UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHRIS WERDEBAUGH, individually and on behalf of all others similarly situated, Plaintiff, v. BLUE DIAMOND GROWERS, Defendant.	Case No.: 12-CV-2724-LHK ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff Chris Werdebaugh ("Werdebaugh" or "Plaintiff") brings this putative class action against Blue Diamond Growers ("Blue Diamond" or "Defendant"), alleging that Defendant's package labeling is unlawful, deceptive, and misbranded in violation of California law. Plaintiff moves to certify a nationwide class of consumers who purchased certain Blue Diamond products during the class period ("Mot."). ECF No. 74. Defendant filed an opposition ("Opp'n"), ECF No. 97, and Plaintiff filed a reply ("Reply"), ECF No. 115. The Court held a hearing on the instant motion on May 22, 2014. Having considered the submissions of the parties, the relevant law, the record in this case, and the oral arguments presented at the hearing, the Court hereby GRANTS IN PART and DENIES IN PART Plaintiff Werdebaugh's Motion for Class Certification.

I. BACKGROUND

A. Factual Background

Blue Diamond is a California corporation and a leading producer of almond milk products and snack foods. *See* Mot. at 3. Blue Diamond sells the vast majority of its products—more than 99.9%—to retailers and distributors for eventual sale to consumers at grocery and other retail stores throughout the United States. Declaration of John O'Shaughnessy in Support of Blue Diamond Growers' Opposition to Plaintiffs' Motion for Class Certification ("O'Shaughnessy Decl."), ¶¶ 4, 5.

Werdebaugh is a California consumer who purchased Blue Diamond's shelf stable Chocolate Almond Breeze almond milk product ("Purchased Product") as a healthy "treat" alternative to white dairy milk for his children. *See* Deposition of Christopher Werdebaugh ("Werdebaugh Depo"), ECF No. 101-1 at 69, 80. Since April 11, 2008, Werdebaugh purchased four cartons of the Purchased Product at $3–4 per carton. Werdebaugh Depo at 75, 107–08, 143–44. Werdebaugh contends that the Purchased Product's label bears false, misleading, and unlawful claims. *See* Mot. at 2. Specifically, the label statements on the Purchased Product alleged to be false and misleading include: (1) listing the sweetener used in its almond milk products "not as 'sugar,' . . . but as 'evaporated cane juice,'"; and (2) "includ[ing] the statement 'All Natural' when, in fact, the products contain synthetic ingredients . . . ." *Id*. at 1. Werdebaugh asserts that he "reasonably relied on those statements for his purchase decision, and would not have bought the product otherwise." *Id*. at 5.

Werdebaugh seeks to certify a class of purchasers of Blue Diamond products that are substantially similar to the variety Werdebaugh himself purchased. *Id*. at 1. Plaintiff contends that there are two types of products at issue, Shelf Stable Almond Milk and Refrigerated Almond Milk, both of which come in several flavors. *Id*. Because the allegedly misleading and unlawful labeling statements found on the cartons of Almond Breeze Chocolate Almond Milk purchased by Werdebaugh are identical to those found on Shelf Stable Almond Milk and Refrigerated Almond Milk products of all flavors (collectively, "Substantially Similar Products"), Plaintiff seeks to

certify a class that includes purchasers of all Substantially Similar Products. *Id*. These Substantially Similar Products include (1) eleven varieties labeled with the ingredient evaporated cane juice; and (2) seven varieties labeled "All Natural" despite containing synthetic ingredients. *See* ECF Nos. 74-1, 74-2, 74-3, 74-4, 74-5, 74-6, 74-7, 75-1, 75-2, 75-3, 75-4 (Blue Diamond product labels with "Evaporated Cane Juice" statements); 78, 78-1, 78-2, 78-3, 78-4, 78-5, 78-6 (Blue Diamond product labels with "All Natural" statements).

1. Evaporated Cane Juice Claims

Werdebaugh alleges that Blue Diamond's use of the term "evaporated cane juice" as an ingredient on the package labels of the Purchased Product and Substantially Similar Products violates federal regulations and California law. Mot. at 4–5. Specifically, Werdebaugh contends that Defendant's use of the term "evaporated cane juice" violates: (a) the FDA's definition of the term "juice"; (b) the FDA's requirements for identifying cane syrup on food labels; and (c) the FDA's blanket requirement that foods must be referred to by their common or usual names and not by names "confusingly similar to the name of another food that is not reasonably encompassed within the same name." *Id*. at 3–4 (quoting 21 C.F.R. § 102.5(a)).

First, according to Werdebaugh, 21 C.F.R. § 120.1(a) defines "juice" as "the aqueous liquid expressed or extracted from one or more fruits or vegetables, purees of . . . fruits or vegetables, or any concentrates of such liquid or puree." *Id*. (quoting FDA October 2009 Guidance for Industry Letter) (internal quotation marks omitted). Although sugar cane is a vegetable, Werdebaugh represents that the FDA "considers the term 'vegetable' in the context of the juice definition to refer more narrowly to edible plant parts that consumers are accustomed to eating as vegetables in their diet." *Id*. Because "the juice or extract of sugar cane is not the juice of a plant that consumers are accustomed to eating as a vegetable in their diet," sugar cane or any extract of sugar cane does not qualify as "juice" under the regulation defining that term. *Id*. Second, Werdebaugh asserts that federal regulations not only proscribe identifying sugar cane and cane syrup as "juice," but mandate that sugar cane be identified as "sugar" or "syrup." First Amended Complaint ("FAC"), ECF No. 38 at ¶¶ 42, 46, 63 (citing 21 C.F.R. §§ 101.4(b)(20) (sugar); 168.130 (cane syrup)).

Third, Werdebaugh alleges that use of the term evaporated cane juice violates the FDA's requirement that ingredients be described by their common or usual names, as established by regulation or common usage. Mot. at 4. (citing 21 C.F.R. § 102.5(d)). Because evaporated cane juice is "'confusingly similar to the name of [another] food that is not reasonably encompassed within the same name,'" Werdebaugh contends that the term cannot satisfy the FDA's common name or usage requirement, and is misleading and deceptive in violation of California and federal law. *Id*. (quoting 21 C.F.R. § 102.5(a)).

Plaintiff contends that the FDA's intention to regulate evaporated cane juice based on these requirements is expressed in an October 2009 Guidance for Industry letter on the topic ("2009 Guidance"), *see id*. at 5; ECF 76-2 (FDA Guidance letter), as well as in "warning letters to the industry" on this issue, ECF 76-3 (warning letter).

2. "All Natural" Claims

Werdebaugh also alleges that Blue Diamond's use of the term "All Natural" on the Purchased Product and Substantially Similar Products violates federal regulations and California law. Mot. at 5–6. Werdebaugh asserts the artificial ingredient potassium citrate is present in the Purchased Product and Substantially Similar Products labeled "All Natural." *Id*. at 2. Werdebaugh argues that 21 C.F.R. § 101.22 prohibits Defendant from labeling its products as "All Natural" when those products contain potassium citrate. *Id*. at 17. According to Werdebaugh, the FDA has "repeatedly affirmed" this policy in regulatory publications, *see* 58 Fed. Reg. 2302-01, 2407 (Nov. 6, 1993), policy guidelines, *see* FDA Compliance Policy Guide § 587.100, and "numerous warning letters." *See* FAC ¶¶ 33, 35–36. Werdebaugh contends that Defendant's labeling representation that the Purchased Product and Substantially Similar Products are "All Natural " is false and misleading in violation of California law and federal regulation because these products in fact contain the ingredient potassium citrate. Mot. at 5–7.

B. Putative Class Claims

Werdebaugh alleges that by manufacturing, advertising, distributing, and selling misbranded products, Defendant has violated California Health & Safety Code Sections 110390,

110395, 110398, 110400, 110660, 110720, 110725, 110735, 110740, 110760, 110765, and 110770. *See* FAC ¶¶ 64–75. In addition, Werdebaugh asserts that Defendant has violated the standards set by 21 C.F.R. §§ 101.4(a)(1), 101.22, 101.30, 102.5(a), 102.5(d), and 120.1(a), as well as by 21 U.S.C. § 343, which have been incorporated by reference into California's Sherman Food, Drug, and Cosmetic Act ("Sherman Law"), Cal. Health & Safety Code §§ 109875 *et seq*. *See* FAC ¶¶ 26–27, 76; *see also* Cal. Health & Safety Code § 110100 ("All food labeling regulations and any amendments to those regulations adopted pursuant to [federal statutes governing food labeling] in effect on January 1, 1993, or adopted on or after that date shall be the food regulations of this state.").

Based on these alleged regulatory and statutory violations, Werdebaugh's FAC alleges the following causes of action: (1) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq*., for unlawful, unfair, and fraudulent business acts and practices (claims 1, 2, and 3); (2) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq*., for misleading, deceptive, and untrue advertising (claims 4 and 5); and (3) violation of the CLRA, Cal. Civ. Code §§ 1750 *et seq*. (claim 6). *See* FAC ¶¶ 96–155.

Werdebaugh has moved for class certification of these claims pursuant to Federal Rule of Civil Procedure 23(b)(2) and (b)(3). Mot. at 3. Plaintiff seeks to certify the following nationwide class:

> All persons in the United States who, from May 19, 2008, until the date of notice, purchased almond milk products manufactured, distributed and/or sold by Blue Diamond Growers containing the label statements "evaporated cane juice" and/or "All Natural."

Mot. at i.

C. Procedural History

Werdebaugh filed his original Complaint on May 29, 2012. ECF No. 1. Blue Diamond filed an Answer on September 25, 2012. ECF No. 20. The Parties stipulated to Plaintiff filing an amended complaint as well as to the Court dismissing with prejudice claims in the original Complaint based on the Magnuson-Moss Warranty Act and Song-Beverly Consumer Warranty

Act. ECF Nos. 36, 37.

Werdebaugh filed his FAC on May 24, 2013. ECF No. 38. Blue Diamond filed its Motion to Dismiss or, in the alternative, to strike particular allegations in the FAC on June 24, 2013. ECF No. 46. Blue Diamond moved to dismiss for four reasons, arguing that: (1) Plaintiff's claims are preempted by the Federal Food, Drug, and Cosmetic Act, on the bases of implied preemption, express preemption, and the doctrine of primary jurisdiction; (2) Plaintiff lacks standing to challenge the Substantially Similar Products because he did not purchase them; (3) Plaintiff's claims are not pled with the particularity required under Fed. R. Civ. P. 9(b); and (4) California's conflict-of-laws analysis prohibits non-California plaintiffs from bringing a claim under the UCL, FAL, or CLRA. *See id*. at i. Blue Diamond moved to strike Werdebaugh's claim for monetary relief under the CLRA arguing that he did not properly seek leave to amend on that basis. *Id*. On July 22, 2013, Werdebaugh filed his Opposition, ECF No. 48, as well as a request that the Court take judicial notice of certain exhibits, ECF No. 49. Defendant filed its Reply on August 30, 2013. ECF No. 58.

On October 2, 2013, the Court denied Defendant's motion to dismiss and motion to strike. ECF No. 65. The Court denied Blue Diamond's motion to dismiss in full, finding that: (1) Plaintiff's claims were not preempted by federal law and application of the doctrine of primary jurisdiction was not warranted in this case; (2) Werdebaugh had adequately alleged Article III and statutory standing at the pleading stage with respect to the Substantially Similar Products; (3) Plaintiff had met the heightened pleading standards of 9(b) with respect to all of his Purchased Product and Substantially Similar Product claims; and (4) striking the nationwide class allegations at the motion to dismiss stage would be premature. *Id*. at 14, 16, 18, 20–21; 23–24; 26; 27. Because the Court also found that Werdebaugh's amendment of the CLRA claim was proper, the Court declined to strike Werdebaugh's claim for monetary relief under the CLRA. *Id*. at 29. Defendant subsequently filed an Answer to the Amended Complaint on November 1, 2013. ECF No. 69.

On January 17, 2014, Werdebaugh moved for class certification. ECF No. 74. Defendants filed an opposition on March 7, 2014, ECF No. 98, along with evidentiary objections to Plaintiff's

expert declarations filed in support of class certification, ECF Nos. 102–03.[1] Plaintiff responded to Defendant's evidentiary objections on March 20, 2014, ECF Nos. 110–11, and on March 28, 2014 filed a reply, ECF No. 115. Defendant subsequently filed two statements of recent decision, ECF Nos. 116, 120. The Court held a hearing on May 22, 2014.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23, which governs class certification, has two sets of distinct requirements that Plaintiffs must meet before the Court may certify a class. Plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy at least one of the prongs of Rule 23(b).

Under Rule 23(a), the Court may certify a class only where "(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). Courts refer to these four requirements, which must be satisfied to maintain a class action, as "numerosity, commonality, typicality and adequacy of representation." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). Further, courts have implied an additional requirement under Rule 23(a): that the class to be certified be ascertainable. *See Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012); *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 671–72 (N.D. Cal. 2011).

In addition to meeting the requirements of Rule 23(a), the Court must also find that Plaintiffs have satisfied "through evidentiary proof" one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The Court can certify a Rule 23(b)(1) class when Plaintiffs make a showing that there would be a risk of substantial prejudice or inconsistent adjudications if there were separate adjudications. Fed. R. Civ. P. 23(b)(1). The Court can certify a Rule 23(b)(2) class 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

[1] The court does not rely in this order on the declarations of Julie Caswell or Edward Scarbrough. Accordingly, Blue Diamond's evidentiary objections to those declarations are OVERRULED AS MOOT.

relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Finally, the Court can certify a Rule 23(b)(3) class if the 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) (emphasis added).

"[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 and Trust Funds*, 133 S. Ct. 1184, 1194 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)); *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.'" (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001)). Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S. Ct. at 1194–95. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195. Within the framework of Rule 23, the Court ultimately has broad discretion over whether to certify a class. *Zinser*, 253 F.3d at 1186.

III. DISCUSSION

Werdebaugh seeks to certify a nationwide class of consumers who purchased Blue Diamond products during the class period under both Rule 23(b)(2) and Rule 23(b)(3). Mot. at i, 8, 14, 15. Plaintiff requests certification of a class seeking restitution and damages under Rule 23(b)(3), and certification of an injunctive relief class under Rule 23(b)(2). The Court addresses Werdebaugh's standing to sue before turning to the requirements of Rule 23(a) and Rule 23(b).

A. Standing

Blue Diamond challenges Werdebaugh's constitutional and statutory standing to bring suit on behalf of the proposed class. Opp'n at 23–25. For the following reasons, the Court finds that Werdebaugh has standing to pursue his claims for damages under Rule 23(b)(3), but not for

injunctive relief under 23(b)(2).

1. Article III and Statutory Standing

"In a class action, standing is satisfied if at least one of named plaintiff[s] meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citing *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001)). Not only must at least one named plaintiff satisfy constitutional standing requirements, but the plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Article III standing to sue requires a plaintiff show "(1) an injury-in-fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that the injury is redressable by a favorable ruling." *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1128 (N.D. Cal. 2014) (citing *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)). Under California's UCL and FAL, a private person has statutory standing only if she "has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204; *see also Kwikset*, 51 Cal. 4th at 322. Similarly, to bring a case under the CLRA, "[a] plaintiff . . . must not only be exposed to an unlawful practice but also have suffered some kind of damage." *Bower v. AT&T Mobility, LLC*, 196 Cal. App. 4th 1545, 1556 (2011) (internal quotation marks omitted).

In cases such as this, both Article III standing and standing under the UCL, FAL, and CLRA can be established by showing the plaintiff either: (1) paid a price premium for a mislabeled product; or (2) would not have purchased the product had he known about the misbranding. *Chobani*, 973 F. Supp. 2d at 1128 ("Article III's standing requirements may be satisfied by allegations that a plaintiff purchased a product he otherwise would not have purchased, or spent more on such product, in reliance on the defendant's misrepresentations."); *see also Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947, 962 (N.D. Cal. 2013) (holding that "Brazil suffered a concrete and particularized injury . . . [because] he allegedly was deceived, and then paid money that he would not otherwise have paid had he known about the true nature of Defendants' products"); *Mazza*, 666 F.3d at 595 ("Plaintiffs contend that class members paid more for the CMBS than they otherwise

would have paid, or bought it when they otherwise would not have done so, because Honda made deceptive claims . . . . To the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact.'"); *In re Google AdWords Litig.*, No. 05-3369, 2012 WL 28068, at *10 (N.D. Cal. Jan. 5, 2012) ("The requirement of concrete injury is satisfied when the Plaintiffs and class members in UCL and FAL actions suffer an economic loss caused by the defendant, namely the purchase of defendant's product containing misrepresentations."); *Manchouck v. Mondelez Int'l Inc.*, No. 13-2148, 2013 WL 5400285, at *2 (N.D. Cal. Sept. 26, 2013) (finding plaintiff had both constitutional and statutory standing where the complaint alleged "plaintiff paid a 'price premium' because the product claimed to be 'made with real fruit,'" and that "[p]laintiff would not have purchased the two products at that price point absent the alleged misstatements"); *see also Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329 (2011) ("For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately."); *Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889, 901 (N.D. Cal. 2012) (allegations "that plaintiffs would not have purchased a product if the product had been labeled accurately [were] sufficient to establish injury under California's consumer laws").

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Because the elements of Article III standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.*; *see also In re iPhone Application Litig.*, No. 11-2250, 2013 WL 6212591 (N.D. Cal. Nov. 25, 2013). On a motion for class certification, this means Plaintiff must show standing "through evidentiary proof." *Comcast*, 133 S. Ct. at 1432; *see also Evans v. Linden Research, Inc.*, No. 11-1078, 2012 WL 5877579 (N.D. Cal. Nov. 20, 2012) (At class certification,

"Plaintiffs 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]."); *Nelsen v. King Cnty.*, 895 F.2d 1248, 1249–50 (9th Cir.1990) ("Standing is a jurisdictional element that must be satisfied prior to class certification."); *In re First Am. Corp. ERISA Litig.*, No. 07-1357, 2009 WL 928294 (C.D. Cal. Apr. 2, 2009) ("[A]t the class certification stage, . . . unlike on a motion to dismiss, the would-be class representative must show standing, rather than merely allege it."); *In re Abbott Labs. Norvir Anti-Trust Litig.*, No. 04-1511, 2007 WL 1689899 (N.D. Cal. June 11, 2007) ("[I]t is 'well-settled that prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.'" (quoting *Wooden v. Bd. of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1287–88 (11th Cir. 2001)); *cf. Baghdasarian v. Amazon.com, Inc.*, No. 05-8060, 2009 WL 4823368 (C.D. Cal. Dec. 9, 2009) *aff'd*, 458 F. App'x 622 (9th Cir. 2011) ("At the class certification stage, Plaintiff must make certain allegations concerning standing. . . . [At] summary judgment, Plaintiff must establish certain facts.").

Accordingly, to establish standing, Werdebaugh must show, and not merely allege, either that he would not have purchased the product had he known about the misbranding or that he paid a price premium. Werdebaugh contends that he has standing to bring his "All Natural" claims and "Evaporated Cane Juice" on both theories. Mot. at 1–2; Reply at 15. Blue Diamond challenges both bases. *see* Opp'n at 24–25. The Court finds that Werdebaugh's deposition testimony clearly shows that he would not have purchased Blue Diamond almond milk had he known about the misbranding for the reasons stated below. Accordingly, the Court need not address Defendant's price premium arguments.

Werdebaugh claims that he was "misled by Defendant's use of the term 'evaporated cane juice' because that term falsely suggests that the sweetener was a juice and not what it really was—either sugar or dried cane syrup." Mot. at 3. In essence, "Defendants deceived the Plaintiff about the presence of added sugars that Plaintiff sought to avoid." *Id*. at 4. Werdebaugh alleges

throughout his FAC that he would not have purchased Defendant's products had he known that the label representations were false. *See, e.g.*, FAC ¶ 61 ("Plaintiff was misled by Defendant's unlawful and misleading label on this product. Plaintiff would not have otherwise purchased this product had he known the truth about this product."); *id*. ¶ 110 ("Plaintiff and members of the Class suffered a substantial injury by virtue of buying Defendant's Purchased Product and Substantially Similar Products that they would not have purchased absent Defendant's [misrepresentations].").

Werdebaugh's deposition testimony bears out the FAC's allegations of reliance. Werdebaugh repeatedly states that he relied on the label statements in purchasing Blue Diamond's almond milk product. When he purchased the almond milk, Werdebaugh was "unfamiliar with the product," and "the 'all natural' label stood out" to him. Werdebaugh Depo at 41. He "stood at the shelf and saw this packaging and picked it up, read the labels, and made the purchase." *Id*. According to Werdebaugh, the "'all natural' label was a substantial reason why [he] bought [Defendant's] product and [he] relied on that." *Id*. at 48. Werdebaugh further testified that he was concerned about seeing "evaporated cane juice" on the ingredients list, but did not know that it is "the equivalent of table sugar." *Id*. at 35, 63. According to Werdebaugh, discovering this fact affected his subsequent purchase decisions. *Id*. at 63.

Apparently conceding that Plaintiff has shown reliance on the "All Natural" label statements, Blue Diamond's reliance arguments are limited to Werdebaugh's standing to bring claims based on the "Evaporated Cane Juice" label statements. *See* Opp'n at 24. According to Blue Diamond, "it is implausible for plaintiffs to think that defendants' products did not contain added sugars or that evaporated cane juice refers to anything other than sugar cane." *Id*. at 25 (citing *Avoy v. Turtle Mountain, LLC*, No. 13-236, 2014 WL 587173, at *6 (N.D. Cal. Feb. 14, 2014)). Defendant contends that Werdebaugh's deposition testimony shows that: (1) he saw the evaporated cane juice ingredient statement on the label before purchasing the product and also saw on the nutrition facts panel that the almond milk contained 20 grams of sugars; (2) he did not understand what the term "cane" in "Evaporated Cane Juice" meant, and that he was not aware of the use of

"cane" in any other food product; and (3) he does not know what "evaporated cane syrup" or "dried cane syrup" is, and that his purchasing decision likely would not have been impacted by the use of those terms in lieu of "Evaporated Cane Juice." *Id*.

Defendant's arguments that Werdebaugh cannot show reliance on the allegedly misleading label statements are unavailing. Specifically, the Court finds *Chobani* and *Turtle Mountain*, two decisions of this Court upon which Defendant relies, distinguishable.

In *Turtle Mountain*, the plaintiff sought products with no added sugar, and alleged that the defendant's use of the term "Evaporated Cane Juice" misled her into purchasing defendant's frozen dessert products. *Turtle Mountain*, 2014 WL 587173, at *5. In that case, the Court found the plaintiff's allegations of reliance implausible for several reasons, none of which apply here. The products at issue in *Turtle Mountain* contained other ingredients that explicitly used the word "sugar," which cast doubt on the plaintiff's claims that she was misled into believing the frozen desserts had no added sugars. *Id*. The plaintiff in that case failed to provide any explanation of how she could have been misled into thinking no sugars were added to the defendant's dessert products given the presence of other ingredients she knew to be sugars or sugar-equivalents. *Id*. at *6.

With regard to *Chobani*, plaintiffs in that case disavowed any theory that evaporated cane juice was a healthier form of sugar. Rather, plaintiffs relied on a theory that they believed that evaporated cane juice was "some type of ingredient healthier than sugar." *Chobani*, 973 F. Supp. 2d at 1132. Plaintiffs therefore claimed that they did not know that evaporated cane juice was a sweetener. The Court found the plaintiffs' allegations of reliance on the ECJ label implausible for two reasons. First, plaintiffs in their complaint acknowledged that *dried cane* syrup was a form of sugar. *Id.* at 1133. In light of this acknowledgement, plaintiffs did not explain how plaintiffs could have believed that *evaporated cane* juice was not a form of sugar. Specifically, despite the fact that plaintiffs knew that dried cane syrup was a form of sugar, plaintiffs provided no alternative understanding of what they believed evaporated cane juice to be. *Id.* at 1133–34. Second, plaintiffs acknowledged in their complaint that fruit *juice* concentrate is a well-known added sugar. *Id.* at 1134. The Court found that this undermined plaintiffs' "purported reliance on the word 'juice' in

'evaporated cane juice' as denoting something 'healthy' . . . ." *Id.* In sum, in *Chobani*, plaintiffs' acknowledgement in their complaint that they knew that both *dried cane* syrup and fruit *juice* concentrate were added sugars led the Court to find implausible plaintiffs' contention that they relied on their understanding that *evaporated cane juice* was not sugar.

The Court finds Werdebaugh's claims distinguishable from those in *Chobani* and *Turtle Mountain*. First, it does not appear that Blue Diamond's products contain any ingredients such as those in *Turtle Mountain* that would have indicated to Werdebaugh the presence of added sugars. *See, e.g.*, 74-2 (Blue Diamond product label with "Evaporated Cane Juice" statement), 75-1 (Blue Diamond product label with "All Natural" statement). Werdebaugh testified that he thought the 20 grams of sugar in the product he purchased was not added sugar, but rather was "an actual squeezed element of an almond that naturally occurs." Werdebaugh Depo at 46. Defendant contends that this is not plausible, but provides no argument in support. Opp'n at 25. Nothing in the record contradicts Werdebaugh's view, and Defendant provides no reason for the Court to find otherwise. Second, Werdebaugh testified that he does not know what dried cane syrup is, in contrast to the plaintiffs in *Chobani* and *Turtle Mountain*. *See* Werdebaugh Depo at 128. Werdebaugh testified that his purchasing decision would not have been affected by the presence of dried cane syrup, but this is not fatal to Plaintiff's theory of reliance in light of the fact that Werdebaugh did not know what that ingredient even was. *Id.* at 130. The fact that the presence of dried cane syrup would not have impacted Werdebaugh's purchasing decision simply shows that unlike the plaintiffs in *Chobani* and *Turtle Mountain*, Werdebaugh does not know what dried cane syrup is.

The Court finds that Plaintiff has introduced sufficient evidence that he relied on Blue Diamond's allegedly misleading label statements in making his purchases.[2] Accordingly, the Court concludes that Plaintiff has standing to bring class claims for monetary relief under the UCL, FAL, and CLRA.

[2] Because merits discovery is ongoing, further inquiry may be appropriate at the summary judgment stage should further factual evidence that bears on Werdebaugh's standing come to light.

2. Standing to Seek Injunctive Relief Under Rule 23(b)(2)

Plaintiff requests certification of the proposed class under Rule 23(b)(3) seeking damages, and separately an injunctive relief class under Rule 23(b)(2). *See* Reply at 13 ("Plaintiff's restitution and damages claims do no [sic] flow from the requested injunctive relief. Plaintiff seeks certification of his restitution and damages claims under Rule 23(b)(3)."). As discussed above, Plaintiff has standing to bring class claims for damages under the UCL, FAL, and CLRA. However, the Court finds that Werdebaugh lacks standing to bring claims for injunctive relief.

An injunctive class can be certified under Rule 23(b)(2) where "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). Unlike Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority of class adjudication to certify a Rule 23(b)(2) class. Rather, only a showing of cohesiveness of class claims is required. *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).

Although the parties did not raise the issue of Plaintiff's standing to pursue injunctive relief in their briefs, "federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230–231 (1990)); *see also Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1065 (9th Cir. 2010).

To establish standing for prospective injunctive relief, Plaintiff must demonstrate that "he has suffered or is threatened with a 'concrete and particularized' legal harm . . . coupled with 'a sufficient likelihood that he will again be wronged in a similar way.'" *Bates*, 511 F.3d at 985 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)); *see also Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (en banc) ("[T]o establish standing to pursue injunctive relief . . . [plaintiffs] must demonstrate a real and immediate threat of repeated injury in the future.").[3] A plaintiff must establish a "real and immediate threat of repeated injury." *Bates*,

[3] This requirement separate from the minimum threshold requirements for Article III standing to bring a damages claim discussed in the previous section. *Clark v. City of Lakewood*, 259 F.3d 996,

511 F.3d at 985. The alleged threat cannot be "conjectural" or "hypothetical." *Lyons*, 461 U.S. at 101–02. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). Finally, a named plaintiff must show that he himself is subject to a likelihood of future injury. Allegations that a defendant's conduct will subject unnamed class members to the alleged harm is insufficient to establish standing to seek injunctive relief on behalf of the class. *Hodgers–Durgin v. De La Vina*, 199 F.3d 1037, 1045–45 (9th Cir. 1999).

Several courts in this district have held in similar cases that "to establish standing, [a plaintiff] must allege that he intends to purchase the products at issue in the future." *Rahman v. Mott's LLP*, No. 13-3482, 2014 WL 325241, at *10 (N.D. Cal. Jan. 29, 2014); *see also Jou v. Kimberly–Clark Corp.*, No. 13-3075, 2013 WL 6491158, at *13 (N.D. Cal. Dec. 10, 2013) (rejecting "Plaintiffs' contention that it is unnecessary for them to maintain any interest in purchasing the products in the future" in order to establish standing for injunctive relief); *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533–34 (N.D. Cal. 2012) (finding plaintiffs had standing to pursue injunctive relief where they alleged intention to purchase products in the future); *Delarosa v. Boiron, Inc.*, No. 10-1569, 2012 WL 8716658, at *3–6 (N.D. Cal. Dec. 28, 2012) (finding plaintiff lacked standing where she did not dispute she had no intention to purchase product in the future); *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 626 (N.D. Cal. 2011); *see also Mason v. Nature's Innovation, Inc.*, No. 12-3019, 2013 WL 1969957, at *4 (S.D. Cal. May 13, 2013) (collecting cases and concluding that "[g]uided by the Ninth Circuit's interpretation of Article III's standing requirements, this Court agrees with the courts that hold that a plaintiff does not have standing to seek prospective injunctive relief against a manufacturer or seller engaging in false or misleading advertising unless there is a likelihood that the plaintiff would suffer future harm from the defendant's conduct—i.e., the plaintiff is still interested in purchasing the product in question").

1006 (9th Cir. 2001) ("A determination that a plaintiff has standing to seek damages does not ensure that the plaintiff can also seek injunctive or declaratory relief.").

Furthermore, "[p]lacing this requirement on Plaintiffs does not thwart the objective of California consumer protection laws since it is not impossible that a consumer would be interested in purchasing the products at issue if they were labeled correctly." *Jou*, 2013 WL 6491158, at *4; *see also Mason*, 2013 WL 1969957 at *4 ("[I]t is an exaggeration to claim that injunctive relief would never be available in false advertising cases. There are cases where a consumer would still be interested in purchasing the product if it were labeled properly—for example, if a food item accurately stated its ingredients."); *Ries*, 287 F.R.D. at 532 (finding standing to seek class-wide injunctive relief where named plaintiffs had a "stated intent to purchase" the challenged product in the future). Also, while plaintiffs face constitutional hurdles to obtaining injunctive relief in federal court, they have the alternative of seeking an injunction in state court. *See Freeman v. ABC Legal Servs., Inc.*, 877 F. Supp. 2d 919, 924 (N.D. Cal. 2012) ("[I]n federal court, a plaintiff must still demonstrate Article III standing to seek injunctive relief, even if she would otherwise have standing in state court.").

Here, because Werdebaugh has not alleged, let alone provided evidentiary proof, that he intends or desires to purchase Blue Diamond almond milk products in the future, there is no likelihood of future injury to Plaintiff that is redressable through injunctive relief, and Plaintiff lacks standing to pursue that remedy. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011). As a result, Plaintiff is precluded from seeking injunctive relief on a classwide basis, and the Court declines to certify the proposed class under Rule 23(b)(2).

B. Ascertainability

"As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists." *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907, 2014 WL 580696 (N.D. Cal. Feb. 13, 2014). A class is ascertainable if the class is defined with "objective criteria" and if it is "administratively feasible to determine whether a particular individual is a member of the class." *See Wolph v. Acer America Corp.*, No. 09-1314, 2012 WL 993531, at *1–2 (N.D. Cal. Mar. 23, 2012) (certifying a class where "the identity and contact information for a significant portion of

these individuals can be obtained from the warranty registration information and through Acer's customer service databases"); *see also Hofstetter v. Chase Home Finance, LLC*, No. 10-01313, 2011 WL 1225900, at *14 (N.D. Cal. Mar. 31, 2011) (certifying class where "defendants' business records should be sufficient to determine the class membership status of any given individual."); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (denying the ascertainability of a class that smoked cigarettes for "at least twenty years"); *Tietsworth v. Sears, Roebuck & Co.*, No. 09-288, 2013 WL 1303100, at *3–4 (N.D. Cal. Mar. 28, 2013) (denying certification where "ascertaining class membership would require unmanageable individualized inquiry").

Werdebaugh has precisely defined the class based on objective criteria: purchase of Blue Diamond almond milk products within the class period. Reply at 6. The class definition "simply identifies purchasers of Defendant's products that included the allegedly material misrepresentations." *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) (finding a class of customers who purchased Kashi products labeled as containing "Nothing Artificial" during the class period to be ascertainable and rejecting argument that because "Defendant does not have records of consumer purchases, and potential class members will likely lack proof of their purchases, . . . the Court will have no feasible mechanism for identifying class members"). Likewise, "[b]ecause the alleged misrepresentations appeared on the actual packages of the products purchased, there is no concern that the class includes individuals who were not exposed to the misrepresentation." *Id.* In the Ninth Circuit, "this is enough to satisfy Rule 23(a)'s implied ascertainability requirement." *Forcellati v. Hyland's, Inc.*, No. 12-1983, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014) (certifying class of consumers who purchased "Defendants' children's cold or flu products within a prescribed time frame"); *see also McCrary v. The Elations Co., LLC*, No. 13-242, 2014 WL 1779243, at *7–9 (C.D. Cal. Jan. 13, 2014) (class ascertainable where "the class definition clearly define[d] the characteristics of a class member by providing a description of the allegedly offending product and the eligible dates of purchase"); *Guido v. L'Oreal, USA, Inc.*, No. 11-1067, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013) (finding class ascertainable where

"the requirement for membership in the class [was] whether a consumer purchased a product after a particular date").

Blue Diamond contends that the proposed class is not ascertainable because no company records exist to identify purchasers or which products they bought. Opp'n at 9–10. Blue Diamond notes that the company itself does not maintain records of customer identities or purchases other than the 0.01% of its products that are sold directly to consumers through Blue Diamond's website or handful of retail stores. *Id.* at 10.[4]

Defendant's concern is that class members will not have actual proof that they belong in the class. Blue Diamond bases its argument largely on *Sethavanish*, 2014 WL 580696, at *5, which found persuasive the Third Circuit's reasoning in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). In *Carrera*, the Third Circuit found that a putative class of purchasers of the defendant's diet supplement was not ascertainable because there was insufficient evidence to show that retailer records could be used to identify class members. *Carrera*, 727 F.3d at 308–09. The Third Circuit rejected plaintiff's proposal to use affidavits submitted by putative class members because this process deprived the defendant of the opportunity to challenge class membership. *Id.* at 309. Additionally, the Third Circuit held that "there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims," and that absent class members could then argue that they are not bound by a judgment because the named plaintiff did not adequately represent them. *Id.* at 310.

"While [*Carerra*] may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit." *McCrary*, 2014 WL 1779243, at *8. "In this Circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to

[4] Blue Diamond further contends that allowing class members to self-identify would violate its due process right to raise individual challenges to class members. Opp'n at 10. However, "because Defendants' liability will be determined in the aggregate, and they will have no claim to any leftover damages, whether any given individual is or is not a rightful class member is entirely immaterial to Defendants' monetary liability in this case." *Forcellati*, 2014 WL 1410264, at *6. "Accordingly, Defendants have no due process interest in challenging class membership that stands in the way of certification." *Id.*; *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (noting that a defendant's interest is "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards").

identify himself or herself as having a right to recover based on the description." *Id*. (internal quotation marks omitted); *see also Astiana*, 291 F.R.D. at 500 ("As long as the class definition is sufficiently definite to identify putative class members, the challenges entailed in the administration of this class are not so burdensome as to defeat certification." (internal quotation marks and alteration omitted)).

Where courts have denied class certification because the proposed class was not ascertainable, identification of class members posed far greater difficulties than it is likely to pose in this case. *See, e.g.*, *Xavier*, 787 F. Supp. 2d at 1090 (proposed class unascertainable where class definition included persons who had smoked a certain number of Marlboro cigarettes potentially over a period of decades because (1) manufacturer lacked data on individual smokers, (2) plaintiffs merely offered broad demographic data on smoking, (3) smoking habits were likely to change over such a long time period, and (4) asking individual class members to submit affidavits attesting to their belief that they had smoked 146,000 Marlboro cigarettes asked too much of potential class members' memories). In *Astiana v. Ben & Jerry's Homemade, Inc.*, Judge Hamilton found unascertainable a plaintiff's proposed class of those who had purchased Ben & Jerry's ice cream that contained alkalized cocoa processed with a synthetic ingredient. No. 10-4387, 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014). In *Ben & Jerry's*, however, only one of the defendant's fifteen suppliers had used a synthetic ingredient, and the plaintiff could provide no method of identifying which consumers had purchased ice cream from that supplier. *Id*. The proposed class in this case is distinguishable. Unlike in *Ben & Jerry's*, here all purchasers of Blue Diamond's almond milk products are included in the class definition, and all cartons of the challenged almond milk products bore the alleged mislabeling. The class period here is also far shorter than in *Xavier*, and inviting plaintiffs to submit affidavits attesting to their belief that they have purchased a carton of Blue Diamond almond milk in the past several years is much likelier to elicit reliable affidavits than asking potential class members to recall whether they had smoked 146,000 of a certain cigarette over the course of several decades. *See Xavier*, 787 F. Supp. 2d at 1090 ("Swearing 'I smoked 146,000 Marlboro cigarettes' is categorically different from swearing 'I have been to Paris,

France,' or 'I am Jewish,' or even 'I was within ten miles of the toxic explosion on the day it happened.'").

Put simply, in the Ninth Circuit "[t]here is no requirement that the identity of the class members . . . be known at the time of certification." *Ries*, 287 F.R.D. at 535 (alteration in original). Rather, they need only be "parameters for membership in the class are set by objective criteria" such that it is "administratively feasible to determine whether a particular individual is a member of the class." *Wolph*, 2012 WL 993531, at *1–2.[5] Because Werdebaugh's proposed class is sufficiently definite to identify putative class members, the Court finds the proposed class sufficiently ascertainable.[6]

C. Rule 23(a) requirements

Blue Diamond challenges Werdebaugh's ability to satisfy each of the four requirements for class certification under Rule 23(a), and the Court addresses each in turn.

1. Numerosity

Under Rule 23(a)(1), a proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticability does not mean impossibility," but rather asks the court to assess the difficulty or inconvenience of joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964). In determining whether numerosity is satisfied, the Court may consider reasonable inferences drawn from the facts before it. *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1332 n.5 (9th Cir. 1977).

Werdebaugh does not proffer an exact figure for the size of the class. However, Defendant does not dispute the numerosity of the proposed class, and courts may infer numerosity from the evidentiary record. *Zeisel v. Diamond Foods, Inc.*, No. 10-1192, 2011 WL 2221113 (N.D. Cal. June 7, 2011). Here, Defendant's expert calculates that between June 2008 and December 2013,

[5] Four judges dissented from the Third Circuit's denial of rehearing en banc in *Carrera*. That dissent agrees with this lower burden of ascertainability, particularly in light of the fact that the ascertainability requirement is rooted in common law and is not compelled by the text of Rule 23.

[6] The Court also notes that because the Court finds certification in this case is proper only as to a class of California purchasers, the burden of ascertaining the identity of class members will ultimately be much lighter than it would have been were the class comprised of purchasers from all 50 states.

Blue Diamond sold more than 200 million units of the challenged products. *See* Export Report of Keith Ugone ("Ugone Report"), ECF No. 101-2, Ex. 6; *see also id*. at 14; ECF No. 76-5 (Blue Diamond press release reporting total sales exceeded $1 billion in fiscal year 2011–12). From this, the Court infers that the class numbers at least in the thousands. Accordingly, the Court finds that joinder of the many members of the class would be impractical, and 23(a)(1) satisfied.

2. Commonality

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" which "does not mean merely that they have all suffered a violation of the same provision of law." *Dukes*, 131 S. Ct. at 2551. The "claims must depend on a common contention" and "[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Commonality is satisfied by "the existence of shared legal issues with divergent factual predicates" or a "common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019–20 (9th Cir. 1998). All questions of fact and law need not be common to satisfy the rule. *Id*. Rather, in deciding whether plaintiffs share a common question with the prospective class, the named plaintiffs must share at least one question of fact or law with the prospective class. *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (citation omitted); *see Mazza*, 666 F.3d at 589 ("[C]ommonality only requires a single significant question of law or fact.").

Blue Diamond contends that Werdebaugh's class claims fail the commonality requirement under Rule 23(a)(2). Blue Diamond first argues that "Werdebaugh is not entitled to a presumption of reliance because what is material varies from consumer to consumer." Opp'n at 13. Blue Diamond contends that class members may have purchased its products for myriad other reasons, and that therefore reliance cannot be presumed based on the allegedly misleading label statements. *Id*. at 13–14. The law is to the contrary. Werdebaugh's UCL, FAL, and CLRA claims depend on whether the labels at issue are unlawful, unfair, deceptive, or misleading to *reasonable* consumers. *See Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (noting

that the UCL prohibits conduct that is unfair, deceptive, or unlawful). A plaintiff can establish that a misrepresentation is material and thus violative of the consumer protection laws at issue in this case by showing that "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 157 (2010) (noting also that "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"). Whether Blue Diamond's label statements constitute material misrepresentations does not depend on the subjective motivations of individual purchasers, and the particular mix of motivations that compelled each class member to purchase the products in the first place is irrelevant. *See Ries*, 287 F.R.D. at 537 ("[V]ariation among class members in their motivation for purchasing the product, the factual circumstances behind their purchase, or the price that they paid does not defeat the relatively 'minimal' showing required to establish commonality."); *see also Mazza*, 666 F.3d at 589 (noting plaintiff bears "limited burden" to demonstrate single common question of law or fact); *Hanlon*, 150 F.3d at 1019–22; *In re Ferrero Litigation*, 278 F.R.D. 552, 558 (S.D. Cal. 2011) (finding commonality where claims were based on "common advertising campaign"). Materiality is therefore a question common to the class, the resolution of which "will resolve an issue that is central to the validity of each of the claims in one stroke." *Dukes*, 131 S. Ct. 2541, 2545 (2011). Because "an inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation," should Werdebaugh prevail in proving that Blue Diamond's label misstatements were material, he will have established a presumption of reliance as to the entire class as well. *Occidental Land, Inc. v. Super. Ct.*, 18 Cal. 3d. 355, 363 (1976); *see also In re Tobacco II Cases*, 46 Cal. 4th 298, 326–28 (2009).

Second, and relatedly, Blue Diamond argues that the allegedly deceptive labeling statements are not specifically regulated and, therefore, are not material under *Kwikset*. 51 Cal. 4th at 329. Opp'n at 14–16. Specifically, Defendant contends that the only prohibitions that might bear on the label statements at issue are "non-binding FDA policy statements." *Id*. at 15. At this stage,

the Court need not decide whether the label statements at issue are material as a matter of law. Rather, the Court only need find that materiality of the label statements is a question common to the class.[7]

Finally, Blue Diamond argues that the "All Natural" label statements are not susceptible to common proof because "All Natural" has no common definition. Opp'n at 11–15. Blue Diamond relies on *Astiana*, 291 F.R.D. at 507–09, in which the court denied class certification of a broad class in favor of certifying a narrower class because the court found that "All Natural" had no common meaning as to the broad class. *Astiana* itself relies on *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009). In *Vioxx*, the court found that "if the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action." *Vioxx*, 180 Cal. App. 4th at 129; *see also Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022–23 (9th Cir. 2011) ("If the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified."). In *Vioxx*, which was based on alleged misrepresentations regarding the pain relief drug Vioxx, the court determined that "the decision to prescribe Vioxx is an individual decision made by a physician in reliance on many different factors, which vary from patient to patient." *Id*. at 133. Additionally, there was evidence that "some patients would rather assume the known risk of taking Vioxx in exchange for pain relief, thereby mandating an individual inquiry into patient desires." *Id*. (internal quotation marks omitted). In that context, even though materiality is an objective standard, the individualized nature of prescribing a drug precluded materiality from being a question common to the class.

Similarly, cases consistent with *Vioxx* generally involve representations that differ for each proposed class member or unique individual decisions. For example, in *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 846–47 (2009), the court denied class certification

[7] The Court notes that contrary to Defendant's contentions, Werdebaugh's claims do not rest solely on non-binding FDA guidance. The Court previously rejected this same argument in its order denying Blue Diamond's motion to dismiss. *See* ECF No. 65, at 15 (noting that Plaintiff's Evaporated Cane Juice claims were grounded in 21 C.F.R. §§ 120.1, 168.130); *id.* at 16–17 (discussing Plaintiff's All Natural claims in light of 21 C.F.R. § 101.22).

because the defendant, which sold insurance policies, made different statements and presentations to each customer. As such, no set of statements were common to the class. *See also Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544, 562-65 (2011) (discussing and following *Kaldenbach*). Another example is *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Products Liab. Litig.*, No. 09-2100, 2012 WL 865041, at *20 (S.D. Ill. Mar. 13, 2012), which followed *Vioxx* and held that "[b]ecause YAZ is a prescription medication, the question of uniformity must consider representations made to each putative class member and her prescribing physician." *Id*.

Unlike *Vioxx*, this case presents specific alleged misrepresentations common to the class: Blue Diamond's "All Natural" and "Evaporated Cane Juice" label statements. Blue Diamond did not make individualized representations to proposed class members, nor did proposed class members likely rely on the advice of a doctor or any other professional. Therefore, the objective inquiry into whether "a reasonable consumer would attach importance" to Blue Diamond's label statements is a question common to the class. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013)

Likewise, *Astiana* itself, upon which Blue Diamond explicitly relies, is distinguishable. The plaintiffs in *Astiana* sought certification of a much broader class that Werdebaugh seeks here. In *Astiana*, "Plaintiffs challenge[d] over 90 different products labeled 'All Natural,' with different ingredients and different advertising campaigns, and which consequently inspire[d] different calculations in the minds of prospective customers." *Astiana*, 291 F.R.D. at 508. No such problem exists here. Werdebaugh only challenges seven products labeled "All Natural" based only on the products' inclusion of potassium citrate. Opp'n at 4. Blue Diamond does not assert that differences in its products' labels cause prospective consumers to understand the representations differently. The court in *Astiana* was also concerned that proposed class members' understanding of "All Natural" might differ based on the ingredient alleged to be unnatural. *Astiana*, 291 F.R.D. at 508. Here, Werdebaugh challenges only one included ingredient: potassium citrate. In the end, the *Astiana* court granted class certification of a narrower class of "Kashi products containing calcium

pantothenate, pyridoxine hydrochloride, and/or hexane-processed soy ingredients but labeled 'All Natural.'" *Id.* at 509. The definition of "All Natural" was sufficiently common for those three ingredients such that the narrower class definition raised questions sufficiently common to the class to pass Rule 23(a)(2)'s commonality requirement. Werdebaugh's proposed class here is similar to the narrower class certified in *Astiana*. The putative class here challenges eighteen products based on two allegedly deceptive and misleading label statement, and one ingredient. Whether the alleged deceptions in the label statements "All Natural" and "Evaporated Cane Juice" are material is a question common to the class.

3. Typicality

Under Rule 23(a)(3) the representative party must have claims or defenses that are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." *Rodriguez*, 591 F.3d at 1124 (citations omitted). This requirement is "permissive and requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Reasonably coextensive claims with absent class members will satisfy the typicality requirement, but the class must be limited to "those fairly encompassed by the named plaintiff's claims." *Dukes* at 131 S. Ct. at 2550. "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanlon*, 976 F.2d at 508 (citations omitted). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Id.*

Blue Diamond argues Werdebaugh's claims are atypical because: (1) the class includes products Werdebaugh himself did not purchase; (2) Werdebaugh did not read each of the alleged misrepresentations on the product labels before his purchases; and (3) Werdebaugh is subject to unique defenses that threaten to become the focus of the litigation. Opp'n at 5–7. For the following reasons, the Court is not persuaded and finds Werdebaugh's claims typical of the proposed class.

First, Blue Diamond argues that Werdebaugh's claims are atypical because he purchased only one of the eighteen total products included in the class definition. Opp'n at 5. Werdebaugh purchased Blue Diamond Almond Breeze Shelf Stable Chocolate Almond Milk, which bears both alleged misrepresentations, "All Natural" and "Evaporated Cane Juice." Mot. at 2. Each other product included in the class definition is an almond milk product, and each bears one or both of the same misbranded label statements. *See* ECF Nos. 74-1, 74-2, 74-3, 74-4, 74-5, 74-6, 74-7, 75-1, 75-2, 75-3, 75-4 (Blue Diamond product labels with "Evaporated Cane Juice" statements); 78, 78-1, 78-2, 78-3, 78-4, 78-5, 78-6 (Blue Diamond product labels with "All Natural" statements). Each product branded "All Natural" included the same allegedly unnatural ingredient, potassium citrate. Mot. at 2. The challenged products are different flavors, but Plaintiff's legal theory is identical for all claims: Werdebaugh alleges that Blue Diamond's placement of the statement "All Natural" on the accused products was unlawful or misleading because the accused products contain potassium citrate, and that use of the term "Evaporated Cane Juice" was likewise unlawful or misleading because the term does not reflect what the ingredient really is, sugar. *Id*. Thus whatever flavor an accused product may be, "other members have the same or similar injury, . . . the action is based on conduct which is not unique to the named plaintiffs, and . . . other class members have been injured by the same course of conduct." *Hanlon*, 976 F.2d at 508.

Blue Diamond bases this typicality challenge on Judge Davila's decision in *Major v. Ocean Spray Cranberries, Inc.*, No. 12-3067, 2013 WL 2558125, at *4 (N.D. Cal. June 10, 2013). However, the *Major* case involved unique facts that justified the court's finding that typicality was lacking in that case. In *Major*, the proposed class was "broad and indefinite," as it "would [have] include[d] any of Defendant's products represented to contain no artificial colors, flavors or preservatives but which contained artificial colors, flavors or preservatives." *Id*. The plaintiff in *Major* attempted to include entire product lines based on a single purchase, and the plaintiff "fail[ed] to link any of those products to any alleged misbranding issue" related to the plaintiff's purchase. *Id*. Furthermore, the *Major* court observed "that the labels and nutrition claims on each of Defendant's products may be unique to that product itself." *Id*. The plaintiff purchased a

pomegranate blueberry drink and alleged misrepresentations based on label language making specific claims about blueberries. Yet the plaintiff sought to certify a class that would include products having label statements making no claims about blueberries. As the *Major* court explained, "[t]he evidence needed to prove Plaintiff's claim that the Diet Sparkling Pomegranate Blueberry drink contained false or misleading labeling is not probative of the claims of unnamed class members who purchased products within the 'Sparkling' line that did not contain blueberries." *Id*.

Here, all products included in the proposed class definition, including the product Werdebaugh himself purchased, have the same "All Natural" or "Evaporated Cane Juice" label statements. This case more closely resembles cases in this Circuit in which courts have found the typicality requirement met, even when the representative plaintiff did not purchase every accused product. *See, e.g.*, *Astiana*, 291 F.R.D. at 502–03; *Ries*, 287 F.R.D. at 539–40; *Chavez v. Blue Sky Natural Bev. Co.*, 268 F.R.D. 365, 377–78 (N.D. Cal. 2010).

Second, Blue Diamond argues that Werdebaugh's claims are atypical because before purchasing Blue Diamond almond milk, Werdebaugh did not read or review the back label, which contained two of three "All Natural" statements. Opp'n at 6. Defendant correctly notes that to successfully pursue a consumer fraud action based on allegedly false or misleading statements, plaintiffs must plead and prove actual reliance. *Id*. (citing *Kwikset*, 51 Cal. 4th at 326–27). But Defendant cites no authority for the proposition that Werdebaugh must have read and relied upon *all* the alleged misrepresentations on the product. Even if Werdebaugh did not read two "All Natural" statements on the package, he read the third, and Defendant provides no reason to distinguish between the three statements.[8] In addition, Defendant provides no authority that requires Plaintiff to have read all of the misrepresentations. Accordingly, the Court is satisfied that

[8] Plaintiff read the statement "All Natural" on the front of the package, but did not read two other statements on the back panel, which read: (1) "Almond Breeze® Almondmilk is an all natural, great tasting NON-DAIRY BEVERAGE"; and (2) "All Natural with added Vitamins and Minerals." FAC ¶ 58.

by reading the statement "All Natural" once on the package, Werdebaugh satisfies the typicality requirement under Rule 23(a)(3).

Third, Blue Diamond contends that for various reasons Werdebaugh "'is subject to unique defenses which threaten to become the focus of the litigation.'" Opp'n at 6 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Blue Diamond points out several facts that may be unique to Werdebaugh, including that he: (1) purchased more of the almond milk after commencing the instant lawsuit; (2) continues to purchase products with evaporated cane juice and potassium citrate; (3) paid more for his purchase because he shopped at Whole Foods, and never looked for cheaper alternatives to Blue Diamond products; and (4) purchased Blue Diamond almond milk as a healthy alternative for his children. *Id*. at 6–7.

However, "Rule 23(a)(3) focuses on "the defendants' conduct and plaintiff's legal theory." *Sisley v. Sprint Commc'ns Co., L.P.*, 284 F. App'x 463, 468 (9th Cir. 2008). Moreover, "individual experience with a product is irrelevant" because "the injury under the UCL, FAL and CLRA is established by an objective test. Specifically, this objective test states that injury is shown where the consumer has purchased a product that is marketed with a material misrepresentation, that is, in a manner such that 'members of the public are likely to be deceived.'" *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 534 (C.D. Cal. 2011). "That Plaintiffs may have considered other factors in their purchasing decisions does not make them atypical." *Astiana*, 291 F.R.D. at 503; *see also Bruno*, 280 F.R.D. at 534 (rejecting argument that plaintiff was atypical because she considered other facts in making purchases).

Regardless of what other motivations Werdebaugh may have had when he purchased Blue Diamond's almond milk, he shares with the proposed class the same interests in determining whether Blue Diamond products were deceptively advertised and labeled. Plaintiff seeks to show misrepresentations common to the Substantially Similar Products; these representations are thus common to the proposed class. Werdebaugh's claims arise out of the same facts and same legal theory as the rest of the proposed class. *See Chavez*, 268 F.R.D. at 377 ("Plaintiff's claims here arise out of the allegedly false statement, worded in several variations, made on every Blue Sky

container indicating that the beverages are connected to Santa Fe, New Mexico and therefore arise from the same facts and legal theory."). Although plaintiff did not purchase each type of almond milk which carried the allegedly misleading label, his claims are "'reasonably coextensive with those of absent members.'" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (2003) (quoting *Hanlon*, 150 F.3d at 1020). Accordingly, the Court finds that Werdebaugh's claims are typical of the proposed class.

4. Adequacy

In the Ninth Circuit, to test the adequacy of a class representative, courts ask two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957 (citing *Hanlon*, 150 F.3d at 1020).

The Court finds Werdebaugh to be an adequate class representative. Werdebaugh and the proposed class share the same claims and interest in obtaining relief, and he is vigorously pursuing relief on behalf of the proposed class. The Court also finds that Plaintiff's counsel has experience in prosecuting consumer fraud and warranty class actions. *See* ECF Nos. 76-6, 77, 77-1, 77-2, 77-3 (Declarations of class counsel detailing experience prosecuting consumer fraud class actions).

Blue Diamond challenges Werdebaugh's adequacy as a class representative on three grounds. Opp'n at 7–9. First, Blue Diamond contends that Werdebaugh's claims are not coextensive with the entire class, referring the Court to Blue Diamond's arguments regarding typicality. *Id*. at 8. This argument fails for similar reasons as do Blue Diamond's typicality arguments. Werdebaugh and the class were exposed to the same alleged misrepresentation on Blue Diamond product labels, and Werdebaugh maintains that absent the Defendant's deception, he would have either paid less for a Blue Diamond product or purchased a different product altogether. FAC ¶¶ 61, 110. Werdebaugh's interests are therefore coextensive with the proposed class.

Second, Blue Diamond asserts that Werdebaugh and his counsel made "affirmative misrepresentations about key facts in the FAC that raise significant credibility issues." Opp'n at 8.

In support of this argument Blue Diamond points to several allegations in the FAC, *see, e.g.*, FAC ¶ 77 (stating Werdebaugh spent "more than twenty-five ($25.00)" on Blue Diamond almond milk), that have not been borne out in discovery, *see, e.g.*, Werdebaugh Depo at 75, 107–108, 143–44 (testifying that he purchased four cartons at $3–4 per carton). However, these inconsistencies fall far short of constituting "affirmative misrepresentations about key facts." For example, Blue Diamond argues that Werdebaugh's deposition testimony and documents produced in discovery show that, in contrast to statements in the FAC, Werdebaugh stopped purchasing Blue Diamond almond milk after he learned of the alleged false label statements, "he and his wife purchased two cartons of Chocolate Almond Breeze nearly six months after the original complaint was filed." Opp'n at 8. This is, at most, a minor inconsistency, and is not evidence of "affirmative misrepresentations" of the kind that would render Werdebaugh an inadequate class representative. In fact, on this particular issue it appears to the Court that the FAC and Werdebaugh's statements are consistent. The FAC states that Werdebaugh, not his wife, stopped purchasing Blue Diamond's products, *see* FAC ¶ 80, and in his deposition Werdebaugh stated that he had no knowledge of the subsequent purchases and speculated that his wife may have purchased the almond milk for a birthday party, *see* Werdebaugh Depo at 70–74. The Court finds Blue Diamond has not sufficiently challenged Werdebaugh's honesty and credibility to support its argument that he is an inadequate class representative.

Finally, Blue Diamond argues that Werdebaugh's "very limited involvement in this litigation to date and the fact that all of his knowledge about his claims" comes from his attorneys "calls into question whether he will prosecute this action vigorously on behalf of the class." Opp'n at 9. Defendant fails to show that Werdebaugh is so uninterested in or uninformed about the case so as to be an inadequate representative of the class. *See Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004) ("The threshold of knowledge required to qualify a class representative is low; a party must be familiar with the basic elements of her claim[ ], and will be deemed inadequate only if she is 'startlingly unfamiliar' with the case." (citation omitted)). To the contrary, Plaintiff is sufficiently familiar with her claims to adequately represent the members of the

proposed class. *See, e.g.*, Werdebaugh Depo at 28 (stating that Werdebaugh reviewed a deposition transcript from another case to prepare for his deposition), 41 (describing the circumstances of his almond milk purchase), 54 (explaining his reliance on the label statements in purchasing Blue Diamond almond milk), 58 (stating that he saved receipts as evidence for the lawsuit).

Accordingly, the Court concludes that Werdebaugh and his counsel are adequate representatives of the proposed classes and therefore that Rule 23(a)(4) is satisfied in this case.

D. Rule 23(b)(3) Requirements

For a class action to be certified under Rule 23(b)(3), the class representatives must show that "the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3) (emphases added). The Court first addresses predominance before turning to superiority.

1. Predominance

Plaintiffs seek to certify a nationwide class alleging California state law claims. Under Rule 23(b)(3), plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The Ninth Circuit has held that "there is clear justification for handling the dispute on a representative rather than an individual basis" if "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication . . . ." *Hanlon*, 150 F.3d at 1022. In ruling on a motion for class certification based on Rule 23(b)(3), the district court must conduct a rigorous analysis to determine whether the class representatives have satisfied both the predominance and superiority requirements. *See Zinser*, 253 F.3d at 1186.

Blue Diamond raises three types of predominance arguments. The first—that the term "All Natural" has no common meaning—is identical to Blue Diamond's commonality argument

regarding the same term. This argument fails to defeat Werdebaugh's showing that common questions predominate, as required by Rule 23(b)(3), for the same reasons set forth above regarding commonality under Rule 23(a)(2). Therefore, for the reasons stated in the commonality section above, the Court concludes that common questions will predominate on all liability questions, including issues of materiality and reliance. The Court need not decide whether the misrepresentations were in fact material. The Court merely concludes that these liability questions are common to all class members.

The Court focuses its discussion in this section on Blue Diamond's remaining predominance contentions. The Court first discusses choice-of-law issues involved in certifying a nationwide class before turning to Blue Diamond's predominance challenges to Werdebaugh's proposed damages models.

a. Nationwide Class Allegations

Defendant argues that were the Court to certify the proposed class under Rule 23(b)(3), individual issues would predominate as the Court would be obliged to apply the laws of 50 different states. Opp'n at 20. The Court agrees, and concludes that because the proposed nationwide class fails the predominance requirement under Rule 23(b)(3), certification of such a class would be improper.

In a CAFA diversity action, this Court applies California's choice of law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Bruno*, 280 F.R.D. at 538 n.7. "Under California's choice of law rules, the class action proponent bears the initial burden to show that California has significant contact or significant aggregation of contacts to the claims of each class member." *Mazza*, 666 F.3d at 589. "Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate that foreign law, rather than California law, should apply to class claims." *Id*. at 590.

"[C]onduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' establishes a 'significant aggregation of contacts, creating state interests.'" *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 (9th Cir. 2013) (citations

omitted). Here, Defendants are headquartered in California and their alleged misconduct originated in California. *See* FAC ¶ 17; O'Shaughnessy Decl. ¶¶ 1, 3. Accordingly, the Court finds that Plaintiff has met his initial burden. "California has a constitutionally significant aggregation of contacts to the claims of each putative class member in this case," and application of California law here poses no constitutional concerns. *Mazza*, 666 F.3d at 591; *see also Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987) (concluding application of California law was constitutionally permissible where defendant's principal offices were in California and the allegedly fraudulent misrepresentations emanated from California); *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 538 (N.D. Cal. 2009) (location of the defendant's headquarters is also a relevant factor in significant contact or aggregation of contacts analyses).

Because the Court is satisfied that California has sufficient contacts with the proposed class claims, the burden is on Defendant to show "that foreign law, rather than California law, should apply." *Mazza*, 666 F.3d at 590. California law may be applied on a class wide basis only if "the interests of other states are not found to outweigh California's interest in having its law applied." *Id*. (quoting *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 921 (2001)). To determine whether the interests of other states outweigh California's interest, courts administer the following three-step government interest test. The court must first determine whether the law of the other states is materially different from California law. *Mazza*, 666 F.3d at 590. Second, if there are differences, the court determines whether the other state has an interest in having its law applied. *Id*. at 591–92. Third, if another state has an interest, the court determines which state's interest would be most impaired if its policy were subordinated to the law of another state. *Id*. at 593. In *Mazza*, the Ninth Circuit vacated a district court's certification of a nationwide class based on the same California consumer protection laws at issue here—the UCL, FAL, and CLRA. *Id*. at 594. The facts and claims here closely parallel those in *Mazza*, and consequently so does the Court's analysis.

Plaintiff concedes that Defendant has met its burden on the first step of California's choice-of-law analysis, and the Court agrees. Reply at 14. Werdebaugh brings claims under the same

California consumer protection statutes as the plaintiffs in *Mazza*: the UCL, FAL, and CLRA. *See* FAC ¶¶ 96–155. Defendant identifies the same material differences between California's consumer protection regime and that of other states that dissuaded the Ninth Circuit from applying California law to other states, *see Mazza*, 666 F.3d at 591, including: (1) injury requirements, (2) deception requirements, (3) scienter, (4) reliance, (5) pre-filing notice requirements, (6) statutes of limitation, (7) restrictions on consumer protection class actions, and (8) remedies. Opp'n at 21; *see also* Declaration of Lawrence Cirelli, Ex. C, ECF No. 101.

As for the second step, the Court finds that the other 49 states each have an interest in applying their own law. As the Ninth Circuit explained in *Mazza*, "each foreign state has an interest in applying its law to transactions within its borders," which means that "if California law were applied to [a nationwide class], foreign states would be impaired in their ability to calibrate liability to foster commerce." 666 F.3d at 593. This reflects the "principle of federalism that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *Id*. at 591 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)).

Here, the purported nationwide class here consists of members from 50 states. *See* O'Shaughnessy Decl. ¶ 6. Plaintiff alleges that consumers from each of the 50 states were subjected to misleading and unlawful representations on which they relied in purchasing Blue Diamond almond milk products. Mot. at 3–6. Blue Diamond denies that its products are misleading or unlawful. *See* Opp'n at 2–4. Given the parties' respective positions, all 50 states have an interest in having their own laws applied to the consumer transactions that took place within their borders. *Gianino v. Alacer*, 846 F. Supp. 2d. 1096, 1102 (C.D. Cal. 2012). Each state has "an interest in being able to delineate the appropriate standard of liability and the scope of recovery based on its understanding of the balance between the interests of individuals and corporate entities operating within its territory." *Frezza v. Google Inc.*, No. 12-237, 2013 WL 1736788, at *7 (N.D. Cal. Apr. 22, 2013).

At the final step, where the states have conflicting policies, the Court must determine which state's interest would be more impaired if its policy was subordinated to the policy of the other

state. *See Mazza*, 666 F.3d at 593–94. This last step of the analysis does not permit the Court to weigh the conflicting state interests to determine which conflicting state law manifests the "better" or "worthier" social policy. *Id*. (citing *McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 97 (2010)). Rather, "the Court must recognize the importance of federalism and every state's right to protect its consumers and promote those businesses within its borders." *Gianino*, 846 F. Supp. 2d. at 1103. Here, for the reasons stated below, for purchases made outside California, the Court finds that other states' interests would be more impaired by applying California law than would California's interests by applying other states' laws.

California undoubtedly has a significant interest in applying its own consumer protection laws to transactions within California. Blue Diamond is headquartered in Sacramento, California, sells many products in this state, and likely made the corporate decisions regarding packaging, labeling, and marketing of Blue Diamond products here. *See* FAC ¶ 17; O'Shaughnessy Decl. ¶¶ 1, 3 (General Manager of Blue Diamond's Consumer Products Division, John O'Shaughnessy, is located in Sacramento, California, and is "involved in strategic business decisions, including Blue Diamond's pricing strategy and sales of the Almond Breeze products that are at issue in this litigation"); Ugone Report ¶ 21 (Blue Diamond "led the development of California's almond industry from a minor domestic specialty crop to the world leader in almond production and marketing. Blue Diamond's Sacramento processing facility, a plant covering 33 city blocks on 90 acres, is the largest nut processing plant in the world."). However, California's interest in applying its law to nonresidents who purchased Blue Diamond products in other states is more attenuated. *See Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

California courts recognize that the predominant interest in "regulating or affecting conduct within its borders" lies with the state which is "the place of the wrong." *Hernandez v. Burger*, 102 Cal. App. 3d 795, 801–02 (1980). The place of the wrong is the geographic location where the misrepresentations were communicated to the consumer. *See McCann*, 48 Cal. 4th at 94 n.12. For nonresident consumers of Blue Diamond products, the place of the wrong is not California, but rather the state in which each consumer resides. *See Mazza*, 666 F.3d at 593–94 ("[T]he last events

necessary for liability as to the foreign class members—communication of the advertisements to the claimants and their reliance thereon in purchasing vehicles—took place in the various foreign states, not in California.").

Blue Diamond's liability accrued when Plaintiff and class members purchased Blue Diamond almond milk products containing the allegedly deceptive and misleading label statements. Thus "the place of the wrong" in this case is the point of purchase by each class member—in other words, in each of the 50 states. Each state has an interest in "protecting their consumers from in-state injuries caused by a California corporation doing business within their borders and in delineating the scope of recovery for the consumers under their own laws." *Gianino*, 846 F. Supp. 2d at 1103. Plaintiff has identified no countervailing California interest that outweighs the other states' interest in effecting their policy choices, and the Ninth Circuit has held that under such circumstances, "California's interest in applying its law to residents of foreign states is attenuated." *Mazza*, 666 F.3d at 594.

Accordingly, the Court concludes that each other state would be impaired in its ability to protect consumers within its borders if California law were to be applied to all claims of the nationwide class. Each nonresident class member's claims should be governed by and decided under the consumer protection laws of the states in which the various class members reside and in which the transactions took place. Because adjudication of the nationwide claims will require application of the laws of 50 states, common questions of law would not predominate for the proposed nationwide class, as is required by Rule 23(b)(3). Significantly different legal issues will arise out of the claims of class members from the various states, and these different legal issues eclipse any common issues of law that exist. Certification of the nationwide class under California law therefore would be improper.

In his reply, Werdebaugh alternatively requests certification of a California-only class. Reply at 15. If the class is comprised entirely of California consumers, only California law need be applied. For such a class, common issues would predominate over individual ones. Certification

would be proper if all other requirements for class certification are met. Accordingly, the Court narrows the proposed class to exclusively California consumers.

b. Damages Models under UCL, CLRA, and FAL

A Plaintiff that seeks certification under Rule 23(b)(3) must present a damages model that is consistent with its liability case. *See Comcast*, 133 S. Ct. at 1433 (rejecting class certification where damages model accounted for four possible theories of antitrust injury when district court had limited case to single theory of antitrust impact). Plaintiff's damages "model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [the defendant's conduct]. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* (internal citations and quotations omitted).

Comcast has been interpreted as "reiterat[ing] a fundamental focus of the Rule 23 analysis: The damages must be capable of determination by tracing the damages to the plaintiff's theory of liability. So long as the damages can be determined and attributed to a plaintiff's theory of liability, damage calculations for individual class members do not defeat certification." *Lindell v. Synthes USA*, No. 11-02053, 2014 WL 841738, at *14 (E.D. Cal. Mar. 4, 2014). According to the Ninth Circuit, "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

Here, the Court first considers what damages are recoverable as a result of Blue Diamond's alleged mislabeling and then assesses whether Werdebaugh has presented a damages model capable of isolating those damages.

The UCL, FAL and CLRA authorize a trial court to grant restitution to private litigants asserting claims under those statutes. *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 694 (2006). Restitutionary relief is an equitable remedy, and its purpose is "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003); *see also Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 177 (2000).

The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received. *Colgan*, 135 Cal. App. 4th at 700 (rejecting restitutionary award for products "Made in U.S.A." where expert "did not attempt to quantify either the dollar value of the consumer impact or the advantage realized by [the defendant]"). This calculation contemplates the production of evidence that attaches a dollar value to the "consumer impact or advantage" caused by the unlawful business practices. *Id*. Restitution can then be determined by taking the difference between the market price actually paid by consumers and the true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices. *See, e.g.*, *Ben & Jerry's Homemade*, 2014 WL 60097, at *12–13 (rejecting class certification for "all natural" ice cream labels based in part on insufficient proof of damages). Accordingly, Werdebaugh must present a damages methodology that can determine the price premium attributable to Blue Diamond's use of the labeling statements "All Natural" and "Evaporated Cane Juice."

Werdebaugh's damages expert, Dr. Oral Capps, presents three damages models: (1) a Full Refund Model, (2) a Price Premium Model, and (3) a Regression Model. The Court addresses each in turn.

i. Full Refund Model

Dr. Capps first proposes refunding the entire purchase or "register" price of the challenged product. Declaration of Oral Capps ("Capps Decl."), ECF No. 77-4, ¶¶ 10–12. This is not the proper measure of damages. As discussed above, "[t]he difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution." *Vioxx*, 180 Cal. App. 4th at 131; *see also Ogden v. Bumble Bee Foods, LLC*, No. 12-01828, 2014 WL 27527, at *13 (N.D. Cal. Jan. 2, 2014) ("[A] claim for restitution requires that Ogden also present evidence of the difference in value between what she spent and what she received."). Dr. Capps's full refund model is deficient because it is based on the assumption that consumers receive no benefit whatsoever from purchasing the accused products. This cannot be the case, as consumers received benefits in the form of calories, nutrition, vitamins, and minerals. *See In re POM Wonderful LLC,*

No. 10-2199, 2014 WL 1225184, at *3 (C.D. Cal. Mar. 25, 2014) (rejecting a full refund model because consumers benefited from consumption of the defendant's products). Class members may not "retain some unexpected boon, yet obtain the windfall of a full refund and profit from a restitutionary award." *Id*. Because the California consumer protection statutes upon which Werdebaugh brought this case authorize the recovery only of whatever price premium is attributable to Blue Diamond's use of the allegedly misleading label statements, Dr. Capps' Full Refund Model is inconsistent with Plaintiff's liability case and must be rejected.[9]

ii. Price Premium Model

Dr. Capps next proposes a Price Premium Model. Capps Decl. ¶¶ 13–17. Under this approach, Dr. Capps compares the price of the accused Blue Diamond products to the price of allegedly comparable products that do not have the "All Natural" and "Evaporated Cane Juice" label statements and calculates the entire price difference as restitution for Blue Diamond's alleged misrepresentations. *Id.* ¶ 14.

However, the Price Premium Model runs afoul of *Comcast*. Dr. Capps has no way of linking the price difference, if any, to the allegedly unlawful or deceptive label statements or controlling for other reasons why allegedly comparable products may have different prices. "Rather than answer the critical question why that price difference exist[s], or to what extent it [is] the result of [Blue Diamond's] actions, [Dr. Capps] instead assumed that 100% of that price difference [is] attributable to [Blue Diamond's] alleged misrepresentations." *POM*, 2014 WL 1225184, at *5.

The proposed Price Premium Model inadequately tracks Werdebaugh's theory of liability in several other respects. First, Dr. Capps' comparison product itself includes the ingredient to which Plaintiff objects in Blue Diamond almond milk: potassium citrate.[10] *See* Declaration of Geoffrey Pittman ("Pittman Decl."), ECF No. 100 ¶ 3, 5, 8; *see also* Pittman Decl., Ex. D, ECF No.

[9] Dr. Capps also proposes an identical disgorgement model. This is rejected for the same reasons as the Full Refund Model. *See Ogden*, 2014 WL 27527, at *13.

[10] Although the Whole Foods almond milk is not labeled "All Natural," it is labeled "Organic," *see* ECF No. 100-4, which Werdebaugh stated he believed would likely be all natural as well, *see* Werdebaugh Depo at 55–56.

100-4 (Whole Foods Organic Almondmilk Vanilla ingredients list). Second, according to Blue Diamond, until 2013 the label for the Whole Foods alternative listed "organic evaporated cane juice" as an ingredient. *See* Pittman Decl. ¶¶ 6–7. Finally, Blue Diamond reports that the Whole Foods alternative is currently priced the same as the challenged Blue Diamond version at Whole Foods stores in San Francisco and Palo Alto. *Id*. ¶¶ 3–4.

Werdebaugh's deposition testimony also casts doubt on the Price Premium Model. Werdebaugh testified that consumers typically pay a premium simply by purchasing from Whole Foods, a distinction for which Dr. Capps does not account in his Price Premium Model. *See* Werdebaugh Depo at 75 ("You typically pay a premium at Whole Foods on a product like [Blue Diamond almond milk]."); 100 ("Q. And you know that at Whole Foods, I think you said you pay a premium when you go there? A. Yeah."). Werdebaugh also testified that for him, price was not an important factor. *Id*. at 101 ("Q. I'm assuming at least at that end, price wasn't an issue because you're going to a place where you pay a premium; fair? A. That's fair.").

The Price Premium Model's inability to account for any differences between the accused Blue Diamond products and Dr. Capps' chosen comparable products, or for any factors that may cause consumers to prefer the accused Blue Diamond products over other identical products—such as brand loyalty or quality differences between brand and generic products—renders the Price Premium Model insufficient under *Comcast*. As Judge Dean Pregerson summarized in the *POM* case, "the Price Premium model simply calculates what the price difference [is]. This damages 'model' does not comport with *Comcast*'s requirement that class-wide damages be tied to a legal theory, nor can this court conduct the required 'rigorous analysis' where there is nothing of substance to analyze." *POM*, 2014 WL 1225184, at *5. Therefore, because the Price Premium Model does not offer a class-wide measure of damages that is tied to the proper legal theory, the Price Premium Model does not comply with the predominance requirement of Rule 23(b)(3). *Comcast*, 133 S. Ct. at 1430.

iii. Regression Model

Dr. Capps' final proposed damages model is an "econometric or regression analysis," ("the Regression Model"). Capps Decl. ¶ 16. "Regression analysis involves the relationship between a variable to be explained, known as the 'dependent variable,' such as the quantity demanded of a particular good or the price of a particular good, and additional variables that are thought to produce or to be associated with the dependent variable, known as the 'explanatory' or 'independent' variables. . . . Regression analysis may be useful in determining whether a particular effect is present as well as in measuring the magnitude of a particular effect." *Id.* ¶ 17. Dr. Capps explains: "It is well documented in the economics literature that commonly recognized factors are associated with sales, the dependent variable in the regression analyses, namely price of the product, prices of competing and complementary products, income, advertising, seasonality, and regional differences. . . . By controlling for these factors and considering differences in sales of Blue Diamond Growers almond milk products before and after the labeling of the language 'All Natural' as well as before and after the introduction of the label statement 'Evaporated Cane Juice,' a quantitative measure of damages in this litigation may be provided." *Id.* ¶ 18. In other words, Dr. Capps proposes to determine Blue Diamond's gains from its alleged misrepresentations by examining sales of its accused products before and after Blue Diamond placed the alleged misrepresentations on its product labels, using regression analysis to control for other variables that could otherwise explain changes in Blue Diamond's sales. Dr. Capps asserts that with further discovery he can apply his Regression Model to calculate damages for all eighteen accused Blue Diamond products. *Id.* ¶ 19. Blue Diamond challenges the Regression Model on two grounds.

First, Blue Diamond argues that the Regression Model raises individual issues because it will be unable to account for "pricing variation experienced by individual consumers across products, sales channels, retailers, geographic regions, and time." Opp'n at 19. Because of these variations, Blue Diamond contends, different consumers allegedly suffered different amounts of damages. For example, Blue Diamond states that "the price for the top selling shelfstable Blue Diamond almondmilk product in 2012 varies by 26% across sales channels, by 31% across the top three retailers, and by 40% across cities in California." *Id.* However, Blue Diamond does not

explain how these regional price differences would impact the actual measure of damages in the Regression Model: price changes within regions that correspond to the introduction and/or removal of the allegedly misleading label statements. For example, if a carton of Blue Diamond almond milk costs $4.00 in San Francisco and $3.00 in Sacramento, this $1.00 unit disparity does not necessarily influence how the price would change as a result of amending the product's label to claim that the almond milk is "All Natural." If both prices increase by $0.10, purchasers in San Francisco and Sacramento have both suffered the same amount in damages, $0.10. Even if the price increase is proportional, the price change will still result in largely similar damages to both purchasers: if prices increase by 5%, the purchaser in San Francisco will pay $0.20 more per carton, and the purchaser in Sacramento $0.15. Regardless, damages can be tied to the liability theory and calculated on a classwide basis.

If Blue Diamond were to introduce evidence that prices would increase by 20% in San Francisco and only 2% in Sacramento, the Regression Model might well fail under *Comcast*. However, Blue Diamond presents no argument whatsoever about how regional differences in price would affect regional differences in price *change*, and the Court sees no reason why this might be the case. Blue Diamond makes two additional, related arguments: that Dr. Capps fails "to explain how Blue Diamond is responsible for these varying retail prices, when Blue Diamond does not set retail prices," and that "Dr. Capps' use of a 'weighted average' price measure would result in overcompensation of some class members and under compensation of others" in violation of the Rules Enabling Act. *Id*. By focusing on regional price differences rather than regional price *changes*, neither argument undermines Dr. Capps' Regression Model.

To the extent that Blue Diamond objects to regional price disparities, and not differences in price changes, Dr. Capps' Regression Model controls for any such regional differences to ensure that the resulting damages figures only cover the benefit Blue Diamond received from its label statements. Capps Decl. ¶ 19. *Comcast* establishes that "[c]alculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case." *Comcast*, 133 S. Ct. at 1433 (citation and quotation omitted). The

Regression Model comports with this requirement. Even if there are regional differences as Blue Diamond contends, the Regression Model is sufficiently precise under *Comcast* and the model's ability to control for other factors that could affect Blue Diamond's sales ensures that Dr. Capps' damages figures are tied only to Blue Diamond's liability. Therefore, because Werdebaugh has advanced a damages methodology that is capable of "tracing the damages to the plaintiff's theory of liability" Werdebaugh has successfully shown that questions common to the class predominate. *Lindell*, 2014 WL 841738, at *14.

Second, Blue Diamond argues that "Dr. Capps' description of his regression analysis is incomplete and thereby fails to provide assurances that this methodology reliably isolates Blue Diamond's sales related to the "All Natural" and "evaporated cane juice" statements." Opp'n at 18–19.

Having rejected Defendant's objections to the specifics of Dr. Capps' methodology, the only remaining question is whether Werdebaugh has sufficiently defined and described Dr. Capps' proposed Regression Model such that it may be deemed a workable means of calculating damages. *See In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 582 (N.D. Cal. 2013) (finding proposed regression analysis provided "a plausible methodology for showing generalized harm to the Class as well as estimating class-wide damages" despite defendants' criticisms regarding the model's design and sensitivity). "The real question before this court is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs' model actually *works* . . . ."" *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 100 (D. Conn. 2009). Because "*Comcast* did not articulate any requirement that a damage calculation be performed at the class certification stage," that Dr. Capps has yet to actually run the regressions and provide results is not fatal to Werdebaugh's reliance on the Regression Model. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2013 WL 5429718 (N.D. Cal. June 20, 2013) *report and recommendation adopted*, MDL No. 1917, 2013 WL 5391159 (N.D. Cal. Sept. 24, 2013); *see also Chavez*, 268 F.R.D. at 379 ("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." (internal quotation marks omitted)).

Blue Diamond cites two previous cases in which Dr. Capps' proposed methodologies were rejected and asserts that "Dr. Capps' assurances that he may be able to establish a damages model in the future have been rejected in the past and should not be accepted here." Opp'n at 19; *see also Ogden*, 2014 WL 27527, at *13; *Kottaras v. Whole Foods Markets, Inc.*, 281 F.R.D. 16, 25 (D.D.C. 2010).

In *Ogden*, this Court found summary judgment proper with respect to plaintiffs' damages claims because rather than calculating damages, Dr. Capps had only "stated that he *could* provide such an estimate and offered a general description of several methods he might use to do so." *Ogden*, 2014 WL 27527, at *13. The Court concluded that Dr. Capps' "description of methodology [was] not evidence of the proper amount of restitution in [that] case." *Id*. The Court's grant of summary judgment to the defendants in *Ogden* was based on the fact that discovery had closed and the plaintiff had neither "explain[ed] her failure to provide any evidence of the actual amount of restitution to which she [was] entitled, nor [requested] further discovery" on the issue. *Id*.

The court in *Kottaras* rejected Dr. Capps' proposed method of showing "monetary loss attributable to the anti-competitive aspect of the merger between" two supermarket chains. 281 F.R.D. at 22. The court initially noted that the plaintiff was not required to "offer evidence as to the amount of damages at [the class certification] stage;" but rather she only needed to "show that the fact of damage [could] be proven using common evidence." *Id*.

Subjecting Dr. Capps' proposed regression analysis to "rigorous analysis," the court rejected the proposed model because: (1) while it may have been sufficient to calculate what losses consumers suffered as a result of the merger, the model failed "to take into account any benefits customers may have received thereby"; and (2) the proposed model was "not sufficiently developed to meet Plaintiff's burden of showing that common questions predominate over individual ones, as required by Rule 23(b)(3)." *Id*. at 24, 26. The court quoted a case from this district for the proposition that courts are "increasingly skeptical of plaintiffs' experts who offer

only generalized and theoretical opinions that a particular methodology may serve this purpose without also submitting a functioning model that is tailored to market facts in the case at hand." *Id*. at 27–27 (citing *In re Graphics Processing Units Antitrust Litigation*, 253 F.R.D. 478, 492 (N.D. Cal. 2008)).

In this case the Court finds Dr. Capps' Regression Model sufficient under *Comcast*. As outlined above, Dr. Capps' regression would control for other factors (such as price, seasonality, and regional differences) that could explain changes in Blue Diamond's sales figures that may otherwise erroneously be attributed to Blue Diamond's label statements. Moreover, the regression compares data on identical Blue Diamond products—the product before the label statement was introduced, and the same product after its label included the alleged misrepresentation. *See* Capps Decl. ¶¶ 18, 19. Unlike in *Ogden*, discovery has not yet closed in this case, and Defendants provide no basis to believe that if Plaintiff obtains the discovery outlined in Dr. Capps's report and apparently requested by Plaintiff, *see id*. ¶ 19, the regression analysis will be unworkable. *See* ECF No. 114, at 2 (setting fact and expert discovery cut-offs of July 18, 2014 and September 12, 2014, respectively). Dr. Capps' proposed model in *Kottaras* accounted for the adverse price impacts of a supermarket merger but completely omitted any measurement of the benefits of such a merger. *Kottaras*, 281 F.R.D. at 23–24. By contrast, the proposed regression here contemplates factors other than the alleged misbranding which might influence price changes over time, including "expenditures associated with the advertising and promotion" of the products at issue, prices of complementary products, disposable personal income of consumers, and population. Capps Decl. ¶ 19. In sum, while Dr. Capps has yet to run the model and determine what price differences, if any, are attributable to the alleged label misrepresentations, he sets forth what is in the Court's view a workable model of calculating damages, and which is tied to Werdebaugh's theory of liability as required under *Comcast*.

Importantly, Defendant's arguments are not directed to the tool of regression analysis itself. A regression model like that proposed by Dr. Capps seeks to isolate the effect of the allegedly misleading label change on the price of Defendant's products by controlling for various factors

other than the label change itself, such as regional price variance, price changes that result from increasing or decreasing demand for complementary products, and inflation. Rather, Blue Diamond attacks the specific variables of the regression Dr. Capps proposes. However, such attacks do not undermine the fundamental workability of Dr. Capps' proposed damages model. Accordingly, because Werdebaugh's proposed damages model provides a means of showing damages on a classwide basis through common proof, the Court concludes that Werdebaugh has satisfied the Rule 23(b)(3) requirement that common issues predominate over individual ones.

2. Superiority

A class action brought under Rule 23(b)(3) must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To make this determination the Court considers: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)–(D).

The superiority requirement tests whether "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually a class action is not superior." *Zinser*, 253 F.3d at 1192.

Here, Plaintiff asserts he was misled by Blue Diamond advertising that its almond milk products were "All Natural" and contained "Evaporated Cane Juice." Mot. at 1–3. Among the class members, these claims are common, involve small sums, and do not depend on individual determinations. Where a case involves multiple claims for relatively small individual sums, some plaintiffs may not be able to proceed as individuals because of the disparity between their litigation costs and what they hope to recover. *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001). The members of Plaintiff's proposed

class would find individual actions economically infeasible given the small size of each class member's claim. *See Deposit. Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Finally, Blue Diamond does not dispute that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because class action is the superior method of efficiently and fairly adjudicating Plaintiff and class members' claims in this case, the Court finds the superiority requirement of Rule 23(b)(3) met.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's Motion for Class Certification. Werdebaugh has satisfied the requirements of Rules 23(a) and 23(b)(3), and the Court CERTIFIES the following class: "All persons in California who, from May 19, 2008, until the date of notice, purchased almond milk products manufactured, distributed and/or sold by Blue Diamond Growers containing the label statements 'evaporated cane juice' and/or 'All Natural.' The following persons are expressly excluded from the Class: (i) Defendant and its subsidiaries and affiliates; (ii) all persons who make a timely election to be excluded from the Class; (iii) governmental entities; and (iv) the Court to which this case is assigned and its staff." The Court APPOINTS Plaintiff Chris Werdebaugh as the class representative, and Pierce Gore of Pratt & Associates, Brian Herrington of Barrett Law Group, P.A., Dewitt M. Lovelace of Lovelace Law Firm, P.A. and Colin Dunn of Clifford Law Offices, P.C. as class counsel. Within 14 days of the date of this Order, Werdebaugh shall file an amended complaint that amends the class definition to comport with the Court's certified class definition. Plaintiffs may not make any other substantive change to the complaint, unless Defendant stipulates to the change. The Court DENIES Plaintiff's Motion for Class Certification of a nationwide class.

IT IS SO ORDERED.

Dated: May 23, 2014

Lucy H. Koh

LUCY H. KOH
United States District Judge