SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 1

BC649863 April 29, 2020
JADE THOMAS ET AL VS NESTLE USA INC 3:15 PM

Judge: Honorable Daniel J. Buckley CSR: None
Judicial Assistant: S. Chung ERM: None
Courtroom Assistant: E. Munoz Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 03/03/2020, now rules as follows:

The Court took the matter under submission. After further consideration of the arguments made during the hearing and reviewing the papers, the Court stays with its tentative ruling.

Background

On February 9, 2017, Plaintiffs filed this consumer class action against Defendant Nestle USA, Inc., alleging violations of the Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law arising from Defendants' sale of opaque "theater boxes" of Raisenets, Buncha Crunch, Butterfinger Bites, Tollhouse Semi-Sweet Chocolate Morsels, Rainbow Nerds, SweeTarts, Spree, Gobstopper, and Sno-Caps (the "Products" or "Candies"). Plaintiffs allege that Defendants' underfilling of larger-than-necessary boxes is misleading to consumers, and that this use of nonfunctional slack-fill violates California and federal law. Plaintiffs now move for class certification of their claims on behalf of all California consumers that purchased the Products.

Discussion

A. Motions to Strike.

At the certification stage, the underlying factual bases supporting certification generally need not be presented in a form, "or with the foundation, which would make such [facts] as now presented, admissible in evidence at a trial." Anthony v. Gen. Motors Corp., 33 Cal. App. 3d 699, 707 (1973). Rather, "[i]t is enough that it appears that evidence in support of plaintiffs' theory may be available when the case goes to trial." Id.; accord, e.g., Osborne v. Subaru of America, Inc., 198 Cal. App. 3d 646, 653 (1988). Nonetheless, "the court may consider only

admissible expert opinion evidence at class certification." Apple Inc. v. Superior Court, 19 Cal. App. 5th 1101, 1117 (2018) (reasoning that "certifying a proposed class based on inadmissible expert opinion evidence would merely lead to its exclusion at trial, imperiling continued certification of the class and wasting the time and resources of the parties and the court"). Specifically, such expert opinion evidence must satisfy the standards set forth in Sargon Enterprises, Inc. v. University of Southern California, 55 Cal. 4th 747, 769-74 (2012). See Apple, 19 Cal. App. 5th at 1120 ("But where, for example, expert opinion evidence provides the basis for a plaintiff's arguments regarding numerosity, ascertainability, commonality, or superiority (or a defendant's opposition thereto), a trial court must assess that evidence under Sargon.").

Under Sargon, the Court is required to "determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture." Sargon, 55 Cal. 4th at 772. "In short, the gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" Id. (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)). The Supreme Court has agreed with the construction that Evidence Code section 801(b) means "'that the matter relied on must provide a reasonable basis for the particular [expert] opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.'" Id. at 770 (quoting Lockheed Litigation Cases, 115 Cal. App. 4th 558, 564 (2004). Ultimately, the Court "acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." Id. at 771-72.

Plaintiffs and Defendants both move to strike the declarations, opinions, and reports of each other's respective packaging experts. First, Defendants move to strike the declaration, opinions, and expert report of Claire Sand, Ph.D., on the grounds that: (1) her methodology for measuring the volume of candy in the Products is not generally accepted by the scientific community and is unreliable; (2) her opinions regarding "actual" and "effective" slack-fill metrics are unreliable and unsupported by academic literature or FDA opinions; and (3) her opinions on the functionality of the slack-fill are inadmissible because she has not sufficiently reviewed Defendants' packaging procedures and practices. The Court disagrees. First, while the legal effect of the interstitial space between individual pieces of candy here (with respect to misbranding and whether it constitutes nonfunctional slack-fill) are subject to significant dispute, the Court does not find this dispute sufficient to warrant exclusion of Dr. Sand's opinions or methodology. Second, the Court does not find Dr. Sand's methodologies—either by calculating "actual" slack-fill through a water displacement test, or "effective" slack-fill through hand

measurements—to be so unreliable that exclusion is warranted under Sargon. Third, even if Dr. Sand did not pore over Defendants' exact procedures with a fine-tooth comb, her experience with packaging generally provides a sufficient basis for her to offer opinions on the necessity of slack-fill in each of the Products. Ultimately, the accuracy of these methods may very well be assailable for numerous reasons. Nonetheless, Defendants' avenue of attack is more appropriately raised through thorough cross-examination and expert witness rebuttal of Dr. Sand's opinions and testimony, not exclusion under Sargon. Defendants' motion to strike is therefore DENIED.

Second, Plaintiffs move to strike the declaration, opinions, and report of Sher Paul Singh, Ph.D., on the grounds that: (1) his opinions rely on inadmissible hearsay because he consulted with another expert, Dr. Bruce Harte; (2) his opinions are not based on independent testing of the Products; and (3) he has a personal animosity and bias against Dr. Sand. The Court disagrees. Even if Dr. Singh consulted Dr. Harte for purposes of developing his opinions in this litigation, such a consultation would not violate the prohibition against experts relying on hearsay about case-specific facts under People v. Sanchez, 63 Cal. 4th 665, 686 (2016). The Court sees little difference between a consultation with a peer and the hearsay that both Drs. Singh and Sand rely on from their educational coursework and academic research. Finally, as a rebuttal expert witness, the Court does not find the lack of any independent testing or purported bias against Dr. Sand to be sufficient to warrant exclusion of his testimony and opinions. Accordingly, Plaintiffs' motion to strike is DENIED.

Third, Defendants move to strike the expert report, opinions, and testimony of Drs. Bechtel and Lenzo on the grounds that they lack relevant experience to offer their expert opinions and their methodology does not conform to accepted statistical and consumer research standards because: (1) their survey failed to draw a sample representative of the putative class of consumers; (2) the survey suffers from focalism and demand bias; (3) they failed to replicate market conditions for consumers in their conjoint analysis; and (4) their damages model does not account for supply-side factors when calculating price premia. While all of these criticisms may be valid, the Court is unconvinced that they cross the line for disqualification under Sargon. First, the argument that the survey included individuals that created false memories of purchasing Defendants' products is little more than idle speculation. Absent corroboration, this concern is insufficient. The Court is disinclined to take the extreme measure of excluding Drs. Bechtel and Lenzo based on a mere possibility that their sample could be tainted by some unknown, yet presumably small, number of false consumers. Second, the Court is unconvinced that either the randomized ordering of the perception and conjoint surveys, or the limited number of presented attributes warrants disqualification. While these concerns are excellent points of impeachment, the Court is unconvinced that the opinions drawn from the data so gathered spans such a large analytical gap

that disqualification under Sargon is warranted. Third, the failure to replicate market conditions exactly by permitting consumers in the conjoint analysis to physically handle and examine the boxes of candy does not render the L-B report wholly devoid of value, and Drs. Bechtel and Lenzo may properly offer opinion on the kernel of value their data offers. Ultimately, whether this data and opinion is sufficient to carry Plaintiffs' burden at trial is a completely different question from whether the Court should exclude it outright. Finally, the criticism that the damages model does not account for supply-side factors does not warrant disqualification. While another, more accurate damages model may exist, the Court is amply convinced that Drs. Bechtel and Lenzo have at least provided a methodologically proper method of calculating damages. For those reasons, Defendants' motion to strike is DENIED.

B. Motion for Class Certification.

California Code of Civil Procedure section 382 permits the Court to certify a class action when the moving party shows the superiority of pursuing the representative action on behalf of a sufficiently numerous and ascertainable class with a well-defined community of interest. See, e.g., Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1021 (2012). The community of interest requirement entails showing that: (1) predominant common questions of law or fact exist; (2) the class representatives have claims or defenses typical of absent class members; and (3) the class representatives and their counsel can adequately represent the interests of the class. Id.

California courts consider "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 333 (2004). The burden is on the party seeking class certification to establish each of the class prerequisites through substantial evidence. Id. at 327. When determining certification, the Court examines all presented evidence "under the prism of [the] plaintiff's theory of recovery." Dep't of Fish & Game v. Superior Court, 197 Cal. App. 4th 1323, 1349 (2011).

When weighing the evidence, the Court does not evaluate the merits of the asserted claims. Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 439-40 (2000). Rather, the primary question on certification is "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." Sav-On, 34 Cal. 4th at 327. Nevertheless, "when the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class." Bartold v. Glendale Fed. Bank, 81 Cal. App. 4th 816, 829 (2000);

see Brinker, 53 Cal. 4th at 1023-24 ("In many instances, whether class certification is appropriate or inappropriate may be determined irrespective of which party is correct. In such circumstances, it is not an abuse of discretion to postpone resolution of the disputed issue.").

1. Ascertainability and Numerosity.

Although among the simplest of the requirements, a proposed class must nevertheless be sufficiently ascertainable and numerous to be certified. Civ. Proc. Code § 382; Daar v. Yellow Cab Co., 67 Cal. 2d 695, 704 (1967). First, "[a]scertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 914 (2001). Ascertainability serves this "limited but important function . . . ," so long as the class "is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.'" Noel v. Thrifty Payless, 7 Cal. 5th 955, 980 (2019) (quoting Hicks, 89 Cal. App. 4th at 915).

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." Id. at 984. Indeed, the due process concerns often associated with ascertainability do "not dictate that certification of a putative plaintiff class invariably must depend on all absent class members being sent (much less receiving) individual notice of the action." Id. at 981. Moreover, ascertainability does not contain a "requirement that the identification of class members must occur '"without unreasonable expense or time,"'" id. at 985 (quoting Sotelo v. Medianews Group, Inc., 207 Cal. App. 4th 639, 648 (2012)), and "[a]rguments and evidence relating to the provision of notice to the class conceivably could counsel against class certification insofar as they may show that . . ." the class action is unmanageable or not superior. Id. at 986.

Second, this ascertained class must be so numerous as to make joinder of all parties impractical. Hendershot v. Ready to Roll Transp., Inc. 228 Cal. App. 4th 1213, 1222 (2014). "No set number is required as a matter of law for the maintenance of a class action," Rose v. City of Hayward, 126 Cal. App. 3d 926, 934 (1981), and classes with as few as ten members have been certified. See Collins v. Rocha, 7 Cal. 3d 232 (1972) (class of 9 named plaintiffs on behalf of 35 others); Bowles v. Superior Court, 44 Cal. 2d 574 (1955) (class of 10 trust beneficiaries). Defendants do not contest numerosity.

Here, Plaintiffs move to certify a class consisting of "[a]ll persons who purchased the Products in California for personal use and not for resale during the time period February 9, 2013, through

the present. Excluded from the Class are Defendants' officers, directors, and employees, and any individual who received remuneration from Defendants in connection with that individual's use or endorsement of the Products." Pls.' Mot., 4:17-19. Plaintiffs' propose a notice by publication process. Thus, the Court finds that the proposed class and subclasses are sufficiently numerous and "defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.'" Noel, 7 Cal. 5th at 980 (quoting Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 915 (2001)). Accordingly, ascertainability and numerosity are established here.

Relatedly, Defendants argue that the proposed definition is overbroad because "[t]he majority of the proposed class consists of repeat purchasers who lack standing because they necessarily are aware of, and comfortable with, the amount of slack-fill and thus are not injured." Defs.' Opp'n, 24:3-5. It is well-settled, however, that class members are not required to establish their individual standing under the FAL or UCL. See In re Tobacco II Cases, 46 Cal. 4th 298, 321 (2009) ("[T]he text of Proposition 64 does not apply the standing requirements to unnamed class members."). Thus, this argument does not countenance denying certification.

2. Community of Interest:

The community of interest requirement entails showing that: (1) predominant common questions of law or fact exist; (2) the class representatives have claims or defenses typical of absent class members; and (3) the class representatives and counsel can adequately represent the interests of the class. Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1021 (2012).

a. Predominance of Common Questions of Law or Fact.

"As part of the community of interest requirement, the party seeking certification must show that issues of law or fact common to the class predominate." Duran v. U.S. Bank Nat'l Ass'n, 59 Cal. 4th 1, 28 (2014) (citing Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 470 (1981)). The "ultimate question" in predominance analysis is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." Collins v. Rocha, 7 Cal. 3d 232, 238 (1972). That answer hinges on "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 327 (2004).

Thus, "a court 'must examine the issues framed by the pleadings and the law applicable to the

causes of action alleged.'" Brinker Rest. Corp., 53 Cal. 4th at 1024 (quoting Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th at 916. In doing so, "[i]t must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." Id. (citing Sav-On Drug Stores, Inc., 34 Cal. 4th at 334); accord Duran, 59 Cal. 4th at 28 (holding that wholly individualized damages inquiries will generally not preclude certification so long as the defendant's liability can be proven on a class wide basis). "[W]hether an element may be established collectively or only individually, plaintiff by plaintiff, can turn on the precise nature of the element and require resolution of disputed legal or factual issues affecting the merits." Id.

Nevertheless, class certification is inappropriate "if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment'" on common issues. City of San Jose v. Superior Court, 12 Cal. 3d 447, 459 (1974); see Arenas v. El Torito Rest., Inc., 183 Cal. App. 4th 723, 732 (2010) ("If the class action 'will splinter into individual trials, common questions do not predominate and litigation of the action in the class format is inappropriate.'").

i. Applicable Law.

Plaintiffs advance—and seek to certify—claims under the Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"). Naturally, the Court turns first to the law governing each of these claims, with a particular focus on "the elements necessary to establish liability . . . ." Brinker Rest. Corp., 53 Cal. 4th at 1024 (citing Sav-On Drug Stores, Inc., 34 Cal. 4th at 334); see Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action.").

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice . . . ." Bus. & Prof. Code § 17200. This statute is extremely broad. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838 (1994). Unlawful practices include "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." Id. at 838-39. Indeed, "[i]t is not necessary that the predicate law provide for private civil enforcement." Id. at 839. Unfair practices are those "whose harm to the victim outweighs its benefits." Id. Finally, fraudulent "does not refer to the common law tort of fraud but only requires a showing [that] members of the public are likely to be deceived." Id. (internal quotations omitted). Similarly, the FAL prohibits businesses and sellers from making any false or misleading statements in connection with the sale of any goods, property, or services. Bus. & Prof. Code § 17500.

Actions under the UCL and FAL may only be brought "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code § 17204. While the UCL and FAL impose broad liability, the tradeoff is that civil remedies thereunder are generally limited to injunctive relief and restitution. See Bus. & Prof. Code § 17203. Moreover, "a UCL violation [cannot] be established without a link between a defendant's business practice and the alleged harm." In re Firearm Cases, 126 Cal. App. 4th 959, 981 (2005) (citing Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 185 (1999)). Although Plaintiffs need not strictly prove legal (i.e. proximate) causation, they (and the class) must nonetheless "show some connection between conduct by defendants and the alleged harm to the public." Id. at 978. This is true, "[e]ven in a UCL unfairness case," since "[w]ithout evidence of a causative link between the unfair act and the injuries or damages, unfairness by itself merely exists as a will-o'-the-wisp legal principle." Id.

On the other hand, the CLRA proscribes twenty-seven specific acts or practices "undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer . . . ," Civ. Code § 1770(a)(1)-(27), including "[r]epresenting that goods or services have . . . characteristics . . . or quantities that they do not have . . . ." Id. at § 1770(a)(5). In contrast to the UCL and FAL, the remedies under the CLRA include not only injunctive relief and restitution, but also actual damages and punitive damages. Veera v. Banana Republic, LLC, 6 Cal. App. 5th 907, 915 (2016) (citing Civ. Code § 1780(a)). Moreover, unlike the UCL, "the CLRA requires a showing of actual injury as to each class member." Steroid Hormone Product Cases, 181 Cal. App. 4th at 155.

With the relevant law established, the Court now turns to the predominance analysis.

ii. Common Issues Predominate Plaintiffs' UCL, FAL, and CLRA Claims.

Plaintiffs' theory of the case is relatively simple: They contend that Defendant misled consumers into buying its products by packaging their candies with an unlawful amount of non-functional slack fill, as proscribed by Business & Professions Code section 12606.2(c) ("A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill."). To establish liability on a classwide basis, Plaintiffs' primarily seek to establish materiality—based on the illegality of nonfunctional slack-fill, cf. Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 329 (2011) ("The Legislature has recognized the materiality of this representation by specifically outlawing deceptive and fraudulent 'Made in America' representations.")—and create a classwide presumption of reliance. Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 976-77 (1997)

("Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question,' and as such materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.'") (citations omitted); accord In re Tobacco II Cases, 46 Cal. 4th 298, 327 (2009). Plaintiffs' also contend that common questions predominate, such as: (1) Whether the Products' packaging is misleading to the reasonable consumer; (2) whether—and what amount of—the slack-fill contained in each Product is functional or nonfunctional; and (3) the propriety and scope of any injunctive relief.

In opposition, Defendants contend that Plaintiffs' evidence does not establish materiality. However, this argument misses the mark. As alluded to earlier, Plaintiffs need not present admissible, on-point evidence establishing the materiality of Defendants' packaging at this stage. Rather, "[i]t is enough that it appears that evidence in support of plaintiffs' theory may be available when the case goes to trial." Anthony v. Gen. Motors Corp., 33 Cal. App. 3d 699, 707 (1973); accord, e.g., Osborne v. Subaru of America, Inc., 198 Cal. App. 3d 646, 653 (1988). Even if Plaintiffs' must present more case-specific consumer research surveys or other evidence to establish materiality at trial, the Court is amply convinced that the more generalized surveys and evidence before it persuasively demonstrates that sufficient common proof will be available when the case goes to trial.

Finally, Defendants argue that individualized inquiries will overwhelm common questions. First, Defendants contend that individualized issues arise from class members that repeatedly purchased the Products because those individuals would have a sufficient understanding of the Products' fill level—and therefore not be deceived by the Products' packaging—on subsequent purchases. Even assuming Defendants' argument stood in the face of the objective standards under the FAL and UCL, it would not defeat certification here. Such an argument may limit class members' total damages by eliminating their ability to recover for subsequent purchases, but it would not preclude class members from recovering for their initial purchases. Thus, this individualized inquiry goes more to the amount of damages rather than any particular class member's individual right to recover, and it therefore cannot defeat certification. See Duran, 59 Cal. 4th at 28. Second, Defendants argue that certification should be denied because consumers are not deceived as a matter of law. This argument, however, invites the Court to impermissibly make an unnecessary merits determination on certification. See, e.g., Brinker, 53 Cal. 4th at 1023-24. The Court declines to do so.

Accordingly, the Court finds that common issues predominate here.

b. Typicality.

The typicality requirement exists to ensure that the interests of the named representatives align with the interests of the class. Johnson v. GlaxoSmithKline, Inc., 166 Cal. App. 4th 1497, 1509 (2008). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Id. (internal quotation marks and citations omitted). Thus, the crux of the typicality inquiry relies on "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.

"[A] defendant's raising of unique defenses against a proposed class representative does not automatically render the proposed representative atypical." Fireside Bank v. Superior Court, 40 Cal. 4th 1069, 1091 (2007). Thus, whether "a representative is subject to unique defenses is one factor to be considered in deciding the propriety of certification." Id. at 1090. "The specific danger a unique defense presents is that the class 'representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class.'" Id. (quoting Beck v. Maximus, Inc., 457 F.3d 291, 297 (3d Cir. 2006)).

Here, Plaintiffs contend that typicality is satisfied because they were injured by purchasing the same allegedly deceptively-packaged Products that putative class members purchased. Defendant responds that typicality is not satisfied because Plaintiffs: (1) lack standing under the UCL and CLRA; (2) did not purchase every product listed in the class definition; and (3) have expectations that differ from the class expectations.

To the first point, Defendants contend that Plaintiffs lack standing because their deposition testimony indicates that they are unsure if the Products' packaging was the determinative cause that induced their purchase. As discussed above, while putative class members need not establish standing under the UCL, see In re Tobacco II Cases, 46 Cal. 4th at 321, named Plaintiffs are still required to do so. See Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322 (2011) (holding that a plaintiff must demonstrate that their "economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim"); Steroid Hormone Product Cases, 181 Cal. App. 4th 145, 154 (2010) ("[O]nce the named plaintiff meets that burden, no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members."). "However, a 'plaintiff is not required to allege that [the challenged] misrepresentations were the sole or even the decisive cause of the injury-producing conduct.'" Id. at 327 (quoting In re Tobacco II Cases, 46 Cal. 4th

at 328.). Thus, even if the Products' packaging was not the sole factor that induced Plaintiffs' purchases, Plaintiffs deposition testimony sufficiently demonstrates that it was at least a substantial cause that induced their purchases. Accordingly, the Court finds that Plaintiffs have sufficiently established standing.

To the second and third point, the Court is unpersuaded that those considerations render Plaintiffs atypical. Even if Plaintiffs did not purchase every named candy in the class definition, the record demonstrates that each Product is packaged in a similar manner and contains—albeit to differing degrees—slack-fill. Thus, the purchase of some Products by Plaintiffs has injured them similarly to class members that purchased other Products. This is true even if Plaintiffs subjective expectations exceed those of a reasonable consumer because a classwide determination of reasonableness would resolve Plaintiffs' and class members' claims together. Thus, typicality is satisfied.

c. Adequacy of Representation.

Adequacy of representation must be shown as to both the class representatives and the putative class's counsel. Richmond v. Dart Indus., Inc., 29 Cal. 3d 462 (1981). Adequacy ordinarily turns on whether there is a conflict as to the litigation itself. See Capitol People First v. State Dep't of Developmental Servs., 155 Cal. App. 4th 676, 696-97 (2007). When resolving adequacy questions, the Court evaluates "the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation available; the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented." Id. at 697 (internal quotation marks omitted).

Serious "[c]redibility problems can [also] be an appropriate ground to reject the adequacy of a class representative." Payton v. CSI Elec. Contractors, Inc., 27 Cal. App. 5th 832, 843 (2018). With respect to class antagonism, only widespread class member opposition that concerns the subject matter of the litigation itself (i.e., not a general dislike of the proposed class representative personally) can successfully challenge a representative's adequacy of representation. Richmond, 29 Cal. 3d at 470-72; compare Fanucchi v. Coberly-West Co., 151 Cal. App. 2d 72 (1957) (one-third of putative class members opposing suit insufficient to defeat certification), and Hebbard v. Colgrove, 28 Cal. App. 3d 1017 (1972) (several putative members out of a class of fifty insufficient to defeat certification), with Schy v. Susquehanna Corp., 419 F.2d 1112, 1116-17 (7th Cir. 1970) (over 80% class antagonism defeats certification).

Here, Plaintiffs have declared that they are aware of their ethical duties to the class, and that they

are willing and able to fully prosecute the action on behalf of it. Thomas Decl. ¶ 11, Hoffman Decl. ¶ 12. Moreover, Plaintiffs' counsel has significant experience with class action and complex litigation. See Clarkson Decl. ¶¶ 16-17, Exs. 7-8. Accordingly, the Court finds that Plaintiffs and their counsel are adequate representatives of the proposed class.

3. Superiority and Manageability.

Courts are required to carefully weigh the respective benefits and burdens, and to allow maintenance of the class action only where substantial benefits accrue, both to litigants and the courts. Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 435 (2000). Trial courts must also pay careful attention to manageability concerns "when deciding whether to certify a class action." Duran v. U.S. Bank Nat'l Ass'n, 59 Cal. 4th 1, 29 (2014). Even if common issues are "sufficient to satisfy the predominance prong for certification, the trial court also ha[s] to determine that these individual issues c[an] be effectively managed in the ensuing litigation." Duran, 59 Cal. 4th at 32-33 (citing Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1054 (2012) (Werdegar, J., concurring op.)).

"While individual issues . . . pose no per se bar," Brinker, 53 Cal. 4th at 1053, to certification, "whether in a given case [those issues] should lead a court to approve or reject certification will hinge on the[ir] manageability . . . ." Id. at 1054. Justice Werdegar carefully distinguished "a defense that hinges liability vel non on consideration of numerous intricately detailed factual questions . . . from a defense that raises only one or a few questions and that operates not to extinguish the defendant's liability but only to diminish the amount of a given plaintiff's recovery." Id. In the latter case, the Supreme Court "ha[s] long settled that individual damages questions will rarely if ever stand as a bar to certification." Id. ("In almost every class action, factual determinations [of damages] . . . to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution. Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device.") (quoting B.W.I. Custom Kitchen v. Owens-Illinois, Inc., 191 Cal. App. 3d 1341, 1354 (1987) (internal quotations and citations omitted).

"Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability," thereby "enabl[ing] individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts." Id. When using such methods, however, the Supreme Court has cautioned:

[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling. Statistical methods cannot entirely substitute for common proof, however. There must be some glue that binds class members together apart from statistical evidence. While sampling may furnish indications of an employer's centralized practices, no court has "deemed a mere proposal for statistical sampling to be an adequate evidentiary substitute for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist." In addition, . . . a statistical plan for managing individual issues must be conducted with sufficient rigor.

If statistical evidence will comprise part of the proof on class action claims, the court should consider at the certification stage whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action. In any event, decertification must be ordered whenever a trial plan proves unworkable.

Duran, 59 Cal. 4th at 31-32 (internal citations omitted). Such plans must be developed with expert input and afford the defendant an opportunity to impeach the model or otherwise show that its liability is reduced. Id. at 38. The plan must also allow the defendant to litigate its affirmative defenses. Id. at 49. In short, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. City of San Jose v. Superior Court, 12 Cal. 3d 447, 459 (1974).

Here, Plaintiffs have demonstrated that there are substantial benefits to trying the relatively small dollar value claims of putative class members together, and that doing so is manageable. Plaintiffs have advanced substantial evidence that they can establish Defendants' liability with common proof, and that the determination of putative class members' damages is manageable. Defendants contend that Plaintiffs' damages model is flawed because: (1) it fails to account for the effect of supply-side production costs on price estimates for smaller-packaged Products; and (2) the model's use of a conjoint analysis gives to much weight to one factor, creating a focalism bias. These issues, however, do not demonstrate unmanageability. Rather, Defendants' criticisms appear to target the model in broad strokes (as opposed to criticizing the model for failing to account for individual concerns and issues). Thus, assuming Plaintiffs' success at trial, Defendants will be more than able to adequately critique the model and reduce or alter any remedy considered by the Court.

Finally, Defendants argue that injunctive relief is improper because there is no continued risk of deceiving repeat purchasers. The Court cannot agree with that per se position. Depending on the evidence revealed at trial, injunctive relief may very well be appropriate to protect competitors and other members of the public. In any event, doubts about the ultimate propriety of injunctive relief do not support denial here.

Accordingly, the Court finds the proposed class to be manageable and superior.

Conclusion

For the foregoing reasons, Plaintiffs Jade Thomas and Carey Hoffman's motion for class certification is GRANTED. Having considered the papers and argument of counsel, the Court finds:

(1) It is impracticable to bring all members of the class before the Court;
(2) The class is ascertainable and is sufficiently numerous to warrant class treatment;
(3) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members;
(4) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class;
(5) The representative plaintiffs and their counsel will fairly and adequately protect the interests of the class; and,
(6) A class action is the superior means for adjudicating the claims.

Therefore, it is hereby ORDERED that:

(1) A class action is proper as to Plaintiffs' FAL, UCL, and CLRA claims.
(2) The Court certifies a Class defined as: All persons who purchased the Products (i.e. opaque "theater boxes" of Raisinets®, Buncha Crunch®, Butterfinger Bites®, Tollhouse Semi-Sweet Chocolate Morsels®, Rainbow Nerds®, SweeTarts®, Spree®, Gobstopper®, and Sno-Caps®) in California for personal use and not for resale during the time period February 9, 2013, through the present. Excluded from the Class are Defendants' officers, directors, and employees, and any individual who received remuneration from Defendants in connection with that individual's use or endorsement of the Products.
(3) Ryan J. Clarkson, Shireen M. Clarkson, and Bahar Sodaify of Clarkson Law Firm, P.C. and Ben Heikali of Faruqi & Faruqi LLP are appointed Class counsel.
(4) Plaintiffs Jade Thomas and Carey Hoffman are appointed Class representatives.

Judge: Honorable Daniel J. Buckley CSR: None
Judicial Assistant: S. Chung ERM: None
Courtroom Assistant: E. Munoz Deputy Sheriff: None

(5) The parties should meet and confer on notice to the Class. This Court cannot conduct a hearing before June 22 and cannot rule on any dispute before then. The Court hopes the parties can agree on the language of the notice, so it can be mailed well before June 22. Under the current circumstances, the Court need not sign an order if the parties can stipulate. If not, we will need to wait until the Court can conduct a status conference.

Status Conference is scheduled for 7/20/20 at 10:00 AM in Department 1 at Spring Street Courthouse.

A joint statement is to be filed five (5) court days in advance of the hearing date.

The Judicial Assistant hereby gives notice.

Clerk's Certificate of Service By Electronic Service is attached.