information. 21 C.F.R. § 101.13(h)(1).[1] Plaintiffs interpret this regulation to require any "0g Trans Fat" statement to be accompanied by such a disclosure. As for MorningStar Farms products, Plaintiffs argue the use of "Evaporated Cane Juice" instead of "sugar" in the products' ingredients list masked the products' sugar content, thereby misleading consumers regarding the amount of added sugar the products contained. Plaintiffs also allege the MorningStar Farms products are misbranded in light of FDCA regulations, including those requiring ingredients be listed by their common names. *See Swearingen v. Late July Snacks LLC*, No. 13-cv-04324-EMC, 2017 WL 1806483, at *1 (N.D. Cal. May 5, 2017) (summarizing Food and Drug Administration guidance on regulations regarding the use of the term "evaporated cane juice").

Plaintiffs filed a Third Amended Complaint ("TAC") in September 2015, alleging (1)

[1] For both the Pringles and MorningStar Farms products, Plaintiffs allege both direct violations of the advertising and misbranded food provisions of California's Sherman Food, Drug, and Cosmetic Law, see Cal. Health & Safety Code §§ 110100, 110660, 110670, 110705, 110760, and violations of the federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, regulations that are incorporated into the Sherman Law. *See* 21 C.F.R. §§ 1.21, 101.4, 101.13, 101.65, 102.5.

unlawful, unfair, and fraudulent business acts and practices in violation of California Business and Professions Code section 17200 ("UCL"), (2) misleading, deceptive, and untrue advertising in violation of California Business and Professions Code section 17500 ("FAL"), (3) violations of the Consumers Legal Remedies Act ("CLRA"), California Civil Code section 1750 *et seq.*, and (4) a quasi-contract claim for unjust enrichment. (*See* TAC (Dkt. 141) ¶¶ 146-210.) As to Pringles products, Plaintiffs seek to certify a class under Rule 23(b)(2) and Rule 23(b)(3) of "All persons in California who, from December 2008 through July 2012 purchased the [identified] Pringles snack chips[.]" (TAC ¶ 135(a).) As to the MorningStar Farms products, Plaintiffs seek to certify a class under Rule 23(b)(2) and Rule 23(b)(3) of "All persons in California from April 16, 2008 through December 2013 who purchased Kellogg's MorningStar Farms products listing 'Evaporated Cane Juice' as an ingredient." (TAC ¶ 135(b).) In April 2016, the Judge formerly assigned to this matter stayed the case pending resolution of a number of related Ninth Circuit appeals. (Dkt. 177.) In August 2018, the stay was lifted, and the parties submitted supplemental briefs regarding the motion for class certification and Plaintiffs' standing. (Dkt. 195.) A second round of supplemental briefing in November 2018 focused on the issue of damages. (Dkt. 199.)

III. LEGAL STANDARD

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure, which represents much more than a mere pleading standard. To obtain class certification, plaintiffs bear the burden of showing they have met each of the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended by* 273 F.3d 1266 (9th Cir. 2001). "A party seeking class certification must affirmatively demonstrate . . . compliance with the Rule[.]" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of

numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012).

If all four prerequisites of Rule 23(a) are satisfied, a court must also find that plaintiffs "satisfy through evidentiary proof" at least one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Rule 23(b)(2) permits certification if a court finds that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) permits certification if a court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "[A] court's class certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013) (quoting *Dukes*, 564 U.S. at 351); *see also Mazza*, 666 F.3d at 588 ("Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." (internal quotation marks and citation omitted)). This "rigorous" analysis applies both to Rule 23(a) and Rule 23(b). *See Comcast*, 569 U.S. at 34 (discussing how Congress included "addition[al] . . . procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out)" and how a court has a "duty to take a 'close look' at whether common questions predominate over individual ones").

Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* If a court concludes that the moving party has met its burden of proof, the court has broad discretion to certify the class. *Zinser*, 253 F.3d at 1186.

IV. DISCUSSION

A. Standing

Before considering whether Plaintiffs have satisfied the requirements of Rule 23, Plaintiffs' individual standing must be determined. As is true in all cases, Plaintiffs must show they have standing to bring their claims in order to represent the putative class. *See Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003). Defendants contend that, for separate reasons, Plaintiffs neither relied upon nor were misled by the challenged labels, and therefore suffered no injury at all.[2] While Defendants couch these arguments as challenges to whether Plaintiffs have satisfied Rule 23's typicality and adequacy requirements, they ultimately amount to contentions that Plaintiffs were not injured within the meaning of Article III and, as a result, lack standing.

The Ninth Circuit, recognizing that the concepts of standing and class certification are frequently (and easily) conflated, has emphasized that "[s]tanding is meant to ensure that the injury a plaintiff suffers defines the scope of the controversy he or she is entitled to litigate," while "[c]lass certification . . . is meant to ensure that named plaintiffs are adequate representatives of the unnamed class." *Melendres v. Arpaio*, 784 F.3d 1254, 1261 (9th Cir. 2015) (emphasis omitted). In *Melendres*, the court held that "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met." *Id.* at 1262 (internal quotation marks omitted) (adopting "class certification approach").

Controlling authority does not detail the evidentiary burden a putative class representative must satisfy in establishing his or her standing. *See Dukes*, 564 U.S. at 350-51 (holding that Rule 23 "does not set forth a mere pleading standard," and noting that the "rigorous analysis" required under the rule "will entail some overlap with the merits of the plaintiff's underlying claim," but

[2] Defendants also contend that Plaintiffs do not have standing to seek injunctive relief. Since this is relevant only to the question of certification under Rule 23(b)(2), the argument is addressed in that section below.

not specifying whether that standard applies to the jurisdictional question of standing in the class certification context (internal quotation marks omitted)). Still, courts in this Circuit have concluded that putative class representatives "must demonstrate, not merely allege, that they have suffered an injury-in-fact to establish Article III standing to bring the claims asserted on behalf of the [class]." *Ang v. Bimbo Bakeries USA, Inc.*, No. 13-cv-01196-HSG, 2018 WL 4181896, at *4 (N.D. Cal. Aug. 31, 2018) (internal quotation marks omitted); *see also Nelsen v. King Cty.*, 895 F.2d 1248, 1249 (9th Cir. 1990) ("Standing is a jurisdictional element that must be satisfied prior to class certification." (internal quotation marks omitted)). This approach is both persuasive and consistent with Rule 23's requirement that plaintiffs prove their entitlement to class certification by a preponderance of the evidence, and accordingly Plaintiffs are required to make some evidentiary showing that they have standing rather than simply alleging as much.

Article III of the U.S. Constitution authorizes the judiciary to adjudicate only "cases" and "controversies." The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992). The three well-known "irreducible constitutional minim[a] of standing" are injury-in-fact, causation, and redressability. *Id.* at 560-61. A plaintiff bears the burden of demonstrating that her injury-in-fact is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). "In food-labeling cases such as this one, a plaintiff can satisfy the Article III injury-in-fact requirement by showing that she either: (1) paid a price premium for a mislabeled product; or (2) would not have purchased the product had he or she known about the misbranding." *Nguyen v. Medora Holdings, LLC*, No. 5:14-cv-00618-PSG, 2015 WL 4932836, at *5 (N.D. Cal. Aug. 18, 2015) (footnote omitted); *see also Mazza*, 666 F.3d at 595 (stating that, in class action alleging UCL, FAL, CLRA, and unjust enrichment claims, "[t]o the extent that class members were relieved of their money by [defendant's] deceptive conduct . . . they have suffered an 'injury in fact'").

Defendants contend that neither Samet nor Figy relied upon or were misled by the

challenged labeling statements on the Pringles and MorningStar Farms products, respectively. The record indicates otherwise. In a sworn declaration, Samet stated the "0g Trans Fat" representation was the reason she purchased Pringles and that she would not have purchased the product had she known it was misbranded. (Dkt. 132 ¶¶ 4-5.) Similarly, Figy submitted a sworn declaration in which he stated the "Evaporated Cane Juice" statement was the reason he purchased the MorningStar Farms Hickory BBQ Riblets and that he would not have done so had he known it was misbranded. (Dkt. 131-2 ¶¶ 3, 5.)

Defendants' arguments to the contrary are not persuasive. Defendants highlight various points in the Samet and Figy depositions which Defendants contend weaken their claims of reliance on the "0g Trans Fat" and "Evaporated Cane Juice" representations. For example, Defendants highlight Samet's admission that she knows Pringles contain fat, that the presence of other non-trans fats does not sway her towards or away from a product, and that she did not know what level of fat is healthy. Further, Defendants highlight that Samet admitted in her deposition she had not been harmed "in any way, whether financial or otherwise," from purchasing Pringles. (Dkt. 148-2, at 131:10–16.) As to Figy, Defendants attack his testimony for admitting he did not review the ingredients listed on the package, and therefore could not have relied on the "Evaporated Cane Juice" statement.

Indeed, Figy never stated in his deposition that he reviewed the ingredients list before purchasing the riblets: only that he was either already "familiar with the product" or he reviewed the ingredients list after purchase. (*Id.* at 78:1–79:4.) Moreover, these statements involved a riblets purchase in September 2013—a month after Figy filed a class action lawsuit against another corporation alleging violations of the UCL based on the same theory that use of the term "Evaporated Cane Juice" was deceptive. *Figy v. Amy's Kitchen, Inc.*, No. 13-cv-03816-SI, 2013 WL 6169503, at *1 (N.D. Cal. Nov. 25, 2013).

Setting aside the effect these statements may have on the *persuasiveness* of Plaintiffs' case, both Samet and Figy have still made a legally sufficient threshold showing that they were deceived by the challenged labeling statements—at least for purposes of class certification. At

this stage, the analysis looks only to whether Plaintiffs have proffered more than just allegations regarding their standing to sue on behalf of the putative class. Plaintiffs have done so: both have submitted sworn declarations to the effect that they relied on the challenged statements. They therefore have standing. Again, this conclusion is only for purposes of class certification, and has no bearing on the strength of Plaintiffs' case on the merits (including the ultimate credibility of their testimony).

B. Rule 23(a)[3]

1. Numerosity

The proposed class is sufficiently numerous that joinder would be impracticable, as thousands of Californians may have purchased the products-at-issue during the class period. P&G and Kellogg do not argue otherwise.

2. Commonality

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury" and that the class claims depend on "a common contention . . . of such a nature that it is capable of classwide resolution[.]" *Dukes*, 564 U.S. at 349-50 (internal quotation marks and citation omitted). To satisfy the commonality requirement, Plaintiffs must show that this case involves common contentions and that a classwide proceeding has the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350 (internal quotation marks omitted). In other words, Plaintiffs must demonstrate that determination of the common contentions' "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Plaintiffs argue there is a common fact that binds the class: all class members purchased either Pringles snack chips with a "0g Trans Fat" label statement without the allegedly required disclosure or purchased MorningStar Farms vegetarian products listing "Evaporated Cane Juice"

[3] Defendants' contentions regarding ascertainability are foreclosed by the Ninth Circuit's decision in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1133 (9th Cir. 2017) ("[T]he language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification . . . .").

as an ingredient. Therefore, there are at least two key common questions: (1) Are these messages unlawful by virtue of violating the FAL, the CLRA, and the advertising and misbranded food provisions of California's Sherman Law? (2) Are these messages likely to deceive a reasonable consumer?[4] The commonality requirement may be satisfied if the claims of the prospective class have even one significant issue common to the class. *Dukes*, 564 U.S. at 359.

At oral argument, Defendants conceded that whether the placement of the challenged statements on the Pringles and MorningStar Farms labels was unlawful is a common question that is susceptible to a classwide answer. (Dkt. 201, Oral Arg. Tr. at 21:8-12.) Defendants' statements are either lawful or they are not: the answer will apply to the entire class. Similarly, whether a reasonable consumer is likely to be misled by Defendants' statements is subject to a common answer of yes or no. Hence, commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires that putative class representatives show "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" "Typicality focuses on the class representative's claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative aligns with the interests of the class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks omitted). "The requirement is permissive, such that representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Id.* (internal quotation marks omitted). "Measures of typicality include whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (internal quotation marks omitted). A court should not certify a class if "there is a

[4] Plaintiffs' TAC brings claims under all three prongs of the UCL: (1) unlawful, (2) unfair, and (3) fraudulent business practices. *See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (holding the unfairness prong is an independent cause of action from the unlawful and fraudulent prongs of the UCL). The parties' briefs, however, do not discuss the unfairness prong nor was it raised in oral argument. Further, the TAC's summary of the case only discussed the unlawful and fraudulent prongs of the UCL.

danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks omitted).

The heart of Defendants' argument that Plaintiffs are atypical centers on Plaintiffs' standing. As discussed above, however, standing is not a requirement of Rule 23: what matters is that the class representatives have standing, which they do here, to bring their claims and satisfy the requirements of Rule 23. Kellogg brings an additional attack against Figy, asserting that his "extensive knowledge regarding food service and nutrition" renders him atypical for purposes of representing a class of Riblets consumers who allegedly lacked the knowledge that "evaporated cane juice" is a form of sugar. (Kellogg Opp'n at 20.) Kellogg, however, does not explain how Figy's experience lead to a dissimilar injury compared to other class members or conduct that is unique to Figy. Nor does Kellogg contend other class members were not injured by the same course of conduct—purchasing Riblets based on the challenged labeling statement—or that Figy would be subject to unique defenses due to his expertise. If anything, Figy's claim that he was misled in spite of his expertise *strengthens* the argument that a layman consumer was likely deceived by Kellogg's labeling statements.[5] In any event, Plaintiffs' claims are typical of the class. Like the class generally, Plaintiffs seek relief for paying for what they allege were falsely-labeled products.

4. Adequacy

Adequacy turns on whether the named plaintiff and class counsel have any conflicts of interest with other class members, and whether the representative plaintiff and class counsel can vigorously prosecute the action on behalf of the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957

[5] The cases Kellogg relies upon are inapposite because they involved class representatives whose experiences were not shared by class members at large, not that the class representatives had a special expertise in the subject matter at issue. *Guido v. L'Oreal, USA, Inc.* involved a class representative who bought the challenged product before the class period, which contained a flammability warning label while products during the class period did not. No. 11-1067, 2013 WL 3353857, at *6 (C.D. Cal. July 1, 2013). Meanwhile, *Martinez v. Welk Grp., Inc.*, dealt with a hypersensitive named plaintiff who had an acute fear of mold that was not shared by the rest of the class. No. 09-2883, 2012 WL 2888536, at *3 (S.D. Cal. July 13, 2012).

(9th Cir. 2003). Defendants do not challenge the appointment of Plaintiffs' counsel as class counsel. Nor have Defendants challenged Samet or Figy's ability to protect fairly and adequately the class's interests beyond challenging their standing. Again, standing is a separate inquiry from class certification, and Plaintiffs have established their standing. Absent any indication to the contrary, Plaintiffs and their counsel have demonstrated they will represent the class adequately.

C. Restitution Under Rule 23(b)(3)

1. Predominance

Defendants believe the nature of Plaintiffs' claims will necessitate numerous individualized inquiries and for three reasons that individual issues predominate. First, they contend that neither the trans fat nor evaporated cane juice statements were material to some consumers. Second, Defendants insist that it will be necessary to engage in individualized inquiries to determine if class members purchased the correct products that used the challenged label statements. Third, they argue Plaintiffs fail to present a model by which to calculate their economic injury.

a. Materiality

According to Defendants, the question of whether consumers relied upon or considered these challenged statements to be material presents an obstacle to class certification. Under the UCL, FAL, and CLRA, a plaintiff may establish reliance by showing that a reasonable person would consider the challenged advertising to be a material misrepresentation. *Forcellati v. Hyland's, Inc.*, No. CV 12-1983, 2014 WL 1410264, at *9 (C.D. Cal. April 9, 2014) (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) & *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 157 (2010) (other citation omitted)). Therefore, to establish a classwide inference of reliance, Plaintiffs must show the challenged statements were material and thus likely to mislead a reasonable consumer. *Townsend v. Monster Bev. Corp.*, 303 F. Supp. 3d 1010, 1043 (C.D. Cal. 2018); *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th at 157. Defendants argue Plaintiffs cannot establish that a reasonable consumer would believe the challenged statements were material because Plaintiffs have failed to proffer any evidence establishing as much.

First, with regard to the UCL's unlawful prong, if Plaintiffs can prove that the challenged statements were unlawful, materiality is presumed. The legislature's decision to prohibit a particular misleading advertising practice is evidence that it has deemed that the practice constitutes a material misrepresentation, and courts must defer to that determination. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013) (citing *Kwikset v. Superior Court*, 51 Cal. 4th 310, 333 (2011)). As to the remaining claims, Defendants focus on the fact that Plaintiffs did not commission a consumer survey, and that Plaintiffs cannot prove the challenged statements would deceive a reasonable person. California law is to the contrary. The California Court of Appeal has expressly rejected the "view that a plaintiff must produce a consumer survey or similar extrinsic evidence to prevail on a claim that the public is likely to be misled by a representation." *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 681-82 (2006), *as modified on denial of rehearing* (internal quotation marks omitted); *see id.* at 682 (noting that with regard to the showing of deception, "the primary evidence in a false advertising case is the advertising itself" (internal quotation marks omitted)).

The lack of extrinsic evidence of reliance does not automatically prevent class certification. Furthermore, Defendants' reliance on consumer surveys to disprove materiality demonstrates that this question *is* susceptible to common proof. Indeed, Plaintiffs point to affirmative evidence that could support an objective finding of materiality, including the testimony of Samet and Figy. Most important, ingredients matter. Representations about specific ingredients' presence or absence in a product are almost self-evidently material in that an advertiser is intending to make a consequential effect on a consumer. *Cf. Chavez v. Nestle USA, Inc.*, 511 F. App'x 606, 607 (9th Cir. 2013) (finding appellants stated UCL and FAL claims where, in addition to alleging injury and reliance, "[Appellants] alleg[e] that the product actually contains very small amounts of the touted ingredient, DHA. Appellants then plead that in order to obtain enough DHA from the [product] to promote potential brain development, young children need to consume an impractical and extremely high quantity of juice"). This is distinct from cases dealing with vague, general statements, such as "all natural," which may be of uncertain

materiality to a consumer. *Cf. Jones v. ConAgra Foods, Inc.*, No. 12-cv-01633-CRB, 2014 WL 2702726 (N.D. Cal. June 13, 2004). Defendants' assertion that a majority of consumers would not be misled is a disputed question that ultimately goes to the merits of the case. Whether a reasonable consumer would be misled by Defendants' statements can be resolved by common proof. Accordingly, the question whether the challenged advertising was misleading does not defeat a finding of predominance.[6]

b. Manageability

Both Defendants raise manageability concerns with the proposed classes. P&G contends that because not all Pringles products contained the "0g trans fat" statement during the class period, individualized inquiries into whether class members purchased the correct product would predominate. Kellogg advances a similar argument, that not all MorningStar Farms products contained the "evaporated cane juice" statement, and also argues that Plaintiffs cannot show with common evidence that class members would have noticed the statement in the ingredient list when it is not placed prominently on the front of the product. Both arguments fail.

P&G is correct in so far as the proposed Pringles class is too broad: for any potential class members who did not purchase a Pringles container displaying the "0g trans fat" statement, individualized inquiries as to the likelihood that each proposed class member was otherwise exposed to the alleged misrepresentations will be required. *Zakaria v. Gerber Prods. Co.*, No. LA CV 15-00200 JAK (Ex), 2016 WL 6662723, at *11 (C.D. Cal. Mar. 23, 2016). This is remedied by narrowing the class to all persons in California who, from December 2008 through July 2012, purchased the TAC-specified Pringles snack chips displaying the "0g Trans Fat" statement. The MorningStar Farms class is already so limited to products listing "Evaporated Cane Juice" as an ingredient and thus is not overly broad. As for the placement of the "Evaporated Cane Juice" statement in the ingredients list as opposed to the front of the product, for consumers who are conscious about their sugar intake, they will be looking to the ingredients list and not necessarily

[6] The same is arguably true of Plaintiffs' unjust enrichment claim. This claim was not briefed, however, as the claim was restored after the Plaintiffs filed their class certification motion.

the front label in making their purchasing decisions. Placing the "evaporated cane juice" statement in the ingredients list is therefore prominently displayed for such consumers and so exposure can be inferred. *Zakaria*, 2016 WL 6662723, at *9.[7]

c. Damages

Plaintiffs propose several models by which to calculate their economic injury, all of which Defendants contend fail to satisfy the predominance requirements of Rule 23(b)(3). In *Comcast*, the Supreme Court held that in order to satisfy the predominance inquiry, plaintiff must present a model that (1) identifies damages that stem from the defendant's alleged wrongdoing and (2) is "susceptible of measurement across the entire class[.]" 569 U.S. at 35. "At class certification, plaintiff must present a likely method for determining class damages, though it is not necessary to show that his method will work with certainty at this time." *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (internal quotation marks omitted); *Lanovaz v. Twinings N. Am., Inc.*, No. 12-cv-02646-RMW, 2014 WL 7204757, at *3 (N.D. Cal. Dec. 17, 2014) ("[A] precise calculation of damages before deeming a class worthy of certification is not required."). Individualized damage calculations alone cannot defeat class certification. *See Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513 (9th Cir.2013).

For the UCL and FAL, monetary relief is limited to restitution.[8] Since a UCL action "is equitable in nature; damages cannot be recovered." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003). Thus, remedies for the UCL are "generally limited to injunctive relief and restitution." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 179 (1999); *see also Korea Supply*, 29 Cal. 4th at 1148 ("[T]he legislature did not intend to authorize courts to order monetary remedies other than restitution in an individual action. This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL."). There

[7] The same is true of Plaintiffs' unjust enrichment claim. *See supra* note 6.

[8] "The remedy provisions of the UCL and FAL are interpreted in the same fashion and allow for the same type of relief." *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 785 n.2 (2015) (internal quotation marks omitted).

is a similar limitation for CLRA monetary relief. *See Colgan*, 135 Cal. App. 4th at 694 ("There is nothing to suggest that the restitution remedy provided under the CLRA should be treated differently than the restitution remedies provided under the [FAL] or [UCL]."). "Restitution" compels a UCL defendant "to return money obtained through an unfair business practice to those persons . . . who had an ownership interest in the property or those claiming through that person." *Korea Supply*, 29 Cal. 4th at 1144-45 (internal quotation marks omitted).

Plaintiffs argue that Defendants should be ordered to disgorge the entire wholesale price they collected for each Pringles and MorningStar Farms product because the products were allegedly misbranded and "illegal." (Mot. at 17-18.) Plaintiffs claim this form of disgorgement is restitutionary, as, in their view, it eliminates Defendants' wrongfully obtained benefit. (*Id.*) In California, "disgorgement" is a broader remedy than restitution. *Korea Supply*, 29 Cal. 4th at 1145. Under California law, there are two forms of disgorgement: "restitutionary disgorgement," which focuses on the plaintiff's loss, and "nonrestitutionary disgorgement," which focuses on the defendant's unjust enrichment. *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 800 (2015) (quoting *Meister v. Mensinger*, 230 Cal. App. 4th 381, 398 (2014)). Where a defendant's benefit and a plaintiff's loss are the same, and the plaintiff successfully proves a defendant was unjustly enriched at his or her expense, the plaintiff may recover all profits the defendant received unjustly as restitutionary disgorgement. *Meister*, 230 Cal. App. 4th at 398; *see also Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531, 535 (9th Cir. 2016) (noting in such a situation, "restitution and disgorgement are functionally the same remedy"). Restitutionary disgorgement is an available remedy under the UCL *only* to the extent that it constitutes restitution. *Korea Supply*, 29 Cal. 4th at 1145. Nonrestitutionary disgorgement, on the other hand, goes beyond restoring money to those from whom it was obtained, but requires the "surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice." *Korea Supply*, 29 Cal. 4th at 1145 (internal quotation marks omitted). In the eyes of the California Supreme Court, nonrestitutionary

disgorgement is akin to an impermissible damages[9] remedy under the UCL. *Id.* at 1150-51; *see also In re Tobacco Cases II*, 240 Cal. App. 4th at 801 ("[R]estitution without proof of any loss to any plaintiff cannot be characterized as *restitutionary*.").

Under California law, where a plaintiff obtains value from the product, the proper measure of restitution is "[t]he difference between what the plaintiff paid and the value of what the plaintiff received . . . ." *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009); *see also In re Tobacco Cases II*, 240 Cal. App. 4th at 792, 794-96. Here, Plaintiffs admit that they received value. Samet testified that she enjoyed Pringles chips' taste and texture, and that she received nutrients and calories from them. (Dkt. 148-2 at 129:19–131:3.) Similarly, Figy testified that he enjoyed the taste of Riblets and found them to be a useful product to entertain his vegetarian friends. (Dkt. 146-14 at 77:8–15.) Therefore, the appropriate calculation for restitution is the price Plaintiffs paid for the products versus the value of the products they received.

Plaintiffs provide no such calculation. Although Plaintiffs are not required to proffer a precise calculation of restitution, they must present *some* estimate of a price paid/value obtained differential in order to quantify their losses. However, *no* method for awarding restitution under UCL and FAL or damages under CLRA is put forward by experts Caswell or Scarborough or otherwise by Plaintiffs.[10] Under the *Vioxx* measure of restitution, Plaintiffs must provide evidence of the actual value of what the Plaintiffs received. *In re Vioxx Class Cases*, 180 Cal. App. 4th at 131. Plaintiffs state that restitutionary disgorgement equals the amount of Defendants' sale to wholesalers. Plaintiffs, however, give no explanation, let alone evidence, to suggest that Defendants' wholesale prices are comparable to the value the Plaintiffs received. Consequently, the return of the full retail or wholesale prices is not a proper measure of restitution, "as it fails to take into account the value class members received by purchasing the products." *Jones*, 2014 WL

[9] "Damages," as with the term "disgorgement," is a broader concept than restitution when used to describe monetary awards. *In re Tobacco II Cases*, 240 Cal. App. 4th at 792. To the extent that damages are confined to restitution, they are permissible under the UCL. *Id.*

[10] The same is true of Plaintiffs' unjust enrichment claim. *See supra* note 6.

2702726, at *19; *see also Ries v. Ariz. Beverages USA LLC*, No 10-cv-1139-RS, 2013 WL 1287416, at *7 (N.D. Cal. Mar. 28, 2013) (applying the *Vioxx* measure of restitution); *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 174 (2000) (explaining restitution as "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received").

Plaintiffs argue alternatively that Defendants' costs for making the products are a proxy for the value Plaintiffs received and thus the Defendants' profits are equivalent to Plaintiffs' loss. Once more, Plaintiffs' proposed method of measuring restitution looks to Defendants' *gains*, rather than the putative class members' *loss*, and so is an impermissible form of nonrestitutionary disgorgement. *Ang*, 2018 WL 4181896, at *14. Plaintiffs further assert that it is impossible to measure a price premium because Defendants did not charge a premium for the products.[11] The absence of a price premium, however, does not excuse Plaintiffs from presenting evidence of the actual value of what they received versus what they ultimately paid. *See In re Vioxx Class Cases*, 180 Cal. App. 4th at 131. Finally, Plaintiffs conceded at oral argument that they are seeking certification only under their unjust enrichment claim and that they cannot proceed with their UCL, FAL, and CLRA claims when restitution is limited to the difference in value between how they valued the products and what they paid. (Dkt. 201 at 52:10–14, 53:11, 55:1–8.)[12] Plaintiffs failure to establish any price/value differential forecloses any discretion to award restitution. *In re Tobacco II Cases*, 240 Cal. App. 4th at 802. Thus, this damages model cannot satisfy the predominance requirement.

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[11] This contradicts Plaintiffs TAC, in which they allege that they paid a premium price for the products. (TAC ¶ 132.)

[12] Plaintiffs subsequently argued that the "benefit of the bargain" theory of restitution has no application where the underlying UCL claim is material in nature. The two principal cases they rely upon, however, are inapposite. *Kwikset v. Superior Court*, 51 Cal. 4th 310 (2011), and *Hansen v. Newegg.com Americas, Inc.*, 25 Cal. App. 5th 714 (2018), addressed only *standing* to sue under the UCL, not the measure of monetary recovery. Indeed, *Kwikset* explained "the standards for establishing standing under section 17204 and eligibility for restitution under section 17203 are wholly distinct. . . . That a party may ultimately be unable to prove a right to . . . restitution[] does not demonstrate that it lacks standing to argue for its entitlement to them." *Kwikset*, 51 Cal. 4th at 335-36.

In supplemental briefing, Plaintiffs request reconsideration of the previously assigned Judge's order reinstating Plaintiffs' unjust enrichment/quasi-contract claim for restitution but not for damages in the form of nonrestitutionary disgorgement. *Lanovaz v. Twinings N. Am., Inc.*, No. 12-cv-02646-RMW, 2015 WL 729705 (N.D. Cal. Feb. 19, 2015), a case Plaintiffs rely upon for claiming nonrestitutionary disgorgement, explains why allowing such relief frustrates the statutory scheme discussed above. There the court noted that allowing plaintiffs to recover disgorgement remedies "would appear to conflict with the comprehensive consumer protection scheme laid out in the UCL, FAL, and CLRA." *Lanovaz*, 2015 WL 729705, at *2. Allowing for disgorgement under unjust enrichment would allow Plaintiffs impermissibly to bypass the limits placed on damages under those statutes through "a generic unjust enrichment claim based on the exact same underlying facts." *Id.* The remedy for an unjust enrichment claim must be linked to the benefit unjustly retained by the defendant. *Id.* The only amount retained attributable to the underlying wrong is the amount Defendants allegedly overcharged based on their labels. *See id.* Thus, the damage appears to be the same as the price premium. *See id.*; *see also Brazil*, 660 F. App'x at 535. To provide the entire profit attributable to the products would constitute a windfall to Plaintiffs. *See Lanovaz*, 2015 WL 729705, at *2. Therefore, no reason has been offered to revisit the prior order on this claim.

Plaintiffs next argue that since the allegedly mislabeled products were illegal to possess under California law, the products were "legally worthless" such that consumers would not have paid to purchase them and so are entitled to a full refund. The Ninth Circuit, however, rejected this very argument. The court found this "outlandish theory" unsupported in California case law—that a consumer would be subjected to risk of fine or prosecution if found in possession of the misbranded product-at-issue. *Brazil*, 660 F. App'x at 534. Plaintiffs must prove that Defendants' products were valueless to be entitled to a full refund. *Id.* at 534-35. Once more, Plaintiffs' own depositions admit to receiving some benefit from the products. Moreover, Plaintiffs' reliance on *Mullins v. Premier Nutrition Corp.* is distinguishable, as the plaintiff in that case proffered sufficient evidence to suggest that no consumer would have purchased the product-

at-issue absent its health claims such that a full refund restitution model was appropriate. 13-cv-01271-RS, 2016 WL 1535057, at *7 (N.D. Cal. Apr. 15, 2016). Plaintiffs failure to demonstrate the worthlessness of the products-at-issue means that recovery is again limited to the premium paid under a misunderstanding that Defendants' products were correctly labelled. *See Brazil*, 660 F. App'x at 535. Since Plaintiffs do not explain how this premium can be calculated with proof common to the class, certification is inappropriate under this model.

Plaintiffs' next proposed model asserts that a class can be certified for nominal damages under California Civil Code section 3360 for their UCL, FAL, and CLRA claims. Plaintiffs cite no case law in which such a class has been certified. Again, the only monetary award available for UCL and FAL claims is restitution, not nominal damages.[13] As for the CLRA, section 3360 allows for nominal damages "[w]hen a breach of duty has caused no appreciable detriment to the party affected[.]" Cal. Civ. Code § 3360. Plaintiffs' CLRA claim has nothing to do with a breach of duty, (see TAC ¶¶ 191–205). *See Jones*, 2014 WL 2702726, at *23 ("Nor do [p]laintiffs point to any CLRA case permitting nominal damages, let alone a CLRA class action."); *see also Lanovaz*, 2014 WL 7204757, at *3 ("[T]he court has found no support for [granting nominal damages in connection with the injunctive class]."). Given the lack of support for this argument, the nominal damages model does not satisfy predominance.

Plaintiffs' final damages argument asserts that a class can be certified for statutory damages under the CLRA. The CLRA addresses damages, but only to the extent that any consumer who suffers damage may bring an action to recover, among other things, "[a]ctual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000)." Cal. Civ. Code § 1780(a)(1). That language sets the minimum for a total award of damages in a class action at $1,000; it does not provide for an automatic award of $1,000 per individual class member. *See Jones*, 2014 WL 2702726, at *23. Thus, in *Wilens v. TD Waterhouse Grp., Inc.*, 120 Cal. App. 4th 746, 754 (2003), the California Court of Appeal

[13] The same is true of Plaintiffs' unjust enrichment claim. *See supra* note 6.

explained, "[t]his language does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." Plaintiffs rely on *Pickman v. Am. Express. Co.*, No. 11-cv-05326-WHA, 2012 WL 258842, at *2 (N.D. Cal. Jan. 27, 2012), for the proposition that CLRA statutory damages are automatically awarded once liability is established. That case is distinguishable, as the court multiplied the minimum amount of CLRA damages by the number of alleged violations to calculate the amount-in-controversy for satisfying subject matter jurisdiction. While Plaintiffs could perhaps use *Pickman* as a guide in calculating their CLRA damages, the case does not negate the need for a showing of causation. *Ang*, 2018 WL 4181896, at *16. Therefore, this model does not satisfy predominance.

In short, none of Plaintiffs proposed models for calculating their economic injury can satisfy the predominance requirements of Rule 23(b)(3). Contrary to Plaintiffs' contentions, "a court cannot . . . award whatever form of monetary relief it believes might deter unfair practices" under the UCL. *Korea Supply*, 29 Cal. 4th at 1148. Because Plaintiffs have not shown that the economic harm they allegedly sustained as a result of the identified misbranding is capable of measurement on a classwide basis, Plaintiffs have not satisfied their burden of showing that common questions predominate. As a result, the motion to certify under Rule 23(b)(3) fails.

D. Injunction Under Rule 23(b)(2)[14]

Plaintiffs seek certification under Rule 23(b)(2) to enjoin Defendants allegedly unlawful and misleading labeling practices. Rule 23(b)(2) is satisfied if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Defendants' sole argument against certification under Rule 23(b)(2) is that Plaintiffs do not have standing to seek injunctive relief.[15]

[14] Plaintiffs do not seek certification under Rule 23(b)(1).

[15] In their original briefing, both Defendants asserted additional arguments against Rule 23(b)(2) certification. P&G argued that Plaintiffs cannot pursue an injunction because they are now "aware" of the true nature of the challenged statements and so cannot be deceived again in the

For injunctive relief, which is a prospective remedy, the threat of injury must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). In other words, the "threatened injury must be certainly impending to constitute injury in fact" and "allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks and alteration omitted). Past wrongs, though insufficient by themselves to grant standing, are "evidence bearing on whether there is a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotation marks omitted). Where standing is premised entirely on the threat of repeated injury, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way[.]" *Id.* at 111.

The Ninth Circuit's decision in *Davidson v. Kimberly-Clark Corp.* provides guidance on how to evaluate whether a plaintiff in a false advertising suit has standing to seek injunctive relief. 889 F.3d 956, 969 (9th Cir. 2018). In *Davidson*, the plaintiff alleged the defendant falsely advertised its wipes as "flushable," in violation of the UCL, CLRA, and FAL. *Davidson*, 889 F.3d at 962. The plaintiff testified she was willing to purchase genuinely flushable wipes from the defendant in the future but had no way of telling whether the defendant's wipes had been improved or whether the advertising on the label remained false. *Id.* at 970-71. The Ninth Circuit concluded that, while it was a "close question," the plaintiff had adequately shown a likelihood of injury based on her "inability to rely on the validity of the information advertised on [the defendant's] wipes despite her desire to purchase truly flushable wipes." *Id.* at 971. The court

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future. The Ninth Circuit recently held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase . . . ." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018) (citation omitted). Kellogg contended that certification under Rule 23(b)(2) was improper because monetary relief is not incidental to the injunctive relief sought in the class action. *See Dukes*, 564 U.S. at 360. *Dukes*, however, involved a putative class attempting to certify a Rule 23(b)(2) class for their *monetary* claims in addition to their injunctive claim without proceeding with the Rule 23(b)(3) analysis. *Id.* at 360-67. Because Plaintiffs seek certification of their injunctive claims under Rule 23(b)(2) and their monetary claims under Rule 23(b)(3), the Supreme Court's prohibition on bypassing the Rule 23(b)(3) analysis for nonincidental monetary claims is satisfied.

also concluded that the injury she alleged was concrete and particularized because it would affect the plaintiff as a direct consumer of the defendant's product. *Id.*

Defendants assert that, unlike the plaintiff in *Davidson*, neither Samet nor Figy testified that they are amenable to purchasing Pringles products or Riblets from Defendants in the future. Rather, Samet stated that she could not "say for sure whether I would or I would not [purchase Pringles products in the future]." (Dkt. 148-2 at 171:8–12.) Similarly, Figy stated he could not "say as I know for sure" if he would buy Riblets in the future. (Dkt. 146-14 at 88:13–15.) Defendants therefore contend these statements prevent both Samet and Figy from establishing a likelihood of future harm. *Davidson*, 889 F.3d at 969-70 (explaining that a consumer has standing if she "plausibl[y] alleg[es] that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to").

Neither Plaintiff testified they would *never* buy Pringles products or Riblets again. But while *Davidson* does not require *certainty* on the part of Plaintiffs that they *will*—as opposed to merely *would*—buy the products again, *Davidson* does require that Plaintiffs demonstrate they are at least interested in buying the products in the future. Samet fails to carry her burden in this regard, while Figy does. Samet's testimony does not indicate any particular interest in purchasing Pringles products again: testifying "[m]aybe I would . . . . [m]aybe I wouldn't" (Dkt. 148-2 at 171:15.) is not equivalent to the plaintiff in *Davidson* who *would* purchase a properly branded product if the product's labeling were reliable. *Davidson*, 889 F.3d at 962. Her passing interest in possibly purchasing Pringles products in the future does not reflect that she is likely to be harmed in the future by Defendants' label practices and therefore lacks standing to seek injunctive relief. Figy, on the other hand, is much more emphatic in his interest in purchasing Riblets in the future. When asked if it was possible that he may do so, he replied "[o]h I'd say it's possible, absolutely." (Dkt. 146-14 at 88:16–18.) He further testified that he would consider consuming Riblets. (*Id.* at 89:2–6.) In contrast to Samet, Figy's testimony is akin to the plaintiff the Ninth Circuit held had injunctive standing in *Davidson*.

Figy, however, still cannot demonstrate he is likely to be harmed in the future. This is

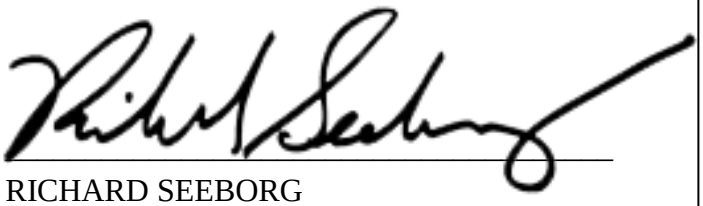
because the alleged mislabeling has ceased. (Dkt. 146-5 ¶¶ 2-3 (ending the use of "Evaporated Cane Juice" on MorningStar Farms products in September 2015).) Similarly, Samet's standing would fail even if she had adequately testified a reliable interest in purchasing Pringles products again in light of the Defendants' dropping of the challenged label. (Dkt. 148-12 ¶¶ 5-6 (ending the use of "0g Trans Fat" on Pringles products in May 2012); Dkt. 148-13 ¶ 6 (same); Dkt. 148-14 ¶ 2 (same).) The "0g Trans Fat" statement has not been used since 2012 and the "Evaporated Cane Juice" statement since 2015. Both Defendants submitted numerous declarations attesting that they will not introduce such statements again in the future. There is no basis to assume the challenged labeling practices will recur. Figy cannot show a sufficient likelihood that he will be wronged again in a similar way, nor can a court-ordered injunction redress his alleged injury. *Davidson*, 889 F.3d at 971-72; *see also In re Vioxx Class Cases*, 180 Cal. App. 4th at 130 ("Injunctive relief is not available when there is no threat that the misconduct to be enjoined is likely to be repeated in the future."). Accordingly, Figy does not have standing to seek injunctive relief and the motion to certify under Rule 23(b)(2) fails.[16]

V. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification is DENIED. The parties shall appear for a further case management conference on February 28, 2019 at 10:00 A.M., with a joint case management conference statement to be filed one week in advance.

IT IS SO ORDERED.

Dated: January 15, 2019



RICHARD SEEBORG
United States District Judge

[16] Plaintiffs cite to this Court's prior order granting class certification in *Petit v. Proctor & Gamble Co.* for the proposition that plaintiff has a "cognizable interest in a market where prices are not distorted by any misrepresentations." No. 15-cv-02150-RS, 2017 WL 3310692, at *5 (N.D. Cal. Aug. 3, 2017). This case is distinguishable both because it predates the Ninth Circuit's decision in *Davidson* and there was no indication that defendant had ceased its labeling practices.