No. 16-___

IN THE

Supreme Court of the United States

CONAGRA BRANDS, INC.,

Petitioner,

v.

ROBERT BRISEÑO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Conagra makes Wesson brand cooking oil. Respondents sought to represent classes of all those who had purchased Wesson Oil in eleven states during the past ten years. But Respondents never proposed any way to efficiently and reliably identify the likely millions of people who fall within that class definition—and there isn't one. Conagra does not sell directly to consumers, so it has no records of any individual purchases. Similarly, Respondents never sought records from other businesses such as grocery stores, likely because they don't have them either. And even if consumers could accurately recall small purchases made years ago, it would take myriad mini-trials to prove as much. With full knowledge of these difficulties, the Ninth Circuit nonetheless affirmed class certification.

The question presented is whether Federal Rule of Civil Procedure 23 permits a district court to certify a damages class where there is no reliable, administratively feasible method for identifying the members of the class.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Conagra Brands, Inc., formerly known as ConAgra Foods, Inc., changed its corporate name effective November 9, 2016. ConAgra Foods, Inc., was Appellant below. Conagra Brands, Inc., has no parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

Respondent Robert Briseño, who was Appellee below, sued Conagra on behalf of himself and a putative class in the Central District of California. Several other cases were consolidated with Mr. Briseño's. The District Court certified eleven classes, with Mr. Briseño and others—Respondents Michele Andrade, Jill Crouch, Erika Heins, Dee Hopper-Kercheval, Rona Johnston, Kelly McFadden, Pauline Michael, Necla Musat, Julie Palmer, Cheri Shafstall, Maureen Towey, and Anita Willman—as class representatives.

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INTRODUCTION

Courts across the country regularly face putative class actions in which the class members are nearly impossible to identify. Consider a class of everyone who purchased a particular kind of bottled water in the past ten years. The class definition is straightforward: if you bought that kind, you're in; if you didn't, you're out. But figuring out who the class members actually are requires herculean effort, if it can be done at all. The manufacturer likely sells through distributors and retailers, not directly to consumers, so it has no idea who bought its products. Distributors are in a similar boat, and retailers—the only ones who interact with individual purchasers—generally don't keep records of those purchases, especially for such a long period.

Consumers themselves might be in the hardest spot of all. Few people save every receipt, and few can accurately recall such trivial purchases years later. Think of the questions. Was it Deer Park, or Dasani? Maybe Aquafina? The store brand? Did I buy eight-ounce minis or the regular twenty-ounce bottles? Was it a twelve pack or a twenty-four pack? And was it really ten years ago, or eleven?

Courts disagree on the obvious question raised by such classes: may a court certify them without a reliable method for identifying class members, short of myriad mini-trials? The Second, Third, Fourth, and Eleventh Circuits have said no, and courts applying that approach have refused to certify classes of consumers who bought diet pills, eggs, sneakers, and tires. The Sixth, Seventh, and Ninth Circuits have said yes, and courts applying that approach have certified indistinguishable classes

involving nutritional supplements, beauty products, single-serve coffee, and ramen noodles.

This disagreement is intolerable. Class certification is the most important decision in any class action, and now it turns on venue in many, many cases. This case—involving those who bought "100% Natural" Wesson Oil in eleven states over the past decade or so—provides this Court with the perfect opportunity to finally end the dispute over this fundamental question of class-action law.

OPINIONS BELOW

The Ninth Circuit's opinion rejecting Conagra's claim that the classes had to be ascertainable (Pet.App.1a-33a) is published at 844 F.3d 1121 (9th Cir. 2017). Its opinion rejecting Conagra's other challenges to class certification (Pet.App.34a-39a) is unpublished but reported at __ F. App'x __, 2017 WL 53421 (9th Cir. Jan. 3, 2017). Its order denying rehearing en banc (Pet.App.349a-350a) is unpublished and unreported.

The District Court's decision granting class certification (Pet.App.40a-254a) is published at 90 F. Supp. 3d 919 (C.D. Cal. 2015). Its earlier decision denying class certification without prejudice (Pet.App.255a-348a) is unpublished and unreported.

JURISDICTION

The Ninth Circuit entered judgment on January 3, 2017. Pet.App.1a. It denied rehearing en banc on February 14, 2017. Pet.App.349a-350a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Civil Procedure 23, the relevant portions of which are reproduced at Pet.App.353a-355a.

STATEMENT

1. Conagra sells cooking oil—vegetable, canola, a blend of those two, and corn—under the Wesson brand. Since the mid-1980s, Wesson Oil has used terms like "Natural," "Pure," and "100% Natural" on its labels. ER773.

"Natural" conveys different things to different people. The FDA has not "defin[ed]" the term and has "not objected" to it "if the food does not contain added color, artificial flavors, or synthetic substances." FDA, *What Is the Meaning of "Natural" on the Label of Food?*, goo.gl/JZxtxX (last updated Jan. 5, 2017). When hundreds of consumers were asked what the term "100% Natural" meant on a bottle of vegetable oil, their responses varied widely. Roughly 40% said they did not know or were not sure what it meant. ER887. Those who tried to define the term gave answers all over the map. Some said it meant "no artificial ingredients," some "healthy," others "no mineral oil," and still others "no G[enetically] M[odified] O[rganisms]." ER803. One even said it meant "nothing," because "there is no government rating that is '100% Natural.'" ER803.

The various kinds of Wesson Oil share shelf space with both store-brand (or "private-label") competitors and brand-name competitors such as Crisco, Mazola, and LouAna. ER773-74. These products often have similar labels. Until recently,

Crisco labeled its cooking oil "Pure" and "All Natural." ER774. LouAna calls its cooking oils "Pure" and "All Natural," while Mazola calls its "100% Pure." ER773-74. Some private-label products also use "pure" and "natural." ER774. Thus, when a shopper purchases a bottle of cooking oil, he chooses from a number of similar items sold by different companies, many of whose products are "pure" or "natural."

2. In June 2011, Robert Briseño sued Conagra. He alleged that it marketed Wesson Oil as "100% Natural" even though its oils were derived from GMOs. According to Briseño, doing so allowed Conagra to recoup an unlawful price premium on its sales—the difference between the sales price and what "truly" "100% Natural" oil would cost. Pet.App.23a-24a.

The United States District Court for the Central District of California consolidated a number of related lawsuits with Mr. Briseño's, and Plaintiffs moved to certify several classes of purchasers of Wesson Oil. Pet.App.3a. Each putative class included claims governed by a different state's law. Pet.App.5a. The start date for each proposed class varied with each state's statute of limitations (with the earliest beginning in January 2007), and each ran through the end of the litigation. Pet.App.5a; Pet.App.43a-44a.

a. Citing *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) and other cases, Conagra argued that Plaintiffs' proposed classes were not ascertainable—that is, they could not be certified because Plaintiffs had not proposed (and could not propose) any reliable, feasible method for identifying those who

had purchased Wesson Oil within the relevant timeframe. ER733-34.

Plaintiffs argued that whether they could put forward such a method was "irrelevant" to class certification. ER300. Plaintiffs admitted that *Carrera* held otherwise, but argued that *Carrera* was wrongly decided. ER301; *see also* ER5618 (noting "conflicting case law"); ER6293 (criticizing *Carrera*). On their view, a proposed class is ascertainable so long as it is defined "by reference to objective criteria," regardless of how hard it would be to determine who meets those criteria. ER300.

b. This dispute mattered because of the difficulty of identifying those who purchased Wesson Oil in eleven states over the past decade. Conagra itself had no records identifying these purchasers because it does not sell directly to consumers. ER774. Other businesses similarly lacked (and Plaintiffs never asked them to provide) such information. Conagra's data vendor, for example, provides only aggregate data about sales, and even then only extrapolates from sampling. ER775.

That left only one other possible source of information about the transactions—consumers' memories of low-value grocery store purchases, recalled years later in hopes of a cash reward. Plaintiffs themselves recognized the problems with identifying class members this way. They objected to questions about alleged purchases (how many made, their dates and locations, the types and amounts of oil purchased, the prices paid, any discounts received, and so on) because they could not be expected "to recall every purchase of Wesson cooking oil" from so long ago. ER1510-15. Nor could they be

expected to have "detailed recollections" or "record[s]" of those purchases. ER1510-16; *see also* ER1515-21 (objecting to similar questions about purchases of non-Wesson products).

Plaintiffs' own testimony further illustrated how hard it is to recall such trivial purchases years down the road. One testified that she "d[idn't know]" the number of bottles of oil she had purchased since June 2007, ultimately settling on "between five and ten" as a "good guess." ER1345. She further "guess[ed]" that she purchased those bottles "possibly [at] Safeway, possibly [at] Albertson's, and definitely [at] King Soopers." ER1345. While she had "no idea" how much she had spent on Wesson Oil overall, she "just guess[ed]" that she had paid around one to five dollars per bottle. ER1346. She admitted, however, that the prices she paid "probably" varied and that she "[p]ossibly" used a coupon or a store discount card sometimes. ER1345-46. She also testified that she "probably purchased" store-brand oils "[m]aybe once a year" during the same timeframe—it "could have been [canola], and possibly corn or vegetable"—and it was "[p]ossibl[e]" that she had purchased other name-brand oil as well. ER1347-48.

Other plaintiffs had similar difficulties. One originally testified that she had not purchased any Wesson Oil since June 2007, a date that would have kicked her out of the relevant class. Pet.App.299a n.95. She later declared, however, that she had been mistaken: she now recalled that a car accident had prompted her to reduce the oil in her diet, and that accident took place in September 2008, so her last purchase "must have occurred" within the

limitations period, her prior recollection notwithstanding. ER6355; *see also* ER1588-89 (one plaintiff purchased corn oil "1-2 times per year," from "[v]arious Marsh Supermarkets locations in Indianapolis," for "[a]pprox. the average retail price for the area"); ER1599-1602 (another purchased vegetable oil "approximately once a year" since 2007, for a total of "approximately four to seven bottles," and "typically" paid the "average retail price" in her area).

c. The district court certified Plaintiffs' proposed classes. Pet.App.253a-254a. It recognized that district courts in the Ninth Circuit were "split as to whether the inability to identify the specific members of a putative class … makes the class unascertainable," Pet.App.110a, with some courts following *Carrera* and others criticizing it. The district court "agree[d]," however, "with those courts that have found classes, such as those proposed by plaintiffs, ascertainable." Pet.App.112a. Otherwise, "class actions involving low priced consumer goods" would be "effectively prohibit[ed]." Pet.App.112a.[1]

3. The Ninth Circuit affirmed. Pet.App.1a-33a (opinion addressing ascertainability); Pet.App.34a-39a (opinion addressing other criteria). The panel acknowledged that the district court had not required Plaintiffs "to proffer" an efficient, reliable means of identifying class members. Pet.App.3a. It

[1] The district court had previously denied class certification for other reasons. Pet.App.255a-348a. With respect to ascertainability, the court's order granting certification largely tracked its prior one. Pet.App.303a-310a.

also took no issue with Conagra's claim that there was no such method because "consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil." Pet.App.7a. And it realized that, "in similar circumstances," "the Third Circuit" and other courts "have refused certification." Pet.App.6a; Pet.App.11a ("[T]he Third Circuit does require putative class representatives to demonstrate 'administrative feasibility' as a prerequisite to class certification.").

It held, however, that "demonstrating an administratively feasible way to identify class members" is not "a prerequisite to class certification." Pet.App.24a.[2] It first reasoned that Rule 23 contains no such express requirement. Federal Rule of Civil Procedure 23(a) sets forth four requirements for class certification, none of which "mention 'administrative feasibility.'" Pet.App.9a. Because the Rule "specifically enumerate[s]" those prerequisites, Pet.App.9a, the court concluded it could not "interpose an additional hurdle into the class certification process," Pet.App.10a.

The panel then devoted most of its opinion to criticizing the Third Circuit's reasoning. Pet.App.11a-25a. It thought, for instance, that other class-certification requirements could better address

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[2] The Ninth Circuit declined to use the term "ascertainability" because courts have sometimes used it in different ways. Pet.App.5a n.3. Unless otherwise noted, we use it here to refer specifically to the requirement that would-be class plaintiffs proffer an efficient, trustworthy means of identifying class members.

concerns about manageability. Pet.App.13a-15a. It also reasoned that concerns about absent class members were misplaced: due process does not demand actual notice, and few absent class members are likely to opt out to pursue their own low-value claims anyway. Pet.App.15a-18a.

The panel was similarly unmoved by fears of fraud. Given the low stakes, it believed few would go to the trouble of submitting bogus claims that might take funds away from those actually harmed. Pet.App.18a-19a. The panel likewise discounted worries about the defendant's ability to press its case because defendants could still challenge individual claims on the back end. Pet.App.19a-23a. Moreover, per the panel, the defendant has no right to present such defenses where the plaintiffs plan to establish the defendant's liability in aggregate rather than individually. In such cases, individualized defenses do not affect the size of the check the defendant must write, only whether its proceeds go to one (potentially mistaken) claimant, another (potentially mistaken) claimant, or a *cy pres* recipient. Pet.App.23a-24a.[3]

The Ninth Circuit denied rehearing en banc on February 14, 2017. Pet.App.349a-350a. It granted Conagra's motion to stay the mandate, which was premised on the likelihood that this Court would grant certiorari to resolve the split. Pet.App.351a-352a.

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[3] In a separate unpublished opinion, the Ninth Circuit rejected Conagra's other arguments against class certification. Pet.App.34a-39a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED.

Would-be class plaintiffs in the Second, Third, Fourth, and Eleventh Circuits must provide an efficient method for identifying absent class members; would-be class plaintiffs in the Sixth, Seventh, and Ninth Circuits need not. Class certification—"often the most significant decision rendered in … class-action proceedings," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)—should not differ by venue. This Court should resolve this important circuit split.

A. Several Circuits Require Plaintiffs To Provide a Reliable, Efficient Method for Identifying Class Members

1. In the Third Circuit, "[c]lass ascertainability is 'an essential prerequisite of a class action.'" *Carrera*, 727 F.3d at 306 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012)). To be ascertainable, a class must meet "two important elements": the class must be "defined with reference to objective criteria," *and* there must be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *see, e.g.*, *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (same).

These two related questions must be "rigorous[ly]" examined "at the outset" because of the "key roles [they] play[] as part of a Rule 23(b)(3) class action." *Carrera*, 727 F.3d at 307. Each "eliminates serious administrative burdens that are incongruous

with the efficiencies expected in a class action." *Id.* They also facilitate notice, guard absent class members against fraud, and protect the defendant's right to challenge every claimant's class membership. *Id.* at 307, 310; *see Marcus*, 687 F.3d at 593.

The Third Circuit's ascertainability requirement has real teeth. Any proposed method of identification must provide more than just "the say-so of putative class members." *Hayes*, 725 F.3d at 356; *see also Marcus*, 687 F.3d at 594. And any proposed method must not require "extensive and individualized fact-finding." *Hayes*, 725 F.3d at 356. Unless would-be plaintiffs can point to reliable records or an effective method for screening (and adversarially testing) individual affidavits, they cannot proceed as a class. *See, e.g.*, *Carrera*, 727 F.3d at 308-12.

Under these standards, the Third Circuit has rejected a number of class actions just like the one against Conagra. In *Carrera*, it set aside certification of a class of those who had purchased One-A-Day WeightSmart nutritional supplements sold at retail; the plaintiffs put forward "no evidence" that retailers had records for the relevant period, nor had they proposed a method for screening affidavits that was "specific to th[e] case" and "reliable." *Id.* at 309, 311. In *Hayes*, it vacated a class of those who purchased warranties on certain items at Sam's Club because the company's records could not be used to identify the relevant purchases, and the plaintiff offered only other class members' "say-so" as an alternative method. 725 F.3d at 355-56. And in *Marcus*, it vacated a class of those who purchased or

leased cars with run-flat tires and then had those tires replaced after going flat. Dealership records did not identify which cars came to the lot with run-flat tires, which cars left the lot with those tires, or which tires were replaced at third-party repair shops. 687 F.3d at 593-94.

Even when certifying classes, the Third Circuit has reiterated its ascertainability requirement (and found it satisfied). In *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, 795 F.3d 380 (3d Cir. 2015), it acknowledged that certification is improper where "class members are impossible to identify" without mini-trials. *Id.* at 396. There, the defendant bank's records *identified* those with the mortgages in question, and the defendant's speculative concern—that some mortgagees might not be the real party in interest because of bankruptcy—could be addressed by consulting a few records. *Id.* at 397. So too for *Byrd*. Those who had purchased or leased spyware-equipped computers could readily be identified through the defendant's own records, and their household members could be identified through public records, supplemented by verifiable testimony if necessary. *See* 784 F.3d at 169-71.

2. The Fourth Circuit has also "repeatedly recognized" an ascertainability requirement: as an "implicit threshold requirement" that must be met prior to certification, a plaintiff must demonstrate that "the members of [the] proposed class [are] readily identifiable." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). In *EQT*, the district court certified classes of those who owned interests in coalbed methane gas and had allegedly not

received the requisite royalties. Identifying the owners of those interests, however, was easier said than done; though records prepared years before offered a starting point, "numerous heirship, intestacy, and title-defect issues" still "plague[d]" the process of locating them. *Id.* at 359.

The Fourth Circuit vacated class certification. In its view, if class members cannot be "identif[ied] without extensive and individualized fact-finding ... , then a class action is inappropriate.'" *Id.* (quoting *Marcus*, 687 F.3d at 593). Because the court had not fully appreciated the task ahead of it—it considered neither the "number" of difficult-to-identify owners nor any "trial management tools … available to ease th[e] process" of identifying them—the Fourth Circuit remanded for a proper ascertainability analysis prior to certification. *Id.* at 360.[4]

3. The Second Circuit has also recognized an "implied requirement of ascertainability," according to which a class may not be certified unless it is "defined by objective criteria that are administratively feasible" *and* that allow for the "identif[ication] of [class] members" without

[4] The Ninth Circuit thought it "far from clear" that the Fourth Circuit had adopted an ascertainability requirement because the problems it identified "sounded in definitional deficiencies, numerosity questions, predominance problems, and management difficulties." Pet.App.11a n.6. This reasoning is ironic, given that the panel criticized the ascertainability requirement for overlapping with other certification factors. Pet.App.13a. It is also wrong. *EQT* called ascertainability an "implicit threshold requirement," followed the Third Circuit's opinion in *Marcus*, and instructed the district court to assess "ascertainability" on remand. 764 F.3d at 358, 360.

intensive fact-finding. *Brecher v. Republic of Argentina*, 806 F.3d 22, 25 (2d Cir. 2015). *Brecher* vacated the grant of class certification in part because, even if the holders of beneficial interests in the bonds at issue "could be traced," "determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability." *Id.* at 26.[5]

The Second Circuit recently applied *Brecher* to affirm the denial of class certification for a putative class composed of those who received prerecorded calls from the defendant on their residential phone line. *See Leyse v. Lifetime Entm't. Servs., LLC*, __ F. App'x __, 2017 WL 659894 (2d Cir. Feb. 15, 2017). "Our precedent," the Second Circuit explained, prohibits class certification where "identifying [class] members would … require a mini-hearing on the merits of each case." *Id.* at *2 (quoting *Brecher*, 806 F.3d at 24-25). Because no list of called numbers "existed," "no such list was likely to emerge," and "proposed class members could not realistically be expected to recall a brief phone call received six years ago" or to "retain any concrete documentation"

[5] The Ninth Circuit recognized that *Brecher* "mentioned administrative feasibility and cited *Marcus*," but claimed "administrative feasibility played no role in the court's decision, which instead turned on the principle that a class definition must be objective and definite." Pet.App.11a n.6. Again, not true. The panel rejected certification "*[e]ven if*" the various interest holders "could be traced"—that is, even if all those who fell within the objective class definition (those who held beneficial interests) could be definitively identified—because doing so would require "individualized mini-hearings." 806 F.3d at 26 (emphasis added).

of such a call, the court affirmed the district court's "finding that Leyse had failed to show a sufficiently reliable method for identifying the proposed class" without "mini-hearing[s]." *Id.* (internal quotation marks omitted, alteration in original).

4. Finally, the Eleventh Circuit has held that "*[b]efore* a district court may grant a motion for class certification," the plaintiff "must establish that the proposed class is adequately defined *and* clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (emphasis added). In *Karhu v. Vital Pharmaceuticals, Inc.*, 621 F. App'x 945 (11th Cir. 2015), this requirement doomed a proposed class of those who had purchased the defendant's aggressively named VPX Meltdown Fat Incinerator. VPX's sales data "identified mostly third-party retailers, not class members," and the plaintiff had not demonstrated that third-party subpoenas to those retailers could bridge the gap, nor had he explained how affidavits could be used without generating myriad mini-trials. *See id.* at 949-50; *see also Ward v. EZCorp, Inc.*, __ F. App'x __, 2017 WL 908194 (11th Cir. Mar. 8, 2017) (per curiam) (affirming denial because the plaintiff proposed no method that could identify pawn shop customers wrongly charged a particular fee); *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 788 (11th Cir. 2014) (per curiam) (vacating where plaintiffs had not "provided any indication" they could identify class members using records or another reliable method).

B. Other Circuits Do Not Require Plaintiffs To Provide a Reliable, Efficient Method for Identifying Class Members

Other circuits allow class actions to proceed even though the plaintiffs have not proposed (and likely cannot propose) a reliable means of identifying class members. Each of these circuits has recognized its disagreement with (at least) the Third Circuit.

1. In *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), the district court certified classes of those who had purchased Instaflex Joint Support, a supplement that plaintiffs alleged was snake oil. Relying on Third Circuit precedent, Direct Digital asked the Seventh Circuit to decertify because it "ha[d] no records for a large number of retail customers," most consumers likely had not "kept their receipts," and there was no effective means of screening self-serving affidavits. *Id.* at 661.

The Seventh Circuit "decline[d]" to follow the Third Circuit's approach. *Id.* at 662. It accepted as "well-settled" the requirement that a class be "defined clearly and based on objective criteria." *Id.* at 659. It refused, however, to require plaintiffs to provide "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at 662 (quoting *Byrd*, 784 F.3d at 163). The court recognized the "substantial and legitimate" concerns underlying the Third Circuit's approach, *id.* at 663, but concluded that they were "better addressed" through other class-certification requirements, which "balance [the] interests that Rule 23 is designed to protect." *Id.* at 658, 672. The Third Circuit's approach, according to *Mullins*, "upsets this balance"

and might prevent low-value consumer class actions from ever being certified. *See id.* at 658, 664-68.

2. In *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), the district court certified classes of those who had purchased Align, a probiotic nutritional supplement that plaintiffs alleged did not in fact aid digestion. On appeal, Procter & Gamble argued that the class was not ascertainable because most consumers bought Align from retailers, so there was "no plausible way to verify that any one single individual actually purchased Align." *Id.* at 524-25.

The Sixth Circuit, however, "s[aw] no reason to follow *Carrera*" and its demand for a reliable, efficient means of identifying class members. *Id.* at 525; *see id.* (noting that courts had criticized *Carrera*, including the Seventh Circuit in *Mullins* and the district court in Conagra's case). Like the Seventh Circuit, it worried that an ascertainability requirement would eliminate class actions for many low-value consumer goods. *See id.* Thus, even though identifying Align purchasers might "require substantial review," the court upheld class certification because the class was "defined by objective criteria." *Id.* at 526.

3. The decision below adopted the approach of the Sixth and Seventh Circuits and rejected the Third's. Pet.App.4a. The panel acknowledged that the district court had not required Plaintiffs to "proffer a reliable way to identify members of the certified classes." Pet.App.3a. It also did not dispute Conagra's basic claim that, given the absence of records and the perils of memory, "consumers would not be able to reliably identify themselves as class members." Pet.App.5a; Pet.App.7a (noting Conagra's

argument that "consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil").

Nonetheless, the Ninth Circuit upheld class certification because it "decline[d]" to require a mechanism for identifying absent class members. Pet.App.4a. It accepted that classes "must not be vaguely defined and must be sufficiently definite," Pet.App.7a n.4, but it rejected an ascertainability requirement as inconsistent with Rule 23's text and unnecessary to guard absent class members, prevent fraud, or protect defendants' rights. Pet.App.8a-24a. It, too, feared that an ascertainability requirement would shut the courthouse doors to consumer class actions. Pet.App.17a.

4. The Ninth Circuit claimed that the Eighth Circuit has also taken its position, Pet.App.4a, but *Sandusky Wellness Center v. MedTox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) only illustrates the confusion caused by the "diverge[nce]" among the circuits "on the meaning of ascertainability." On the one hand, the Eighth Circuit suggested agreement with the Ninth Circuit (and others) by stating that it has "not outlined a requirement of ascertainability" as a "separate, preliminary requirement." *Id.* at 996. On the other, it suggested agreement with the Third Circuit (and others) by reading Rule 23 to require that the class be "adequately defined and clearly ascertainable." *Id.* at 996. It also upheld the class in question because "fax logs showing the numbers that received each [disputed] fax [we]re objective criteria that make the recipient clearly ascertainable." *Id.* at

997. This focus on records makes little sense under the Ninth Circuit's approach.

District courts in the Eighth Circuit have drawn contradictory conclusions from this jumble. *Compare Abarca v. Werner Enters., Inc.*, 2016 WL 6407836 (D. Neb. Oct. 28, 2016) (denying certification of a class of truckers who worked in California on ascertainability grounds), *with In re Global Tel*Link Corp. ICS Litig.*, 2017 WL 471571, at *3 (W.D. Ark. Feb. 3, 2017) (certifying a class of hard-to-identify prisoners who paid to make phone calls because it does not matter "how administratively difficult it may be to locate … class members in practice"). And relief, alas, is not in sight; *McKeage v. TMBC, LLC*, 847 F.3d 992, 998-99 (8th Cir. 2017) (per curiam), recently reiterated *Sandusky*'s mess.

II. THE CIRCUIT SPLIT IS IMPORTANT BECAUSE CRITICAL CERTIFICATION DECISIONS NOW TURN ON VENUE.

Again, class certification is "often the most significant decision rendered in … class-action proceedings." *Roper*, 445 U.S. at 339. It should not depend on whether customers shopped at a Safeway in California or a Kroger in Pennsylvania.

A. Class Certification Matters

This Court has repeatedly recognized the game-changing significance of certification decisions. "Certification … may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Worse, defendants often have to abandon cases that are

clear winners. "[W]hen damages allegedly owed to thousands of potential claimants are aggregated and decided at once, the risk of error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

The plaintiffs' bar understands these coercive forces. After certification, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). In other words, the post-certification value of plaintiffs' claims "reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (Easterbrook, J.). "Judge Friendly, who was not given to hyperbole," called the deals struck in such circumstances "'blackmail settlements.'" *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1970)).

B. Ascertainability Now Leads to Different Results in Indistinguishable Cases

1. Circuits courts recognize that their divergence affects many certification decisions. *Mullins* explained, for example, that other courts' "heightened" ascertainability requirement "has defeated certification, especially in consumer class actions," 795 F.3d at 657, while the Ninth Circuit made a similar point below, Pet.App.6a. Commentators have also noted the often dispositive

disagreement. *See, e.g.*, 1 MCLAUGHLIN ON CLASS ACTIONS § 4:2 (13th ed. 2016 update) (noting that the Sixth and Seventh Circuits "have rejected" the Third Circuit's approach); 7A FEDERAL PRACTICE & PROCEDURE § 1760 (3d ed. Jan. 2017) (noting that the Seventh Circuit has "specifically rejected" the Third Circuit's approach).

2. Recent litigation makes clear that certification turns on geography. Courts that require plaintiffs to propose a reliable, feasible method of identification have routinely denied class certification in consumer class actions. In *Ault v. J.M. Smucker Co.*, 310 F.R.D. 59, 64-66 (S.D.N.Y. 2015), for example, the court declined to certify classes of those who bought Crisco cooking oil labeled "All Natural." In *In re Processed Egg Products Antitrust Litigation*, 312 F.R.D. 124 (E.D. Pa. 2015), the court refused to certify classes of those who had purchased eggs at grocery stores despite its "qualms" about the effects of a "heightened ascertainability requirement" on consumer classes; as it explained, such consumers rarely have receipts and may not accurately recall purchases, and the plaintiffs had not suggested a method for screening affidavits. *See id.* at 138-41, 141 n.13. Classes of those who purchased over-the-counter products marketed as "The Better Vitamin C" met the same fate, *see Hughes v. The Ester C Co.*, 317 F.R.D. 333, 348-50 (E.D.N.Y. 2016), as did classes of those who bought SpringBlade sneakers, *Ruffo v. Adidas Am. Inc.*, 2016 WL 4581344, at *2 (S.D.N.Y. Sept. 2, 2016), and Rock 'N Play infant sleepers, *see Harris v. Fisher-*

Price, Inc., 2016 WL 1319696, at *1-2 (N.D. Ala. Apr. 5, 2016). The list goes on.[6]

By contrast, classes like these sail through in jurisdictions where courts ask only for an objectively defined class. In *Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239 (S.D. Ill. 2015), for example, the court certified classes of those who had purchased Grove Square Coffee single-serve coffee cups (marketed as "premium," but allegedly 95% instant coffee) because the plaintiffs did not need to explain how these "in-store purchasers" could possibly be identified. *Id.* at 243, 260. Another court expressly relied on the decision below to certify classes of those who purchased Korean ramen in 23 states and the District of Columbia—much to the relief of college

[6] *See, e.g.*, *Wilmington Sav. Fund Soc'y, FSB v. Bus. Law Grp., P.A.*, __ F.R.D. __, 2017 WL 1034198, at *7 (M.D. Fla. Feb. 22, 2017) (mortgagees whose class membership could only be determined by "individual inquiry into the circumstances surrounding each potential class member's" mortgage); *Abraham v. WPX Prod. Prods., LLC*, 317 F.R.D. 169, 254-58 (D.N.M. 2016) (well owners whose gas was processed at certain facilities); *Shepherd v. Vintage Pharms., LLC*, 310 F.R.D. 691, 696-97 (N.D. Ga. 2015) (women who purchased or ingested birth control pills with a rare, apparently random packaging defect); *McCamis v. Servis One, Inc.*, 2017 WL 589251, at *3 (M.D. Fla. Feb. 14, 2017) (former homeowners contacted by a mortgage servicer after obtaining discharges in bankruptcy); *Peterson v. Aaron's, Inc.*, 2017 WL 364094, at *3-5 (N.D. Ga. Jan. 25, 2017) (users, owners, and lessees of computer equipment); *Kotsur v. Goodman Global, Inc.*, 2016 WL 4430609, at *5-6 (E.D. Pa. Aug. 22, 2016) (homeowners who paid to replace an HVAC unit's evaporator coil while still under warranty); *Brown v. Sega Amusements, U.S.A., Inc.*, 2015 WL 9450812, at *1, *3 (S.D.N.Y. Nov. 30, 2015) (those who "played the Sega Key Master arcade game" but received no "prize").

alums nationwide. *See In re Korean Ramen Antitrust Litig.,* 2017 WL 235052, at *21, *24 (N.D. Cal. Jan. 19, 2017). This list, too, goes on.[7]

III. THIS CASE IS AN EXCELLENT VEHICLE

A. Plaintiffs Did Not and Could Not Propose a Feasible Method for Identifying Class Members

1. The classes here could not have been certified if Plaintiffs had been required to put forward an efficient, reliable method for identifying those who purchased Wesson Oil at retailers in eleven states over the past decade. The district court recognized as much. It said Plaintiffs lacked the "[]ability to identify the specific members of [their] putative class[es]." Pet.App.110a. But because it "agree[d] with those courts that have found [such] classes ... ascertainable" so long as they are objectively defined, it certified anyway. Pet.App.112a.

The Ninth Circuit also acknowledged that these classes could not have been certified if Plaintiffs had

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[7] *See, e.g.*, *Meyer v. Bebe Stores, Inc.*, 2017 WL 558017, at *3 (N.D. Cal. Feb. 10, 2017) (those who received text messages from a retailer even though the third-party messenger may not have had records of the numbers texted); *Mojica v. Securus Techs., Inc.*, 2017 WL 470910, at *4 (W.D. Ark. Feb. 3, 2017) (those who paid to make or receive calls from correctional facilities, even though defendant did not directly receive the payments); *Hale v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4992504, at *10-11 (S.D. Ill. Sept. 16, 2016) (automobile insurance policyholders who "received quotes for non-OEM crash parts" or "had those parts installed"); *Steigerwald v. BHH, LLC*, 2016 WL 695424, at *4 (N.D. Ohio Feb. 22, 2016) (those who purchased inexpensive pest-control devices from retailers).

to propose an efficient process for locating class members. The panel never suggested that there might be such a method lurking somewhere. In fact, it barely mentioned the facts of this case at all. Instead, it framed the question as a legal one: whether Plaintiffs must "proffer a reliable way to identify members of the certified classes." Pet. App.3a. It then upheld certification because it decided not to join the Third Circuit in requiring such a method. Pet.App.4a.

2. The lower courts had no choice but to resolve this case on the law: Plaintiffs did not propose a reliable and efficient means of identifying a decade's worth of Wesson Oil purchasers, and there isn't one. Conagra itself has no record of any individual purchase; it sells to distributors and retailers, not individual consumers. ER774. Plaintiffs never sought records from retailers (who likely do not track individual purchases over a decade). And the only other possible comprehensive source of such information—a third-party vendor that collects market-share data—doesn't have any either. It only collects data in aggregate, and even then only by sampling stores in particular regions. ER775.

Plaintiffs, for their part, did not put forward a method that could cure these defects, at least not one that went beyond "potential class members' say so." *Carrera*, 727 F.3d at 304. They argued that would-be class representatives need not proffer any feasible method of identification and, insofar as there were such a requirement, standalone affidavits could satisfy it because every bottle of Wesson Oil sold during the class period bore the "100% Natural" label. C.A. Br. 11-20. Plaintiffs recognized, however,

that these arguments conflicted with the Third Circuit's more demanding approach. C.A. Br. 21-31.

Everyone involved in this case—the Ninth Circuit, the district court, Conagra, and Plaintiffs themselves—understood that these classes could not be certified if the Ninth Circuit took the Third Circuit's side of the pre-existing split. There could not be a cleaner vehicle for resolving that split.

B. This Case Differs from Previously Denied Petitions

1. In two cases a month apart in early 2016, this Court denied certiorari on the question presented. *See Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493 (Mar. 28, 2016) (mem.); *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161 (Feb. 29, 2016) (mem.). Unlike this case, those were flawed vehicles because in each there was reason to believe that most class members could easily be identified anyway.

Take first *Rikos*, where Procter & Gamble raised ascertainability as its third question presented. *See* Petition, 2015 WL 9591989, at i. After rejecting *Carrera*, the Sixth Circuit held that "[e]ven if [it] were to apply *Carrera*, there [we]re significant factual differences that ma[d]e [Rikos's] class more ascertainable" than the one in that case. 799 F.3d at 526. Per the court, Procter & Gamble's "own documents indicate[d] that more than half of its sales" took place "online" and that, "[a]t a minimum, online sales would provide the names and shipping addresses of those who purchased Align." *Id.* "In addition," the court stated, studies conducted by Procter & Gamble "reveal[ed] that an overwhelming number of customers learned about Align through

their physicians." *Id.* Thus, unlike the defendants in *Carrera*, Procter & Gamble "could verify that a customer purchased Align by, for instance, requesting a signed statement from that customer's physician," with "[s]tore receipts and affidavits ... supplement[ing]" these other methods. *Id.* at 527.

The respondent in *Rikos* pointed these problems out. *See* BIO, 2016 WL 4176854, at *32. Procter & Gamble disputed the accuracy of the Sixth Circuit's view of the facts. But it could not dispute that the Sixth Circuit had found those facts and had relied upon them in reaching its alternative holding. *See* Reply, 2016 WL 1056624, at *11-12.

Mullins was also a problematic vehicle. In keeping with its name, Direct Digital was primarily a direct online retailer. It drummed up customers through television and online advertising and then, armed with the credit card and shipping information that customers themselves provided, sent a free bottle with 14 days' worth of product. BIO, 2015 WL 9488470, at *1-2. Unless customers canceled, however, Direct Digital then shipped them additional Instaflex each month, charging their already-provided credit cards. *Id.* at *2. Although Direct Digital sold some Instaflex through retailers, most of its revenue came through direct sales. *Id.*

Direct Digital quibbled with some of these facts; for example, it claimed that sales percentages did not tell the whole story because some customers buy more than others. *See* Reply, 2016 WL 159561, at *5. But it could not deny the respondent's fundamental points. It did not reject the respondent's description of its business model, and it merely "disputed" the claim that it "kn[ew] the identity of the

overwhelming majority of its customers." *Id.* at *4. When push came to shove, the most it would say—in a footnote—was that it made "around half" of its sales at retail. *Id.* at *5 n.1. It is no surprise this Court denied certiorari when most class members could be identified after all.

2. The brief in opposition in *Mullins* also argued that there was no mature split because the Third Circuit had walked back its position since *Carrera*. *See* 2015 WL 9488470, at *18-21.

This was a bad argument the day it was made, and it has only gotten worse since. *Community Bank* and *Byrd*—the two cases that supposedly retreated from *Carrera*—reiterated its core holding: unless the plaintiff can provide "evidentiary support" for a method of identifying class members without resort to "extensive and individualized fact-finding," the class cannot be certified. *Community Bank*, 795 F.3d at 396; *see Byrd*, 784 F.3d at 163-65. The judges in those cases had no choice but to do so; the Third Circuit, over four judges' dissent, had already denied a request to revisit *Carrera* en banc. *See Carrera v. Bayer Corp.*, 2014 WL 3887938, at *1 (3d Cir. May 2, 2014) (Ambro, J., dissenting sur denial of petition for rehearing en banc); *see also Byrd*, 784 F.3d at 172, 177 (Rendell, J., concurring) (concurring under the Third Circuit's "current [ascertainability] jurisprudence" but calling for it to be jettisoned). *Carrera*'s core holding, however, is precisely the one with which the Sixth, Seventh, and Ninth Circuits disagree. *See supra* 16-19. Moreover, *Community Bank* and *Byrd* allowed certification only because class plaintiffs had proven an efficient, reliable means of identifying absent class members. *See*

supra 12. Faithfully applying *Carrera* hardly cuts it back or eliminates the split.

Subsequent developments further demonstrate that, even if there were doubts about the scope or importance of the circuit split when *Rikos* and *Mullins* were denied, they are gone now. In case after case *since those decisions*, district courts that apply a more stringent approach to ascertainability have denied class certification because the plaintiffs had not proposed a reliable, feasible method for identifying absent class members. *See supra* 21-22 & n.6. But in case after case where courts do not impose such a requirement, virtually identical class actions have been certified. *See supra* 22-23 & n.7.

3. This has to stop. There is no question that class certification matters, that courts disagree about whether a class of impossible-to-identify plaintiffs can be certified, or that this disagreement leads to conflicting outcomes in indistinguishable cases. This case—the paradigmatic consumer class action at the heart of this disagreement—gives the Court an ideal vehicle through which to end the confusion.

IV. THE DECISION BELOW IS WRONG

A. Rule 23 Requires a Reliable, Feasible Method for Identifying Class Members

1. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). For certain kinds of classes, that exception is justified. *See id.* at 362 (discussing Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2)). Damages classes under Rule

23(b)(3), however, represent the "most adventuresome" departure from the usual rule. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Like all class litigation, they bind absent members to litigation in which they played no part. But unlike the limited-fund or injunctive classes addressed by Rules 23(b)(1) and 23(b)(2), they do so largely for "convenien[ce]" rather than necessity, *id.* at 615, all while greatly magnifying the defendant's potential liability, *see supra* 19-20.

To keep this "adventurous" departure within acceptable bounds, damages plaintiffs must propose an efficient, reliable means of identifying class members. Without such a mechanism, courts cannot meaningfully evaluate whether the proposed class satisfies Rule 23's other requirements. *See Byrd*, 784 F.3d at 162.

Without such a mechanism, courts also cannot meaningfully protect absent plaintiffs, class defendants, or their own dockets against the risks inherent in such cases. For plaintiffs, the difficulty of identifying absent class members makes it nearly impossible to provide notice, leaving them bound by litigation they might want to escape. *See Marcus*, 687 F.3d at 593. For defendants, that difficulty subjects their victories to potential collateral attack by unknown class members, *see Carrera*, 727 F.3d at 310, makes it hard to identify potentially applicable defenses against unknown class members, and jeopardizes their right to raise every available defense against every claim, *see id.* at 307. For courts, that difficulty threatens the very harm Rule 23 was designed to avoid. Cases will devolve into myriad mini-trials when defendants challenge

individual claims by raising legitimate doubts about who *really* purchased everyday items many years ago. *See Marcus*, 687 F.3d at 593.

2. The Ninth Circuit largely brushed this all aside with a syllogism: none of the provisions in Rule 23 specifically requires a method for identifying absent class members, so under the interpretive principle *expressio unius est exclusio alterius*, there must not be any such requirement. Pet.App.8a-11a. That argument proves too much. Those courts that dispute the existence of an ascertainability requirement themselves recognize that a class must at least be "defined by objective criteria," *Rikos*, 799 F.3d at 526, not "vaguely defined," Pet.App.7a n.4; *see also Mullins*, 795 F.3d at 657. But that requirement—grounded in many of the same concerns as the ascertainability rule—is itself "implicit." *Mullins*, 795 F.3d at 657. Nothing in Rule 23 or the canons of interpretation precludes a court from recognizing an ascertainability rule grounded in "the nature of the class-action device itself." *Byrd*, 784 F.3d at 162.

The Ninth Circuit's syllogism also ignores the way in which an ascertainability requirement *derives from* Rule 23's prescribed demands. Among other things, those seeking to pursue damages claims as a class must prove that the representative parties' claims are "typical" of the class's as a whole, that the representative parties will "fairly and adequately protect" the class's interests, that there are "questions of law or fact common to the class," that those common questions will "predominate over" individualized ones, and that classwide adjudication "is superior to" other methods of resolving the

dispute, considering "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(a), 23(b)(3). Additionally, any class certification order "must define the class," Fed. R. Civ. P. 23(c)(1)(B), and upon certification the court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts," Fed. R. Civ. P. 23(c)(2)(B).

It is impossible to "rigorous[ly] analy[ze]" these requirements before certification, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013), without determining whether class members can feasibly be identified. How could the court tell whether the common claims are typical or whether the named representative is truly representative when the members themselves cannot be identified? How could it reasonably notify millions of hard-to-identify class members? Most importantly, how could it conclude that classwide issues predominate or that classwide adjudication is superior when it knows that every single claimant may have to be cross-examined about whether he actually purchased an everyday item sometime in the past decade? Framed as an implicit requirement inherent in the class-action device or as an application of Rule 23's predominance and superiority requirements to a recurring set of facts, the ascertainability requirement fits comfortably within the text and purpose of that Rule.

B. The Ninth Circuit's Approach Harms Class Members, Defendants, and District Courts Alike

1. The Ninth Circuit also attacked the purposes underlying the ascertainability requirement, but those arguments fare no better. It began by reasoning that administrative concerns about such classes were misplaced: courts possess "procedural tools" to manage these cumbersome cases, and Rule 23's superiority requirement better addresses manageability concerns anyway. Pet.App.14a-15a.

For all the talk of "procedural tools" and case-management "solutions," *Mullins*, 795 F.3d at 664, no court has suggested one that could actually work without endless mini-trials. That's because it can't be done. By definition, identifying class members in these cases can only be done person by person, through testimony about routine purchases made years ago (if ever).

Moreover, whatever courts may say about denying certification under other requirements, in reality their approach guarantees certification in cases like these. This case is proof. Conagra sold millions of bottles of Wesson Oil over the relevant class periods, and each absent class member will have to recall purchasing a bottle of oil within the last decade or so to make a claim. The Ninth Circuit promised that courts could take the prospect of myriad mini-trials into account under Rule 23's other requirements. Pet.App.13a. But in its unpublished decision addressing those requirements, it said nothing on the issue. If the prospect of countless individualized fact-findings wasn't worth mentioning here, it is hard to imagine where it would be.

Indeed, the outcome is predetermined: because the Ninth Circuit "presume[s]" that class status should not be withheld "merely" because the class is unmanageable, and because it prefers classwide adjudication for cases involving "inexpensive consumer goods," Pet.App.15a, these problems will never stand in the way of certification.

2. The Ninth Circuit also reasoned that an ascertainability requirement is not needed to protect absent class members: due process does not require actual notice to them, those holding low-value claims are unlikely to opt out anyway, and excess damages can just be given to non-claimants through *cy pres*. Pet.App.15a-17a. Put more directly, the Ninth Circuit's point seems to be this: no one should worry about whether most absent class members even know about the litigation, because most of them won't care and because most of the money will end up going to some other organization anyway.

That is a strange explanation. The need to resort to publication notice—and the exceptionally low claims rates that result from such notice—are bugs, not features, of a system purportedly designed to vindicate individual rights. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 n.12 (1974) (problems with publication notice); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 120 (2007) (noting that "shockingly low participation rates" such as "less than 5%" have "becom[e] ordinary"). Indeed, one member of this Court has already pointed out the serious problems raised by class actions that are in fact mechanisms for fining defendants to the benefit of class counsel and *cy pres*

recipients, with absent class members left with little or nothing to show for their extinguished claims. *See Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (mem.) (statement of Roberts, C.J., respecting the denial of certiorari) (noting the "fundamental concerns" raised by the "use of such remedies in class action litigation").

The Ninth Circuit similarly reasoned that those with real claims need not fret about those raising bogus ones: no consumer would "risk perjury charges" for a few dollars, and false claims can be screened through "auditing processes." Pet.App.18a. But Conagra is more concerned about motivated memory than premeditated perjury. The class representatives *themselves* could only guess about their purchases, *e.g.*, ER1345, and the prospect of an increased financial recovery might tempt people to round up, whether consciously or not. Moreover, the unspecified "auditing processes" to detect faulty memories do not exist. It is already difficult to verify whether someone has purchased Wesson Oil at all since 2007; it is much harder still to prove whether he bought two bottles or ten.

3. The Ninth Circuit also reasoned that allowing classes to go forward despite the impossibility of identifying absent class members does not harm defendants' rights. In the Ninth Circuit's view, defendants can challenge class representatives' purchases at certification, they can challenge other claimants later, and sometimes they need not be allowed to raise challenges at all because their liability, established in aggregate based on total items sold, will not change. Pet.App.19a-24a.

The first point is true as far as it goes, but that's not far. Defendants may challenge *every* class member's claim, not just the class representatives', and they cannot investigate individualized defenses—let alone raise them—if they do not even know who the absent class members are. *See Dukes*, 564 U.S. at 366-67. Moreover, pointing to the possibility of post-certification challenges *assumes* there will be thousands of mini-trials, an assumption that the careful application of Rule 23—at the *certification* stage, not later, *see Comcast*, 133 S. Ct. at 1432—was designed to prevent. It also blinks reality, where class certification virtually guarantees settlement. *See supra* 19-20. Finally, courts have "repeatedly rejected" the use of aggregate liability to avoid any needed individualized inquiry in litigated class actions, 2 MCLAUGHLIN ON CLASS ACTIONS § 8:16, including with respect to the issues that would likely arise here, *see, e.g.*, *Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (Friendly, J.) (antitrust plaintiffs could not use fluid recovery given "the scores of different products involved, varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchases after a lapse of five or ten years").

4. Ultimately, the Ninth Circuit grounded much of its decision on one overarching policy concern: if plaintiffs must put forward a method of identifying absent class members, no class will be certified, and no one will bring these low-value claims. *E.g.*, Pet.App.15a. Of course, cases like *Byrd* and *Community Bank* demonstrate that many low-value consumer class actions are ascertainable, just not the ones that are impossible to litigate without

thousands of mini-trials. Moreover, it is hard to give this concern too much weight when, as the Ninth Circuit itself repeatedly pointed out, these cases aren't really about vindicating class members' rights anyway—virtually no one files a claim, and those who do receive at most a few dollars. Other mechanisms—regulatory action, injunctive relief, attorney general suits, and so on—are much better suited for thwarting diffuse but widespread wrongdoing. Using inherently unwieldy class actions to do so just gives the plaintiffs' bar and *cy pres* recipients a windfall at the expense of absent class members' and defendants' rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

APRIL 2017

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BRISENO, individually and on behalf of all others similarly situated, *Plaintiff-Appellee,* v. CONAGRA FOODS, INC., *Defendant-Appellant.*	No. 15-55727 D.C. No. 2:11-cv-05379-MMM-AGR OPINION

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted September 12, 2016
San Francisco, California

Filed January 3, 2017

Before: William A. Fletcher, Morgan B. Christen, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland

SUMMARY*

Class Certification

The panel affirmed the district court's class certification in putative class actions brought against ConAgra Foods in eleven states by consumers who purchased Wesson-brand cooking oil products labeled "100% Natural" during the relevant period.

Plaintiffs argued that the "100% Natural" label was false or misleading because Wesson oils are made from bioengineered ingredients that plaintiffs contend are "not natural." ConAgra manufactures, markets, distributes, and sells Wesson products. Defendant urged reversal of the district court's class certification because the district court did not require Plaintiff-Appellee Robert Briseno and the other named class representatives to proffer an administratively feasible way to identify members of the certified classes.

The panel held that the language of Federal Rule of Civil Procedure 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification. The panel therefore joined the Sixth, Seventh, and Eighth Circuits in declining to adopt an administrative feasibility requirement.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

FRIEDLAND, Circuit Judge:

This appeal requires us to decide whether, to obtain class certification under Federal Rule of Civil Procedure 23, class representatives must demonstrate that there is an "administratively feasible" means of identifying absent class members. Defendant-Appellant ConAgra Foods, Inc. ("ConAgra") urges us to reverse class certification because the district court did not require Plaintiff-Appellee Robert Briseno and the other named class representatives (collectively, "Plaintiffs") to proffer a reliable way to identify members of the certified classes here—consumers in eleven states who

purchased Wesson-brand cooking oils labeled "100% Natural" during the relevant period.[1]

We have never interpreted Rule 23 to require such a showing, and, like the Sixth, Seventh, and Eighth Circuits, we decline to do so now. *See Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc.*, 821 F.3d 992, 995–96 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016). A separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23. Further, Rule 23's enumerated criteria already address the policy concerns that have motivated some courts to adopt a separate administrative feasibility requirement, and do so without undermining the balance of interests struck by the Supreme Court, Congress, and the other contributors to the Rule. We therefore affirm.

I

Plaintiffs are consumers who purchased Wesson-brand cooking oil products labeled "100% Natural." The "100% Natural" label appeared on every bottle of Wesson-brand oil throughout the putative class periods (and continues to appear on those products). Plaintiffs argue that the "100% Natural" label is false or misleading because Wesson oils are made from bioengineered ingredients (genetically modified organisms, or GMOs) that Plaintiffs contend are "not

[1] We address ConAgra's other challenges to the district court's class certification order in a concurrently filed memorandum disposition.

natural." ConAgra manufactures, markets, distributes, and sells Wesson products.

Plaintiffs filed putative class actions asserting state-law claims against ConAgra in eleven states, and those cases were consolidated in this action. Plaintiffs moved to certify eleven classes defined as follows:[2]

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

As relevant here, ConAgra opposed class certification on the ground that there would be no administratively feasible way to identify members of the proposed classes because consumers would not be able to reliably identify themselves as class members. As a result, ConAgra argued that the class was not eligible for certification.[3]

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[2] We refer to Plaintiffs' amended motion for class certification, which is the subject of this appeal.

[3] ConAgra called this a failure of "ascertainability." We refrain from referring to "ascertainability" in this opinion because courts ascribe widely varied meanings to that term. For example, some courts use the word "ascertainability" to deny certification of classes that are not clearly or objectively defined. *See, e.g., Brecher v. Republic of Argentina*, 806 F.3d 22, 24–26 (2d Cir. 2015) (holding that a class defined as all owners of beneficial interests in a particular bond series, without reference to the time owned, was too indefinite); *DeBremaecker*

The district court acknowledged that the Third Circuit and some district courts have refused certification in similar circumstances, but it declined to join in their reasoning. Instead, the district court held that, at the certification stage, it was sufficient that the class was defined by an objective criterion: whether class members purchased Wesson oil during the class period.

The district court ultimately granted Plaintiffs' motion in part and certified eleven statewide classes to pursue certain claims for damages under Federal Rule of Civil Procedure 23(b)(3). ConAgra timely sought and obtained permission to appeal pursuant to Rule 23(f).

II

Federal Rule of Civil Procedure 23 governs the maintenance of class actions in federal court. Parties seeking class certification must satisfy each of the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—and at least one of the requirements of Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011).

ConAgra argues that, in addition to satisfying these enumerated criteria, class proponents must

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v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (affirming denial of class certification because a class composed of state residents "active in the 'peace movement'" was uncertain and overbroad). Others have used the term in referring to classes defined in terms of success on the merits. *See, e.g., EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) (remanding and instructing the district court to consider, "as part of its class-definition analysis," *inter alia*, whether the proposed classes could be defined without creating a fail-safe class). Our court does not have its own definition. *See infra* note 4.

also demonstrate that there is an administratively feasible way to determine who is in the class.[4] ConAgra claims that Plaintiffs did not propose any way to identify class members and cannot prove that an administratively feasible method exists because consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil. We have not previously interpreted Rule 23 to require such a demonstration, and, for the reasons that follow, we do not do so now.

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[4] On appeal, ConAgra continues to present administrative feasibility as part of a threshold "ascertainability" prerequisite to certification. ConAgra relies on a footnote in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), to argue that our court has recognized such a requirement. But in that footnote we explicitly declined to decide whether the district court abused its discretion by denying certification based on a "threshold ascertainability test." *Id.* at 1071 n.3. ConAgra cites no other precedent to support the notion that our court has adopted an "ascertainability" requirement. This is not surprising because we have not. Instead, we have addressed the types of alleged definitional deficiencies other courts have referred to as "ascertainability" issues, *see supra* note 3, through analysis of Rule 23's enumerated requirements. *See, e.g., Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136–39 (9th Cir. 2016) (addressing claim that class definition was overbroad—and thus arguably contained some members who were not injured—as a Rule 23(b)(3) predominance issue); *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986) (recognizing that a class must not be vaguely defined and must be "sufficiently definite to conform to Rule 23"). Although the parties here use the word "ascertainability," they dispute only whether a class proponent must proffer an administratively feasible way to identify class members. That is therefore the only issue we decide.

A

We employ the "traditional tools of statutory construction" to interpret the Federal Rules of Civil Procedure. *Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2014) (quoting *United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013)). In construing what Rule 23 requires, our "'first step'" is thus "'determin[ing] whether the language at issue has a plain meaning.'" *Id.* (quoting *McDonald v. Sun Oil Co.,* 548 F.3d 774, 780 (9th Cir. 2008)); *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (noting that interpretation of the federal rules "begin[s] with the language of the Rule itself"). "When interpreting [the Rule], words and phrases must not be read in isolation, but with an eye toward the 'purpose and context of the statute.'" *Petri*, 731 F.3d at 839 (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)). "An interpretation that gives effect to every clause is generally preferable to one that does not." *Mackay*, 742 F.3d at 864.

Beginning then with the plain language, Rule 23(a) is titled "Prerequisites" and provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

> (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). This provision identifies the prerequisites to maintaining a class action in federal court. It does not mention "administrative feasibility."

Traditional canons of statutory construction suggest that this omission was meaningful. Because the drafters specifically enumerated "[p]rerequisites," we may conclude that Rule 23(a) constitutes an exhaustive list. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (explaining that, under the doctrine of *expressio unius est exclusio alterius,* the enumeration of certain criteria to the exclusion of others should be interpreted as an intentional omission). We also take guidance from language used in other provisions of the Rule. In contrast to Rule 23(a), Rule 23(b)(3) provides, "The matters pertinent to these findings *include*," followed by four listed considerations. FED. R. CIV. P. 23(b)(3) (emphasis added). If the Rules Advisory Committee had intended to create a non-exhaustive list in Rule 23(a), it would have used similar language. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (per curiam))). Moreover, Rule 23(b)(3) requires a court certifying a class under that section to consider "the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(D). Imposing a separate administrative

feasibility requirement would render that manageability criterion largely superfluous, a result that contravenes the familiar precept that a rule should be interpreted to "give[ ] effect to every clause." *Mackay*, 742 F.3d at 864.

Supreme Court precedent also counsels in favor of hewing closely to the text of Rule 23. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court considered whether a settlement-only class could be certified without satisfying the requirements of Rule 23. In holding that it could not,[5] the Court underscored that the Federal Rules of Civil Procedure result from "an extensive deliberative process involving . . . a Rules Advisory Committee, public commenters, the Judicial Conference, [the Supreme] Court, [and] Congress." *Id.* at 620. The Court warned that "[t]he text of a rule thus proposed and reviewed limits judicial inventiveness" and admonished that "[c]ourts are not free to amend a rule outside the process Congress ordered." *Id.* The lesson of *Amchem Products* is plain: "Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted." *Id.* at 622.

In sum, the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification. Mindful of the Supreme Court's guidance, we decline to interpose an additional hurdle into the class certification process delineated

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[5] The Court recognized, however, that a settlement-only class— which by definition will not proceed to trial—can be certified without consideration of potential trial-management challenges under Rule 23(b)(3)(D). *See Amchem Prods.*, 521 U.S. at 620.

in the enacted Rule. *See Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (declining to recognize a "separate, preliminary" requirement and, instead, "adher[ing] to a rigorous analysis of the Rule 23 requirements").

B

We recognize that the Third Circuit does require putative class representatives to demonstrate "administrative feasibility" as a prerequisite to class certification.[6] *See Byrd v. Aaron's Inc.*, 784 F.3d 154,

[6] Other circuits have cited the Third Circuit's administrative feasibility standard but have not actually imposed the standard in the same manner as has the Third Circuit. The First Circuit has cited *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), for the proposition that at the class certification stage, it must be anticipated that, by the time a case reaches the liability and claims administration stages, there will be an administratively feasible way to distinguish injured from uninjured class members. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 19–20 (1st Cir. 2015). Requiring plaintiffs to propose a mechanism for eventually determining whether a given class member is entitled to damages is different from requiring plaintiffs to demonstrate an administratively feasible way to identify *all* class members at the certification stage. In *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015), the Second Circuit mentioned administrative feasibility and cited *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012), but administrative feasibility played no role in the court's decision, which instead turned on the principle that a class definition must be objective and definite. *Brecher*, 806 F.3d at 24–26. The Fourth Circuit has reversed class certification based in part on potential "administrative barrier[s]" to ascertaining class members and cited the Third Circuit in doing so. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 358–60 (4th Cir. 2014). But the "administrative barriers" identified by the court in *EQT* sounded in definitional deficiencies, numerosity questions, predominance problems, and management difficulties, *see id.*—issues that all implicate other class certification criteria. It is thus far from clear that the

162–63 (3d Cir. 2015); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306–08 (3d Cir. 2013). The Third Circuit justifies its administrative feasibility requirement not through the text of Rule 23 but rather as a necessary tool to ensure that the "class will actually function as a class." *Byrd*, 784 F.3d at 162. The Third Circuit suggests that its administrative feasibility prerequisite achieves this goal by (1) mitigating administrative burdens; (2) safeguarding the interests of absent and bona fide class members; and (3) protecting the due process rights of defendants. *See Carrera*, 727 F.3d at 307, 310. The Seventh Circuit soundly rejected those justifications in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), and the Sixth Circuit followed suit, *see Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) (citing *Mullins* in declining to follow *Carrera*). We likewise conclude that Rule 23's enumerated criteria already address the interests that motivated the Third Circuit and, therefore, that an independent administrative feasibility requirement is unnecessary.

Fourth Circuit requires an affirmative demonstration of administrative feasibility as a separate prerequisite to class certification. Even the Third Circuit has cabined its administrative feasibility rule in recent cases. *See In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 396–97 (3d Cir. 2015) (distinguishing *Carrera* as addressing particular "evidentiary problems"), *cert. denied sub nom. PNC Bank v. Brian W.*, 136 S. Ct. 1167 (2016); *Byrd,* 784 F.3d at 164 (clarifying that *Carrera* did not create a "records requirement" at the class certification stage and instead "only requires the plaintiff to show that class members *can be identified*" (quoting *Carrera*, 727 F.3d at 308 n.2 (emphasis added))).

1

One rationale the Third Circuit has given for imposing an administrative feasibility requirement is the need to mitigate the administrative burdens of trying a Rule 23(b)(3) class action. Courts adjudicating such actions must provide notice that a class has been certified and an opportunity for absent class members to withdraw from the class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011); *accord* FED. R. CIV. P. 23(c)(2)(B). The Third Circuit largely justifies its administrative feasibility prerequisite as necessary to ensure that compliance with this procedural requirement does not compromise the efficiencies Rule 23(b)(3) was designed to achieve.[7] *See Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015); *Carrera*, 727 F.3d at 307.

But Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve that goal: the manageability criterion of the superiority requirement. Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy," and it specifically mandates that courts consider "the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(D).

Moreover, as the Seventh Circuit has observed, requiring class proponents to satisfy an

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[7] Because the notice requirement is mandatory only for Rule 23(b)(3) classes, the Third Circuit has declined to extend its "ascertainability" prerequisite, which includes its administrative feasibility requirement, to Rule 23(b)(2) classes. *See Shelton*, 775 F.3d at 562–63. We understand ConAgra's arguments here to be similarly limited to Rule 23(b)(3) class actions.

administrative feasibility prerequisite "conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns." *Mullins*, 795 F.3d at 663; *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (holding that refusal to certify a class "on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule'" (quoting *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La. 1980))), *overruled on other grounds by In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), *and superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006). This presumption makes ample sense given the variety of procedural tools courts can use to manage the administrative burdens of class litigation. For example, Rule 23(c) enables district courts to divide classes into subclasses or certify a class as to only particular issues. FED. R. CIV. P. 23(c)(4), (5); *see also In re Visa Check/MasterMoney*, 280 F.3d at 141 (listing "management tools available to" district courts).

Adopting a freestanding administrative feasibility requirement instead of assessing manageability as one component of the superiority inquiry would also have practical consequences inconsistent with the policies embodied in Rule 23. Rule 23(b)(3) calls for a comparative assessment of the costs and benefits of class adjudication, including the availability of "other methods" for resolving the controversy. By contrast, as the Seventh Circuit has emphasized, a standalone administrative feasibility requirement would invite

courts to consider the administrative burdens of class litigation "in a vacuum." *See Mullins*, 795 F.3d at 663. That difference in approach would often be outcome determinative for cases like this one, in which administrative feasibility would be difficult to demonstrate but in which there may be no realistic alternative to class treatment. *See id.* at 663–64. Class actions involving inexpensive consumer goods in particular would likely fail at the outset if administrative feasibility were a freestanding prerequisite to certification.

The authors of Rule 23 opted not to make the potential administrative burdens of a class action dispositive and instead directed courts to balance the benefits of class adjudication against its costs. We lack authority to substitute our judgment for theirs. *See Amchem Prods.*, 521 U.S. at 620 ("[T]he Rule as now composed sets the requirements [courts] are bound to enforce.").

2

The Third Circuit has also justified its administrative feasibility requirement as necessary to protect absent class members and to shield bona fide claimants from fraudulent claims.

A

With respect to absent class members, the Third Circuit has expressed concern about whether courts would be able to ensure individual notice without a method for reliably identifying class members. *See Byrd*, 784 F.3d at 165; *Carrera*, 727 F.3d at 307. We believe that concern is unfounded, because neither Rule 23 nor the Due Process Clause requires actual notice to each individual class member.

Rule 23 requires only the "best notice that is *practicable under the circumstances*, including individual notice to all members who can be identified through *reasonable effort*." FED. R. CIV. P. 23(c)(2)(B) (emphasis added). In other words, "[t]he rule does not insist on actual notice to all class members in all cases" and "recognizes it might be *impossible* to identify some class members for purposes of actual notice." *Mullins*, 795 F.3d at 665. And courts have long employed *cy pres* remedies when some or even all potential claimants cannot be identified. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) ("In a majority of class actions at least some unclaimed damages or unlocated class members remain. The existence of a large unclaimed damage fund, while relevant to the manageability determination, does not necessarily make a class action 'unmanageable.'" (citation omitted)). The notion that an inability to identify all class members precludes class certification cannot be reconciled with our court's longstanding *cy pres* jurisprudence. *See id*.

Likewise, the Due Process Clause does not require actual, individual notice in all cases. *See Silber v. Mabon*, 18 F.3d 1449, 1453–54 (9th Cir. 1994); *see also Mullins*, 795 F.3d at 665 (explaining that when individual notice by mail is "not possible, courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process"). Courts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process. *See, e.g., Hughes v. Kore of Ind.*

Enter., Inc., 731 F.3d 672, 676–77 (7th Cir. 2013) (holding that sticker notices on two allegedly offending ATMs, as well as publication in the state's principal newspaper and on a website, provided adequate notice to class members in an action challenging ATM fees); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1319 (11th Cir. 2012) (holding that notice to unidentified class members by periodical and website satisfied due process).

Moreover, the lack-of-notice concern presumes that some harm will inure to absent class members who do not receive actual notice. In theory, inadequate notice might deny an absent class member the opportunity to opt out and pursue individual litigation. But in reality that risk is virtually nonexistent in the very cases in which satisfying an administrative feasibility requirement would prove most difficult—low-value consumer class actions. Such cases typically involve low-cost products and, as a result, recoveries too small to incentivize individual litigation. At the same time, an administrative feasibility requirement like that imposed by the Third Circuit would likely bar such actions because consumers generally do not keep receipts or other records of low-cost purchases. Practically speaking, a separate administrative feasibility requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class mechanism. Justifying an administrative feasibility requirement as a means of ensuring perfect recovery at the expense of any recovery would undermine the very purpose of Rule 23(b)(3)— "vindication of 'the rights

of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods.*, 521 U.S. at 617 (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

B

The Third Circuit has also expressed concern that without an administrative feasibility requirement, individuals will submit illegitimate claims and thereby dilute the recovery of legitimate claimants. *See Carrera*, 727 F.3d at 310.

The fraud concern may be valid in theory, but "in practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible." *Mullins*, 795 F.3d at 667. This is especially true in class actions involving low-cost consumer goods. Why would a consumer risk perjury charges and spend the time and effort to submit a false claim for a de minimis monetary recovery? And even if consumers might do so, courts "can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court" to avoid or minimize fraudulent claims. *Id.*

As to the dilution concern specifically, consistently low participation rates in consumer class actions make it very unlikely that non-deserving claimants would diminish the recovery of participating, bona fide class members.[8] *See id.* "It is not unusual for

[8] Theoretically, if there were non-legitimate claimants, they would dilute a *cy pres* fund. But that outcome would not impact

only 10 or 15% of the class members to bother filing claims." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119 (2007). Moreover, if certification is denied to prevent dilution, deserving class members "will receive nothing, for they would not have brought suit individually in the first place." *Mullins*, 795 F.3d at 668. As the Seventh Circuit put it, "[w]hen it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good." *Id.* at 666.

3

Finally, the Third Circuit has characterized its administrative feasibility requirement as necessary to protect the due process rights of defendants "to raise individual challenges and defenses to claims." *Carrera*, 727 F.3d at 307. The gravamen of this due process concern seems to be that defendants must have an opportunity to dispute whether class members really bought the product or used the service at issue.[9] *See id.* (stating that a defendant

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bona fide claimants, who would have already received distributions. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (explaining that, after distributions have been made to any claimants, "[t]he *cy pres* doctrine allows a court to distribute *unclaimed* or *non-distributable portions* of a class action settlement fund to the 'next best' class of beneficiaries" (emphasis added)). Nor would it affect the defendant, whose liability will already have been determined. *See Six (6) Mexican Workers*, 904 F.2d at 1307 ("The use of *cy pres* or fluid recovery to distribute unclaimed funds may be considered only after a valid judgment for damages has been rendered against the defendant.").

[9] Relatedly, ConAgra argues that an administrative feasibility requirement would protect its ability to meaningfully

has a "due process right to challenge the proof used to demonstrate class membership"); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012) ("Forcing [defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.").

As an initial matter, defendants plainly can mount such challenges as to the named class representatives. Class representatives must establish standing by, for example, showing that they bought the product or used the service at issue. *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 595 (9th Cir. 2012) (holding that class representatives who allegedly paid more for or purchased a product due to a defendant's deceptive conduct have suffered an "injury in fact" that establishes Article III standing); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (stating that "[t]he plaintiff class bears the burden of showing" that "at least one named plaintiff" meets the Article III standing requirements). At the class certification stage, the class representatives bear the

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assert a *res judicata* defense in future actions asserting the same claims. But determining whether a plaintiff in that future action was a member of this class precluded from relitigating would be possible so long as the class definition in this action was clear (and ConAgra does not dispute that it is). If a future plaintiff were to assert a claim challenging the "100% Natural" label on Wesson oil purchased during the class period in one of the eleven states at issue, that would show that she was a member of the class bound by the judgment. This would be so regardless of how "administratively feasible" it was to prove the entirety of the membership at the class certification stage in this action. *See* Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 YALE L.J. 2354, 2374–78 (2015).

burden of demonstrating compliance with Rule 23. *See Wal-Mart Stores*, 564 U.S. at 350 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule."). And if the case proceeds past the certification stage, the plaintiff class must carry the burden of proving every element of its claims to prevail on the merits. *See id.* at 351 n.6 (observing that, in a securities fraud class action, "plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, an issue that they will surely have to prove *again* at trial in order to make out their case on the merits" (citation omitted)); *id.* at 367 ("[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b))); *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) ("A class action. . . . leaves the parties' legal rights and duties intact and the rules of decision unchanged."). Defendants can oppose the class representatives' showings at every stage. Indeed, in litigating class certification, ConAgra took discovery of the class representatives, challenged whether they bought Wesson oil products, attacked their credibility, and disputed whether they relied on the label at issue. As the case proceeds, ConAgra will have further opportunities to contest every aspect of Plaintiffs' case.

Defendants will have similar opportunities to individually challenge the claims of absent class members if and when they file claims for damages. At the claims administration stage, parties have long relied on "claim administrators, various auditing processes, sampling for fraud detection, follow-up

notices to explain the claims process, and other techniques tailored by the parties and the court" to validate claims. *Mullins*, 795 F.3d at 667. Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment (explaining that certification may be proper "despite the need, if liability is found, for separate determinations of the damages suffered by individuals within the class"); *see also Levya v. Medline Indus. Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013) (reaffirming, after *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), that the need for individualized damages determinations after liability has been adjudicated does not preclude class certification). ConAgra does not explain why such procedures are insufficient to safeguard its due process rights.[10]

Given these existing opportunities to challenge Plaintiffs' case, it is not clear why requiring an administratively feasible way to identify all class members at the certification stage is necessary to protect ConAgra's due process rights. As the Seventh Circuit put it, "[t]he due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative

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[10] District courts also have discretion to allow limited discovery from absent class members if the particular circumstances of a specific case justify it. *See* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 9:13 (5th ed. 2013) ("[C]ertain forms of limited discovery from absent class members may be permitted in certain circumstances.").

class members actually come forward." *Mullins*, 795 F.3d at 670. ConAgra may prefer to terminate this litigation in one fell swoop at class certification rather than later challenging each individual class member's claim to recovery, but there is no due process right to "a *cost-effective* procedure for challenging every individual claim to class membership." *Id*. at 669.

If the concern is that claimants in cases like this will eventually offer only a "self-serving affidavit" as proof of class membership, it is again unclear why that issue must be resolved at the class certification stage to protect a defendant's due process rights. If a Wesson oil consumer were to pursue an individual lawsuit instead of a class action, an affidavit describing her purchases would create a genuine issue if ConAgra disputed the affidavit, and would prevent summary judgment against the consumer. *See Mullins*, 795 F.3d at 669; *accord* FED. R. CIV. P. 56(c)(1)(A). Given that a consumer's affidavit could force a liability determination at trial without offending the Due Process Clause, we see no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made.

Moreover, identification of class members will not affect a defendant's liability in every case. For example, in this case, Plaintiffs propose to determine ConAgra's aggregate liability by (1) calculating the price premium attributable to the allegedly false statement that appeared on every unit sold during the class period, and (2) multiplying that premium by the total number of units sold during the class period.

We agree with the Seventh Circuit that, in cases in which aggregate liability can be calculated in such a manner, "the identity of particular class members does not implicate the defendant's due process interest at all" because "[t]he addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class." *Mullins*, 795 F.3d at 670; *see also Six (6) Mexican Workers*, 904 F.2d at 1307 ("Where the only question is how to distribute damages, the interests affected are not the defendant's but rather those of the silent class members."). The defendant will generally know how many units of a product it sold in the geographic area in question, and if the defendant is ultimately found to have charged, for example, 10 cents more per unit than it could have without the challenged sales practice, the aggregate amount of liability will be determinable even if the identity of all class members is not. The Third Circuit recognized as much in *Carrera*. *See Carrera*, 727 F.3d at 310 (acknowledging but not addressing the argument that "[the defendant's] total liability" would not be "affected by unreliable affidavits").

For these reasons, protecting a defendant's due process rights does not necessitate an independent administrative feasibility requirement.

C

In summary, the language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification, and the policy concerns that have motivated the Third Circuit to adopt a separately articulated requirement

are already addressed by the Rule. We therefore join the Sixth, Seventh, and Eighth Circuits in declining to adopt an administrative feasibility requirement. *See Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc.*, 821 F.3d 992, 995–96 (8th Cir. 2016) (recognizing that some courts have imposed an administrative feasibility requirement, but declining to do so); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) ("We see no reason to follow *Carrera.*"); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015) (rejecting the administrative feasibility requirement as incompatible with Rule 23 and "the balance of interests that Rule 23 is designed to protect").

III

For the forgoing reasons, the district court did not err in declining to condition class certification on Plaintiffs' proffer of an administratively feasible way to identify putative class members.

AFFIRMED.

United States Court of Appeals
for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:

- ♦ A material point of fact or law was overlooked in the decision;
- ♦ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
- ♦ An apparent conflict with another decision of the Court was not addressed in the opinion.

- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - ♦ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - ♦ The proceeding involves a question of exceptional importance; or
  - ♦ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).

- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:

- Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
- and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____v._____9th Cir. No.____

The Clerk is requested to tax the following costs against: _____

_____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record	___	____	$____	$____	___	____	$____	$____
Opening Brief	___	____	$____	$____	___	____	$____	$____
Answering Brief	___	____	$____	$____	___	____	$____	$____
Reply Brief	___	____	$____	$____	___	____	$____	$____
Other**	___	____	$____	$____	___	____	$____	$____
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit

Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

_____

(To Be Completed by the Clerk)

Date_____ Costs are taxed in the amount of $____

Clerk of Court

By:_____, Deputy Clerk

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JAN 3 2017
MOLLY C. DWYER,
CLERK
U.S. COURT OF APPEALS

ROBERT BRISENO, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. CONAGRA FOODS, INC., Defendant-Appellant.	No. 15-55727 D.C. No. 2:11-cv-05379-MMM-AGR MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted September 12, 2016
San Francisco, California

Before: W. FLETCHER, CHRISTEN, and FRIEDLAND, Circuit Judges.

Defendant-Appellant ConAgra Foods, Inc. ("ConAgra"), appeals the district court's order certifying eleven statewide damages classes composed of persons who purchased Wesson-brand cooking oils labeled "100% Natural." Plaintiff-Appellee Robert Briseno and other named class representatives (collectively, "Plaintiffs"), argue that the "100% Natural" label is false and misleading because Wesson oils are made from genetically modified organisms ("GMOs"), which they contend are not "natural." As a result, Plaintiffs claim ConAgra has violated state consumer protection statutes, breached express and implied warranties, and been unjustly enriched. We exercise jurisdiction pursuant to 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f), and we affirm.

I

Parties seeking class certification must satisfy the four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy—and at least one of the requirements of Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011). Here, the district court certified the classes under Rule 23(b)(3), which permits class actions in which "questions of law or fact common to class members predominate" over

individual issues and as to which litigation through the class mechanism will be "superior to other available methods for fairly and efficiently adjudicating the controversy"—the so-called predominance and superiority requirements.

ConAgra challenges the district court's determinations as to typicality, predominance, and superiority.[1] Reviewing for abuse of discretion, we conclude that the district court's holdings were not illogical, implausible, or unsupported by the record. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 (9th Cir. 2014).

A

ConAgra argues that Plaintiffs' claims differ from those of absent class members, and are therefore atypical, in two ways.

First, ConAgra contends that although Plaintiffs claim to have actually relied on the "100% Natural" label in deciding whether to purchase Wesson products, the majority of absent class members did not rely on the label. That distinction is irrelevant because the district court held that none of the certified claims require a showing of actual reliance with respect to absent class members, and ConAgra has not challenged that holding.

Second, ConAgra contends that Plaintiffs did not actually rely themselves on the "100% Natural"

[1] We address in a concurrently filed opinion ConAgra's argument that the district court erred by not requiring Plaintiffs to demonstrate an "administratively feasible" way to identify class members.

label.[2] The district court concluded otherwise based on Plaintiffs' declarations. Although ConAgra challenges the credibility of those declarations, the district court's holding was adequately supported by the record.

B

ConAgra next argues that the district court erred because individual issues predominate over common questions with respect to both materiality and damages.

With respect to materiality, ConAgra contends Plaintiffs have not offered evidence that a reasonable consumer would consider the "100% Natural" label material and understand it to mean GMO-free—as they must to prevail on the certified claims. The record contains sufficient evidence to support the district court's contrary conclusion. ConAgra believes that evidence is unpersuasive and argues that its own evidence should have been given greater weight, but the district court did not clearly err in finding otherwise for purposes of class certification. ConAgra may advance those arguments at the merits stages of this litigation, but they do not bear on predominance. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1191 (2013).

With respect to damages, ConAgra argues that Plaintiffs did not proffer a sufficient method for

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[2] To the extent this argument could be construed as challenging Plaintiff Robert Briseno's ability to pursue a claim under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210, in light of state-law standing requirements, that argument was not raised in the district court and is therefore waived.

calculating classwide damages under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Plaintiffs propose to measure the classwide price premium attributable to their theory of liability using two steps: First, Plaintiffs will use hedonic regression analysis to calculate the price premium attributable to the "100% Natural" label; second, they will use conjoint analysis to segregate the portion of that premium attributable to a "no-GMO" understanding of the label. ConAgra challenges the reliability and soundness of combining these two well-established damages models,[3] but it was not an abuse of discretion for the district court to conclude that Plaintiffs' proffered model tracked their theory of liability and was therefore sufficient to survive class certification. *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016).

C

Finally, ConAgra argues that administering eleven statewide classes involving various state-law claims renders class adjudication of this action unmanageable and, therefore, inferior to other litigation methods.

The district court concluded otherwise because many of the state-law claims raise common issues. The district court also observed that the eleven classes could ultimately be severed for separate adjudication if necessary. Moreover, the benefits of

[3] To support its *Comcast* argument, ConAgra cited an out-of-circuit district court decision that, contrary to ConAgra's characterization, in fact explicitly agreed with the district court's conclusion in *this* case that the damages model Plaintiffs offered satisfied *Comcast*.

the class mechanism are best realized in cases like this, where the likely recovery is too small to incentivize individual lawsuits, and the realistic alternative to class litigation will be no adjudication at all. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-91 (9th Cir. 2001). Given these considerations, the district court did not abuse its discretion in holding that Plaintiffs satisfied Rule 23(b)(3)'s superiority requirement.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE CONAGRA FOODS, INC.	CASE NO. CV 11-05379 MMM (AGRx) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

On June 28, 2011, Robert Briseno filed a complaint against ConAgra;[1] between October and December 2011, the court consolidated several cases filed against ConAgra under the caption above.[2] On

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

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

January 12, 2012, plaintiffs filed a First Consolidated Amended Complaint.[3] On February 24, 2012, ConAgra filed a motion to dismiss,[4] which the court granted in part and denied in part on November 15, 2012.[5] On December 19, 2012, plaintiffs filed a Second Consolidated Amended Complaint.[6] On February 20, 2014, they filed a motion seeking an order permitting the withdrawal of several named plaintiffs and the dismissal of their claims;[7] the court granted this motion on May 5, 2014.[8] The same day,

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Conagra Foods, Inc., CV 11-05379 MMM (AGRx); *Christi Toomer v. Conagra Foods, Inc.*, CV 11-06127 MMM (AGRx); *Kelly McFadden v. Conagra Foods, Inc.*, CV 11-06402 MMM (AGRx); *Janeth Ruiz v. Conagra Foods, Inc.*, CV 11-06480 MMM (AGRx); *Brenda Krein v. Conagra Foods, Inc.*, CV 11-07097 MMM (AGRx); *Phyllis Scarpelli, et al. v. Conagra Foods, Inc.*, CV 11-05813 MMM (AGRx); *Michele Andrade v. Conagra Foods, Inc.*, CV 11-09208 MMM (AGRx); and *Lil Marie Virr v. Conagra Foods, Inc.*, CV 11-08421 MMM (AGRx).

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

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

[5] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Docket No. 138 (Nov. 15, 2012).

[6] Second Amended Class Action Complaint ("SAC"), Docket No. 143 (Dec. 19, 2012).

[7] Motion for Order for Allowing Withdrawal and Voluntary Dismissal, Docket No. 190 (Feb. 20, 2014). *See also* Corrected Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Order Allowing Withdrawal and Voluntary Dismissal, Docket No. 191 (Feb. 20, 2014) at 4, 5, 6.

[8] Order Granting Plaintiffs' Motion for Withdrawal and Voluntary Dismissal of Individual Claims, Docket No. 238 (May 2, 2014). Following the court's order, no named plaintiffs

plaintiffs filed a motion for class certification.[9] On June 2, 2014, ConAgra filed a motion to strike the declarations of plaintiffs' experts, Colin B. Weir and Charles M. Benbrook.[10] The next day, plaintiffs filed a motion seeking an order permitting the withdrawal of named plaintiffs Bonnie McDonald and Phyllis Scarpelli and the dismissal of their claims.[11] The court subsequently granted plaintiffs' motion and permitted McDonald and Scarpelli to withdraw as named plaintiffs on July 31, 2014.[12] On August 1, 2014, the court denied plaintiffs' motion for class certification, but granted them leave to file an amended motion for class certification.[13]

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remained who reside in Washington or Wyoming; this required dismissal of the claims asserted by the putative Washington and Wyoming classes. (*Id.*)

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

[10] Motion to Strike Declarations of Colin B. Weir and Charles M. Benbrook, Docket No. 262 (June 2, 2014).

[11] Motion for Order Allowing Withdrawal and Voluntary Dismissal, Docket No. 273 (June 3, 2014). *See also* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Order Allowing Withdrawal and Order of Voluntary Dismissal, Docket No. 273-2 (June 3, 2014).

[12] Order Granting Plaintiffs' Motion for Withdrawal and Voluntary Dismissal of Individual Claims, Docket No. 349 (July 31, 2014). Following the court's order, no named plaintiffs remained who resided in Massachusetts or New Jersey, requiring the dismissal of the claims asserted by the putative Massachusetts and New Jersey classes. (*Id.*)

[13] Order Denying Plaintiffs' Motion for Class Certification; Granting in Part and Denying in Part Defendants' Motion to Strike ("Order"), Docket No. 350 (Aug. 1, 2014).

Plaintiffs did so on September 8, 2014.[14] ConAgra opposed the amended motion on October 6, 2014.[15] The same day, it filed a motion to strike various declarations filed in support of plaintiffs' amended motion.[16] Plaintiffs oppose ConAgra's motion to strike.[17]

I. BACKGROUND

A. Factual Background

Plaintiffs are consumers residing in eleven different states who purchased Wesson Oils between January 2007 and their entry into this case. They allege that from at least June 27, 2007 to the present, ConAgra Foods, Inc. ("ConAgra") deceptively and misleadingly marketed its Wesson brand cooking oils, made from genetically-modified organisms ("GMO"), as "100% Natural." Throughout the proposed class period, every bottle of Wesson Oil carried a front label stating that the product was "100% Natural."[18]

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[14] Notice of Motion and Amended Motion to Certify Class, Docket No. 363 (Sept. 8, 2014). *See also* Memorandum of Points and Authorities in Support of Amended Motion to Certify Class ("Class Cert. Motion"), Docket No. 371 (Sept. 8, 2014).

[15] Memorandum in Opposition to Amended Motion to Certify Class ("Class Cert. Opp."), Docket No. 383 (Oct. 6, 2014).

[16] Notice of Motion and Motion to Strike Declarations of Weir and Howlett in Support of Plaintiffs' Amended Motion for Class Certification ("Motion to Strike"), Docket No. 387 (Oct. 6, 2014).

[17] Opposition Re: Motion to Strike Declarations of Weir and Howlett in Support of Plaintiffs' Amended Motion for Class Certification ("Motion to Strike Opp."), Docket No. 401 (Oct. 27, 2014).

[18] Answer to Amended Complaint, Docket No. 145 (Jan. 16, 2013), ¶¶ 2, 11-31.

Plaintiffs seek to certify eleven statewide classes as follows:

> "All persons who reside in the States of California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, or Texas who have purchased Wesson Oils within the applicable statute of limitations periods established by the laws of their state of residence (the 'Class Period') through the final disposition of this and any and all related actions."[19]

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

- ☐ California: (1) California Consumer Legal Remedies Act, California Civil Code §§ 1750, *et seq*. and California Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq*. and §§ 17500, *et seq*.; (2) California Commercial Code § 2313; California Commercial Code § 2314.
- ☐ Colorado: (1) Colorado Consumer Protection Act, Colorado Revised Statutes §§ 6-1- 101, *et seq*.; (2) Colorado Revised Statutes § 4-2-313; (3) Colorado Revised Statutes § 4-2-314; (4) Unjust Enrichment.
- ☐ Florida: (1) Florida Deceptive and Unfair Trade Practices Act, Florida Statutes Annotated §§ 501.201, *et seq*.; (2) Unjust Enrichment.

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[19] Class Cert. Motion at 2.

- ☐ Illinois: (1) Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Illinois Compiled States §§ 505/1, *et seq*.; (2) Unjust Enrichment.
- ☐ Indiana: (1) Indiana Code § 26-1-2-313; (2) Indiana Code § 26-1-2-314; (3) Unjust Enrichment.
- ☐ Nebraska: (1) Nebraska Consumer Protection Act, Nebraska Revised Statutes §§ 59- 1601, *et seq*.; (2) Nebraska Revised Statutes § 2-313; (3) Nebraska Revised Statutes § 2-314; (4) Unjust Enrichment.
- ☐ New York: (1) New York Consumer Protection Act, New York General Business Law §§ 349, *et seq*.; (2) N.Y. U.C.C. Law § 2-313; (3) Unjust Enrichment.
- ☐ Ohio: (1) Ohio Consumer Sales Practices Act, Ohio Revised Code §§ 1345.01, *et seq*.; (2) Unjust Enrichment.
- ☐ Oregon: (1) Oregon Unfair Trade Practices Act, Oregon Revised Statutes §§ 646.605, *et seq*.; (2) Oregon Revised Statutes § 72-3130; (3) Unjust Enrichment.
- ☐ South Dakota: (1) South Dakota Deceptive Trade Practices and Consumer Protection Law, South Dakota Codified Laws §§ 37 24 1, *et seq*.; (2) S.D. COD. LAWS § 57A-2- 313; (3) South Dakota Codified Laws § 57A-2-314; (4) Unjust Enrichment.
- ☐ Texas: (1) Texas Deceptive Trade Practices - Consumer Protection Act, Texas Business

& Commerce Code §§ 17.41, *et seq*.; (2) Unjust Enrichment.[20]

B. ConAgra's Request for Judicial Notice

ConAgra requests that the court take judicial notice of ten documents and various attached exhibits, each of which has previously been filed in this action, in support of its opposition to plaintiffs' amended motion for class certification.[21] Specifically, ConAgra asks that the court take judicial notice of: (1) the Declaration of Colin B. Weir in Support of Plaintiffs' Motion for Class Certification and for Appointment of Counsel, which plaintiffs filed on May 5, 2014 as Docket No. 243;[22] (2) the Declaration of Raquelle Hunter in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Counsel, which ConAgra filed on June 2, 2014 as Docket No. 266;[23] (3) the Declaration of Dominique M. Hanssens, Ph.D., in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Counsel, with attached appendices and exhibits, which ConAgra

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[20] *See* Notice of Motion and Amended Motion to Certify Class, Docket No. 363 (Sept. 8, 2014) at 4-5.

[21] ConAgra Foods, Inc.'s Amended Request for Judicial Notice in Support of its Opposition to Plaintiffs' Amended Motion for Class Certification ("RJN"), Docket No. 388 (Oct. 6, 2014).

[22] *See* Declaration of Colin B. Weir in Support of Plaintiffs' Motion for Class Certification and for Appointment of Counsel, Docket No. 243 (May 5, 2014).

[23] *See* Declaration of Raquelle Hunter in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Counsel ("Hunter Decl."), Docket No. 266 (June 2, 2014).

filed on June 2, 2014 as Docket No. 267;[24] (4) the Declaration of Keith R. Ugone in Opposition to Plaintiffs' Motion for Class Certification, with attached appendices and exhibits, which ConAgra filed on June 2, 2014 as Docket No. 268;[25] (5) the Declaration of Robert B. Hawk in Opposition to Plaintiffs' Motion for Class Certification, with attached exhibits, which ConAgra filed on June 2, 2014 as Docket No. 269;[26] (6) the Declaration of Stacy R. Hovan in Opposition to Plaintiffs' Motion for Class Certification, with attached exhibits, which ConAgra filed on June 2, 2014 as Docket No. 270;[27] (7) the Declaration of Marcella Thompson in Opposition to Plaintiffs' Motion for Class Certification, which ConAgra filed on June 2, 2014 as Docket No. 271;[28] (8) the Rebuttal Declaration of Colin B. Weir in Support of Plaintiffs' Reply Memorandum of Points and Authorities in Further Support of Plaintiffs' Motion for Class Certification, which plaintiffs filed on June

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[24] *See* Declaration of Dominique M. Hanssens, Ph.D., in Opposition to Plaintiffs' Motion for Class Certification and Appointment of Counsel, Docket No. 267 (June 2, 2014).

[25] *See* Declaration of Keith R. Ugone in Opposition to Plaintiffs' Motion for Class Certification, Docket No. 268 (June 2, 2014).

[26] *See* Declaration of Robert B. Hawk in Opposition to Plaintiffs' Motion for Class Certification, Docket No. 269 (June 2, 2014).

[27] *See* Declaration of Stacy R. Hovan in Opposition to Plaintiffs' Motion for Class Certification, Docket No. 270 (June 2, 2014).

[28] *See* Declaration of Marcella Thompson in Opposition to Plaintiffs' motion for Class Certification, Docket No. 271 (June 2, 2014).

30, 2014 as Docket No. 285;[29] (9) the Declaration of Dr. Elizabeth Howlett, which plaintiffs filed on June 30, 2014 as Docket No. 288;[30] and (10) the court's Order Denying Plaintiffs' Motion for Class Certification, which was entered on August 1, 2014 as Docket No. 350.[31]

It is well established that a court can take judicial notice of its own files and records under Rule 201 of the Federal Rules of Evidence. "Judicial notice is properly taken of public records, such as transcripts, orders, and decisions made by . . . courts or administrative agencies." *See Wayne v. Leal*, No. 07 CV 1605 JM (BLM), 2009 WL 2406299, *4 (S.D. Cal. Aug. 4, 2009); *Molus v. Swan*, No. 05cv452-MMA (WMc), 2009 WL 160937, *2 (S.D. Cal. Jan. 22, 2009) ("Courts also may take judicial notice of their own records," citing *United States v. Author Services*, 804 F.2d 1520, 1523 (9th Cir. 1986)). The court may thus taken judicial notice of the filings and order referenced in ConAgra's request for judicial notice. *See NovelPoster v. Javitch Canfield Group*, No. 13-CV-05186-WHO, 2014 WL 5594969, *4, n. 7 (N.D. Cal. Nov. 3, 2014) ("In conjunction with the motion, defendants requested judicial notice of various documents, including NovelPoster's *ex parte* application for a temporary restraining order in this case and this Court's subsequent order. . . .

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[29] *See* Rebuttal Declaration of Colin B. Weir in Support of Plaintiffs' Reply Memorandum of Points and Authorities in Further Support of Plaintiffs' Motion for Class Certification, Docket No. 285 (June 30, 2014).

[30] *See* Declaration of Dr. Elizabeth Howlett, Docket No. 288 (June 30, 2014).

[31] *See* Order.

Defendants' request for judicial notice of the TRO application and order is GRANTED"); *see also In re Linda Vista Cinemas, L.L.C.*, 442 B.R. 724, 740 n. 7 (Bankr. D. Ariz. 2010) (stating that "[t]he court takes judicial notice of its own records," specifically, a declaration attached to the opposition to a preliminary injunction motion, citing *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980)). Accordingly, the court grants ConAgra's request for judicial notice, "although [ConAgra] [is] advised for future reference that [it] need not seek judicial notice of documents previously filed in the same case." "An accurate citation will suffice." *NovelPoster*, 2014 WL 5594969 at *4 n. 7.

II. DISCUSSION

A. ConAgra's Motion to Strike and Evidentiary Objections

Before addressing the merits of the certification motion, the court must first consider ConAgra's challenges to declarations filed by the named plaintiffs and plaintiffs' experts. ConAgra contends that the expert declarations of Colin B. Weir and Elizabeth Howlett, Ph.D. submitted in support of plaintiffs' amended motion for class certification, as well as the reply declarations of Weir, Howlett, Benjamin M. Benbrook, Ph.D., and Dr. John C. Kozup, should be stricken because they are inadmissible and unreliable.[32] It also asserts that

[32] Motion to Strike at 1-3; Response in Support of Motion to Strike Declarations of Weir and Howlett in Support of Plaintiffs' Amended Motion for Class Certification ("Motion to Strike Reply"), Docket No. 405 (Nov. 3, 2014) at 1-3; *see also* Defendant ConAgra Foods, Inc.'s Evidentiary Objections to Plaintiffs' Evidence, Docket No. 407 (Nov. 3, 2014).

the court should strike the newly filed declarations of the named plaintiffs because each is a "sham" declaration that is immaterial to plaintiffs' amended motion for class certification.[33] Plaintiffs counter that the Weir and Howlett declarations are admissible expert testimony and that the named plaintiffs' new declarations are consistent with their prior deposition testimony.[34]

1. Evidentiary Objections to the Testimony of Plaintiffs' Experts

The court first considers ConAgra's challenges to plaintiffs' experts. While courts in this circuit previously held that expert testimony was admissible in evaluating class certification motions without conducting a rigorous analysis under *Daubert v. Merill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993), the Supreme Court in Dukes expressed "doubt that this [was] so." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011). After *Dukes*, the Ninth Circuit approved analysis under *Daubert* of the admissibility of expert testimony presented in support of or opposition to a motion for class certification. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) ("In its analysis of Costco's motions to strike, the district court correctly applied the evidentiary standard set forth in *Daubert*. . ."). As a result, the court applies that standard to the proffered testimony of the parties' expert witnesses.

Under Rule 702,

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[33] *Id.*

[34] Motion to Strike Opp. at 1-2.

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

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

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

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

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

"In determining whether expert testimony is admissible under Rule 702, the district court must keep in mind [the rule's] broad parameters of reliability, relevancy, and assistance to the trier of fact." *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1134 (9th Cir. 1998) (internal quotation marks omitted); *see also Jinro Am. Inc. v. Secure Invests.,*

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

Inc., 266 F.3d 993, 1004 (9th Cir. 2001) ("Rule 702 is applied consistent with the 'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony" (internal quotation marks omitted)). On a motion for class certification, it is not necessary that expert testimony resolve factual disputes going to the merits of plaintiff's claims; instead, the testimony must be relevant in assessing "whether there was a common pattern and practice that could affect the class as a whole." *Ellis*, 657 F.3d at 983.

a. Plaintiffs' Expert Colin B. Weir

Colin Weir is plaintiffs' economic expert. Weir is Vice President of Economics and Technology, Inc. ("ETI"), a research and consulting firm specializing in economics, statistics, regulation, and public policy. Weir has worked at the firm for eleven years.[36] He holds an MBA from the High Technology program at Northeastern University, and a Bachelors of Arts degree in Business Economics from the College of Wooster.[37] Weir's academic studies included work on hedonic regression analysis and conjoint analysis.[38] His work at ETI involves econometric and statistical analysis, multiple linear regression, statistical sampling, micro and macroeconomic modeling, and other types of economic analyses.[39] Weir has testified as an expert in federal and state courts, and before

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[36] Amended Expert Declaration of Colin B. Weir ("Am. Weir Decl."), Docket No. 367 (Sept. 8, 2014) at 3; Opp. Motion to Strike, Exh. C ("Weir Depo.") at 47:8-12.

[37] *Id.*

[38] *Id.* at 9:20-10:21; 13:13-14:7.

[39] *Id.*, Exh. 1 at 1.

the Federal Communications Commission and state regulatory commissions.[40] He has also consulted on a variety of consumer and wholesale products cases, calculating damages related to household appliances, herbal remedies, HBC beauty products, food products, electronics, and computers.[41]

Weir opines that:

> "[I]t is possible to determine damages, with a reasonable degree of specificity, certainty, and accuracy, attributable to ConAgra's conduct of placing the '100% Natural' claim on the label of every bottle of Wesson Oil by applying the scientifically valid economic methodology of hedonic regression to common, class- wide, aggregate historical retail price and attribute data for Wesson Oil and competing cooking oils to calculate a class wide Price Premium, and then multiplying that Price Premium by the total retail amounts all Class Members paid for Wesson Oil to yield total class-wide damages."[42]

He also opines that it is possible to determine damages attributable to ConAgra's labeling of Wesson Oils as "100% Natural" through the use of a "conjoint analysis survey."[43]

In its August 1 order, the court struck Weir's declaration because he failed to provide a reliable damages model for calculating classwide damages. The court stated:

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[40] Am. Weir Decl. at 3.

[41] *Id.*

[42] *Id.*, ¶ 9.

[43] *Id.*, ¶ 10.

"Here, unlike the experts in *Ralston[v. Mortg. Investors Grp., Inc.*, No. 08-536-JF (PSG), 2011 WL 6002640, *9 (N.D. Cal. Nov. 30, 2011),] or *Hemmings[v. Tidyman's, Inc.*, 285 F.3d 1174 (9th Cir. 2002)], Weir does not provide a damages model that lacks certain variables or functionality. Rather, he provides no damages model at all. Although the methodologies he describes may very well be capable of calculating damages in this action, Weir has made no showing that this is the case. He does not identify any variables he intends to build into the models, nor does he identify any data presently in his possession to which the models can be applied. The court is thus left with only Weir's assurance that he can build a model to calculate damages. Stated differently, his declaration is 'so incomplete as to be inadmissible as irrelevant.' *Hemmings*, 285 F.3d at 1188 (quoting *Bazemore[v. Friday]*, 478 U.S. [385,] 400 n. 10 [1986]). *See Building Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1154 (9th Cir. 2012) (district court did not abuse its discretion in rejecting the declaration of an expert who 'offered unsupported assertions' with 'no data forming the basis for [the expert's] assumptions or conclusions'); *see id.* ('The party offering expert testimony has the burden of establishing its admissibility'). Accordingly, the court finds that Weir's declaration does not satisfy the requirements of Rule 702. The court therefore grants ConAgra's motion to strike Weir's

> declaration, and will not consider his testimony in deciding the certification motion."[44]

ConAgra argues that Weir's testimony continues to lack a reliable factual foundation and thus should be stricken by the court and not considered in deciding plaintiffs' amended motion for class certification.[45] It maintains that Weir's declaration is flawed in the same ways that his original declaration was defective. Specifically, ConAgra asserts that "Weir fails to identify any data in his possession to which the [hedonic regression] model can be applied or any variables that he intends to build into the model."[46] ConAgra contends that Weir's failure to identify the data that would form the basis for his regression analysis leaves the court with nothing but "assurances that are based on incomplete data, [that are] vague assertions regarding variables and likely outcomes, and [that] are, ultimately false."[47] The court does not agree.

As ConAgra notes,[48] the court previously rejected Weir's original declaration and proposed regression methodology because he failed to identify, *inter alia*, the variables he intended to build into the models and the data he possessed to which the models could be applied. Weir's declaration in support of plaintiffs' amended class certification remedies these shortcomings.

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[44] Order at 13-14.

[45] Motion to Strike at 7-9.

[46] *Id.* at 8.

[47] *Id.*

[48] *Id.* at 7-9.

Weir has prepared a preliminary regression model, in which the dependent variable of the proposed methodology being measured is the product's price/price premium.[49] The model employs a number of independent variables as potential explanatory variables impacting price.[50] Weir states that his preliminary hedonic regression of the price of Wesson Oil products "analyze[s] twenty [ ] product attributes," including the brand of oil, the "natural" claim at issue in this litigation, other product label claims, oil variety (e.g., canola, corn, blend, or vegetable), the size of the bottle of oil, promotional prices, and time period.[51]

Weir used data from various spreadsheets and reports reflecting historical price, cost, profit and attribute information for Wesson Oils and competitor brands.[52] He obtained this data from twelve spreadsheets produced by ConAgra reflecting (1) internal data related to Wesson Oil products only, and (2) "scanner data" collected by market research companies such as Information Resources, Inc. ("IRI") and Nielsen, which registers, in real time, price, quantity, and other information about products as they are being purchased by consumers.[53] Weir also received three spreadsheets directly from IRI, which reflect oil sales data from 2009 to mid-2014 on an

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[49] Am. Weir Decl., ¶¶ 65-70, 105, Exh. 3.

[50] Motion to Strike Opp. at 6-7; *see* Am. Weir Decl., ¶¶ 100-105.

[51] Am. Weir Decl., ¶¶ 102-103, Exh. 3.

[52] *Id*., ¶¶ 37-48.

[53] *Id*., ¶¶ 34-35.

national and state basis.[54] While Weir acknowledges that this is all the price, cost, and attribute data he has received at this point, the data "affirm[s] [his] understanding that more geographically and temporally specific" can be obtained, and can be used for "more refined regressions."[55]

ConAgra contends Weir has failed to show that the data required to perform a hedonic regression analysis exists or is obtainable; it asserts that the data it provided is not useful in performing the analysis, and becomes useful only after he has isolated the appropriate price premium.[56] It also argues that "Weir's attribute-related data (1) is incomplete and does not accurately reflect the attributes of [the] products [he] chose[ ] for analysis . . . , (2) does not control for historical label claims and label changes, and (3) does not control for other variables that have been shown to affect prices (e.g., geographic locations, sales channels, and retailers)."[57] As support for its assertion that Weir has not shown that he can calculate a price premium associated with 100% Natural claim, ConAgra cites the opinions of its expert, Keith R. Ugone, Ph.D.[58] Dr. Ugone concludes that Weir's proposed methodology for calculating classwide damages is flawed in several

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[54] *Id.*, ¶ 49.

[55] *Id.*, ¶ 50.

[56] Motion to Strike at 9.

[57] *Id.*

[58] *See* Reply Declaration of Keith R. Ugone in Support of Defendant's Opposition to Plaintiffs' Amended Motion for Class Certification ("Reply Ugone Decl."), Docket No. 385 (Oct. 6, 2014).

respects; most notably, Ugone asserts that Weir's proposed regression analysis cannot isolate the price premium attributable to the purportedly unlawful and misleading conduct plaintiffs allege here, i.e., leading consumers to believe that Wesson Oils do not contain GMOs when, in fact, they do.[59] He also contends that Weir improperly calculates damages on a nationwide basis, rather than on a state-by-state basis consistent with the subclasses proposed for each state, and that Weir inappropriately performed an "expansion" of his data set in an attempt to reflect the number of transactions he believed took place.[60]

The court is not persuaded that any of Ugone's criticisms indicate that Weir's methodology is unreliable or that he cannot offer an opinion in support of plaintiffs' amended motion for class certification. As respects Ugone's criticism that the methodology does not satisfy the requirement articulated in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) – i.e., that damages be capable of measurement on a classwide basis – this does not affect the *admissibility* of Weir's opinions.

Admissibility turns on whether Weir's methodology is sufficiently reliable; whether it satisfies *Comcast* and shows that a class should be certified is another question altogether – one which the court will address *infra* in conducting a Rule 23(b)(3) predominance analysis.

Ugone's remaining criticisms are similarly unavailing. While it is true that a damages model

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[59] Reply Ugone Decl., ¶ 9.

[60] *Id.*

likely will have to calculate the alleged price premium for smaller geographic areas since plaintiffs seek certification of eleven state subclasses, and, as both Weir and Ugone recognize, prices vary from one state to another, Weir's failure to perform a state-by-state regression analysis at the class certification stage does not compel the conclusion that his methodology is unreliable, and that his opinion should be stricken. Weir states that there is "more geographically and temporally specific information" available from IRI and Nielsen that he was not able to obtain prior to submitting his declaration in support of the certification motion.[61] He reports that the same preliminary regression analysis described in his declaration can be performed using more specific geographical and temporal data. While Ugone asserts that "significant price variation exists across geographic areas . . . which could influence a price premium analysis . . . ,"[62] and that Weir may not "obtain[ ] the same claimed positive, significant [price premium] estimates [when he conducts a regression analysis on a statewide basis], [63] this suggests only that Weir's testimony may not be helpful to plaintiffs, not that his methodology is unreliable. Thus, the fact that Weir has not yet conducted a hedonic regression analysis with respect to each of plaintiffs' proposed state classes does not render his methodology unreliable, particularly given that he has identified the information he is attempting to obtain that will permit him to conduct

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[61] Am. Weir Decl., ¶ 50. 44(b).

[62] Reply Ugone Decl., ¶ 9.

[63] *Id.*, ¶44(b)

such an analysis; that he has stated the state by state analysis will be conducted in the same manner as his nationwide analysis; and that he has explained why he is not in possession of the information needed to complete the analysis at this time.[64]

ConAgra also asserts that Weir expanded the data set so that he could opine – erroneously – that his results are statistically significant when they are not.[65] In reply, however, Weir notes that economists regularly use data expansion when performing hedonic regression.[66] More importantly, Weir asserts that "expansion of the data and analytic weights will produce an identical coefficient in the regression," i.e., the same coefficient used to measure the price premium attributable to the "100% Natural" claim.[67] Weir's reply declaration assuages the concerns raised in Ugone's reply declaration. The court therefore concludes that Weir's expansion of the data set does not undercut the reliability of his methodology. To the extent the parties' experts disagree on this point, the court concludes that the disagreements go to the weight of the results produced by Weir's regression methodology, not to its reliability. *See, e.g.*, *Apple iPod iTunes Antitrust Litig.*, No. 05-CV-0037 YGR, 2014 WL 4809288, *5-6 (N.D. Cal. Sept. 26, 2014) ("Finally, the Court rejects Apple's argument that the analysis predicts a constant, immediate overcharge that Apple claims is not consistent with the notion of a gradual lock-in over time. Apple purports to

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[64] Am. Weir Decl., ¶ 50.

[65] Reply Ugone Decl., ¶ 9(c); *see also id.*, ¶¶ 66-68.

[66] Reply Weir Decl., ¶¶ 27-28.

[67] *Id.*, ¶ 28.

demonstrate that Noll's own admissions 'are irreconcilable with the single, unchanging overcharge amount predicted by his damages model.' That argument ultimately is one of weight, not evidence of the unreliability of the regression analyses themselves"); *Edwards v. National Milk Producers Federation*, No. C 11-04766 JSW, 2014 WL 4643639, *6 (N.D. Cal. Sept. 16, 2014) ("Upon review of the evidence and Defendants' arguments regarding Dr. Connor's expert reports, the Court finds that any failure to consider relevant factors goes to the weight of the evidence, as opposed to admissibility"). For all these reasons, the court concludes that Weir's methodology is sufficiently reliable.[68] ConAgra's motion to strike his declaration is therefore denied.[69]

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[68] Weir sets forth a second methodology in his amended declaration; specifically, he proposes that conjoint analysis be used to calculate the price premium associated with ConAgra's use of the purportedly misleading "100% Natural" label. (*See* Am. Weir Decl., ¶¶ 110-120.) Plaintiffs do not rely on Weir's conjoint analysis, however. Instead, they rely solely on the amended declaration of Dr. Howlett, who also proposes a conjoint analysis. (*See* Class Cert. Motion at 4, 64-66 (citing Howlett's amended declaration and discussing her conjoint analysis).) Because the plaintiffs do not rely on Weir's proposed conjoint, the court need not address whether it is sufficiently reliable to consider it in deciding the amended certification motion.

[69] Ugone attacks Weir's regression methodology on several other bases in his reply declaration. He contends that the regression model cannot measure a classwide price premium tied to plaintiffs' theory of liability because, *inter alia*, the product data Weir uses is incomplete and does not accurately reflect the "natural" claims ConAgra has made regarding Wesson Oils and competitor products (Reply Ugone Decl. at 24-31); the data does not accurately reflect the classes plaintiffs seek to certify (*id.* at 32); and the single price premium Weir

b. Plaintiffs' Expert: Elizabeth Howlett, Ph.D.

ConAgra also moves to strike the expert declaration of Elizabeth Howlett, Ph.D.[70] Specifically, it to exclude: (1) Howlett's opinions concerning the Kozup survey, as well as the underlying survey

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calculates does not take into account the different types of cooking oil, the length of time over which the price premium purportedly existed and price differentials during that period, and promotional pricing, making it impossible for Weir to calculate a price premium on a classwide basis. (*Id*. at 36-43.) As respects Ugone's first criticism concerning "inaccurate data," Weir proffers a reply declaration that why the criticisms are misplaced; Weir states that he used Nielsen and IRI data, which Ugone recognizes as reliable and sufficient to support a hedonic regression analysis. (Reply Weir Decl., ¶¶ 33-35.) To the extent any data was omitted from the Nielsen and IRI data used (*See* Reply Ugone Decl., ¶¶ 80-82), Weir notes that the purportedly omitted data represents an infinitesimally small variation in the premium that was calculated and does not affect the statistical significance of his results. (*See* Reply Weir Decl., ¶¶ 39-42.) Regarding Ugone's second criticism, Weir has testified that his hedonic regression methodology can be refined to specific retail channels or geographic areas; accordingly, the fact that Weir used national data, rather than state-specific data, does not render his methodology unreliable. (*See* Reply Weir Decl., ¶¶ 36-38.) Finally, Ugone's criticisms of Weir's ability to calculate price premiums across different attributes unpersuasive. As the court has noted, Weir has demonstrated through his preliminary regression analysis that his hedonic regression can control for various attributes and can be refined and narrowed to focus only on particular product attributes and to control for "time," "sales channel," and "geography." (Reply Weir Decl., ¶¶ 36-38.)

[70] Motion to Strike at 10.

itself;[71] and (2) Howlett's opinions related to her proposed conjoint analysis methodology.[72]

(1) Kozup Survey

ConAgra first seeks to strike the Kozup survey, and Howlett's opinions concerning it, asserting that it is unreliable and inadmissible, and does not provide a sufficient foundation upon which Howlett can base expert opinions.[73] ConAgra cites several admissions by Howlett during her deposition that it contends render the survey, and her opinions, inadmissible: (1) Howlett admitted that the description of GMOs used in the Kozup survey "alarmed and confused survey respondents"; (2) she admitted that the survey sample was too small to provide accurate results for different states' populations; and (3) she admitted that the non-response rate was high and likely made the results unreliable.[74] Plaintiffs respond that any deficiencies in the survey affect its weight, not its admissibility.[75]

The Ninth Circuit has held that typically "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility." *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n. 8 (9th Cir. 1997) ("However, 'as long as they are conducted according to accepted principles,' survey evidence should ordinarily be found

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[71] *Id.* at 10-15.

[72] *Id.* at 15-19.

[73] *Id.* at 10.

[74] *Id.*

[75] Motion to Strike Opp. at 10.

sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value," quoting *Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992)); *id.* at 1143 (the fact that a survey that was conducted only in the southern portion of the state and asked leading questions went to the weight of the evidence, not the admissibility of the survey); *see also Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001) ("Treatment of surveys is a two-step process. First, is the survey admissible? That is, is there a proper foundation for admissibility, and is it relevant and conducted according to accepted principles? This threshold question may be determined by the judge. Once the survey is admitted, however, follow-on issues of methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility. These are issues for a jury or, in a bench trial, the judge"); *Alcantar v. Hobart Serv.*, No. ED CV 11–1600 PSG (SPx), 2013 WL 156530, *4 (C.D. Cal. Jan. 15, 2013) ("[A]ny problems with the response rate affect the weight, and not the admissibility of the study"); *Microsoft Corp. v. Motorola Inc.*, 904 F.Supp.2d 1109, 1120 (W.D. Wash. 2012) (criticisms of a conjoint analysis concerned "issues of methodology, survey design, reliability, and critique of conclusions, and therefore [went] to the weight of the survey rather than admissibility"); *Harris v. Vector Marketing Corp.*, 753 F.Supp.2d 996, 1001-02 (N.D. Cal. 2010) ("[Plaintiff] criticizes the content of the survey conducted and prepared by

[defendant's expert] as well as the response rate to the survey. The problem for [Plaintiff] is that, as she herself admits in her brief, even challenges to defects in methodology normally affect the weight to be accorded the survey and not its admissibility"); *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F.Supp. 1283, 1296 (N.D. Cal. 1991) (holding that the alleged under-inclusiveness of a survey in a copyright infringement action affected "the weight of the survey, not its admissibility"), aff'd, 964 F.2d 965 (9th Cir. 1992), cert. denied, 507 U.S. 985 (1993).

Recognizing that most challenges to a survey such as Kozup's go to its weight rather than its admissibility, ConAgra maintains that Howlett's admissions show that the underlying methodology used to conduct the survey is flawed and unreliable, and that it thus does not satisfy *Daubert*.[76] The court agrees. The Ninth Circuit has held that before a survey can be admitted it must: (1) be "conducted according to accepted principles"; and (2) be "relevant" to the issues in the case. *Fortune Dynamic, Inc. Victoria's Secret Stores Brand Mgmt.*, 618 F.3d 1025, 1036 (9th Cir. 2010); *see also Citizens Fin. Group, Inc. v. Citizens Nat'l Bank*, 383 F.3d 110, 121 (3d Cir. 2004) (excluding survey results because the "methodology was fundamentally flawed," and rejecting a contention that flawed methodology went to the weight, rather than the admissibility, of the survey).

[76] Motion to Strike Reply at 14-15.

Howlett did not participate in designing or administering the Kozup survey.[77] She asserts, in conclusory fashion, however, that the "[s]urvey adheres to the guidelines and procedures [in the Reference Guide on Survey Research published by the American Bar Foundation] in order to ensure that this research can help inform the [c]ourt about important consumer beliefs and behaviors with regards to the '100% Natural' claim on the labels of Wesson Oils."[78] Howlett provides no specifics as to why she reached this conclusion regarding the survey's design and administration and does not respond substantively to ConAgra's critiques of the survey methodology.

ConAgra charges that the language the survey uses to describe GMOs – e.g., "bacteria," "virus," or "toxic to certain insects"[79] – may have alarmed and confused survey respondents, skewing the results. The court is not convinced, as ConAgra argues, that *Daubert* compels the use of definitions provided by the FDA or the USDA to ensure reliability. ConAgra cites the fact that 51 percent of respondents responded incorrectly to a "manipulation" question after reviewing this description of the GMO process, however; the manipulation question was designed to ensure that survey respondents understood the definition of the GMO process. Despite Howlett's

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[77] Amended Declaration of Dr. Elizabeth Howlett in Support of Plaintiffs' Amended Motion for Class Certification ("Am. Howlett Decl."), Docket No. 368 (Sept. 8, 2014), ¶ 67 ("I did not participate in the design or administration of the survey").

[78] *Id.*, ¶ 70.

[79] Motion to Strike at 11-12.

assertion that the survey's description of the GMO process is accurate based on her work as an FDA consultant,[80] she concedes that the manipulation question indicates some misunderstanding among the survey respondents.[81] Given this fact, and the fact that she did not participate in designing or administering the survey, the court cannot credit her conclusory assertion that the methodology of the survey is reliable.

ConAgra also argues that the survey's sample size is too small to provide valid and reliable evidence about the studied population. Courts regularly find that concerns that a survey's sample size is too small

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[80] *See* Am. Howlett Decl., ¶ 78(a) ("To avoid uncertainty or confusion about terms such as 'GMOs,' 'genetically modified ingredients,' 'bioengineering,' or 'biotechnology,' rather than using those terms, Plaintiffs' survey provided descriptions of certain aspects of the genetic modification process. Using descriptions of the bioengineering process rather than 'GMOs' or similar terms avoided the obvious confounding of results due to confusion inherent in the terms. Furthermore, the descriptions used in the survey are consistent with my understanding of the bioengineering processes based on my extensive work in the area of food labeling, including my work as a consultant to the FDA. The descriptions of bioengineering processes used in the questions are, in my expert opinion, factual, straightforward, and understandable to the average customer").

[81] *See* Declaration of Laura Coombe in Opposition to Amended Motion to Certify Class ("Coombe Decl."), Docket No. 386 (Oct. 6, 2014), Exh. B (Deposition of Dr. Elizabeth Howlett ("Howlett Depo.")) at 191:7-16 ("Q. So because of the 51 respondents it leads you to believe that the question was unclear in some way? A. I– I– yes, I agree that there are some, it's clear, that there are at least 11 consumers. Q. 51, not 11? A. Well, the strongly disagree, the people that very strongly disagree. I think it's clear that there's a little bit of misunderstanding").

or unrepresentative do not preclude its admission, but go to the weight to be accorded the survey results. *See Southland Sod Farms*, 108 F.3d at 1143 n. 8 ("However, 'as long as they are conducted according to accepted principles,' survey evidence should ordinarily be found sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value," quoting *Gallo Winery*, 967 F.2d at 1292); *id.* at 1143 (the fact that a survey was conducted only in the southern portion of the state and that it asked leading questions went to the weight of the evidence, not the admissibility of the survey); *Lewis Galoob Toys, Inc.*, 780 F.Supp. at 1296 (holding that the alleged under-inclusiveness of a survey in a copyright infringement action affected "the weight of the survey, not its admissibility"). Courts generally reach this conclusion once they are satisfied that the survey has been "conducted according to accepted principles," however. *Fortune Dynamic, Inc.*, 618 F.3d at 1036. Howlett concedes that she does not know the sampling method used in the Kozup survey, and additionally that the sample does not approximate the relevant characteristics of the population being surveyed.[82]

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[82] *Id.* at 161:20-162:5 ("Q. With probability sampling, you'd agree that the results from probability sampling are to be extrapolated out for the population, not for a larger population, correct? A. That's correct. Q. That's not what was done here, correct? . . . Q. Is that what's done here? A. No"); *id.* at 144:5-8 ("Q. Are you aware of a term that's used to describe the sampling method that was used in plaintiffs' survey? A. No").

Howlett further acknowledges that the non-responsive rate on the Kozup survey was 95%, which is even higher than the 92% non-responsive rate that formed the basis for his opinion that the Hanssen survey was unreliable.[83] Although the court previously noted that a survey's non-responsive rate generally goes to the weight of the results rather than their admissibility,[84] given Howlett's inability to validate that the survey was reliably designed and administered, such concerns reasonably suggest that the survey's methodology may be flawed.

Finally, ConAgra notes that 53 of the survey respondents failed an "attention check" question designed to ensure the validity of the results.[85] Howlett testified that the responses of individuals who failed the "attention check" question should have been excluded from the survey; she was unsure, however, whether they had been.[86]

In sum, Howlett's testimony demonstrates that she is not sufficiently familiar with the methodology used to design and administer the survey to opine that it was "conducted according to accepted principles" and reliable. *See In re TMI Litigation Cases Consolidated*

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[83] *Id.* at 200:10-16 ("Q. In paragraph 62 of your declaration, the June 30 Exhibit A, you describe Han[ssen's] survey non-response rate of 92 percent as quite high. Yours was 95 percent, right? A. It was. Q. Would it be very high? Higher? A. Quite high").

[84] Order at 29-30.

[85] Motion to Strike at 14-15.

[86] Coombe Decl., Howlett Depo. at 177:9-13 ("A. This report. I'm– I'm– I'm just looking back through if – you know, I don't know these – I don't know if these items were – if these respondents were dropped or not now that I look at this").

II, 922 F.Supp. 1038, 1046-48 (M.D. Pa. 1996) (excluding as unreliable an epidemiological analysis in which the epidemiologist did not include a description of study design and at his deposition acknowledged that he had not participated in conducting the study).[87]

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[87] In her reply declaration discussed *infra*, Howlett offers additional opinions concerning, *inter alia*, the Kozup survey methodology and validity. Specifically, Howlett addresses the attention check question, the survey's manipulation check, and the sampling methodology Kozup employed. ConAgra challenged each of these aspects of the survey in its motion to strike Howlett's amended declaration and the Kozup survey. (Reply Declaration of Dr. Elizabeth Howlett in Support of Amended Motion for Class Certification ("Reply Howlett Decl."), Docket No. 396 (Oct. 27, 2014) at 3-9.) Howlett asserts that after a post-deposition review of the survey and "obtain[ing] additional information from [ ] Dr. John C. Kozup," she "stand[s] by and reaffirm[s] [her] conclusions and opinions set forth in [her] Amended Declaration." (*Id*., ¶¶ 5-6.) She first responds to ConAgra's contention that the words used to describe the genetic engineering process were inflammatory, asserting that the definition used is accurate. (*Id*., ¶¶ 7-20.) This conclusion is consistent with her amended declaration, where Howlett stated that the definition was accurate based on her work for the FDA. (*See* Am. Howlett Decl., ¶ 78(a).)

Howlett also responds substantively to ConAgra's critique of the survey methodology, which affects its admissibility. (*See* Reply Howlett Decl. at 7.) Although Howlett defends the survey's attention check question, manipulation check question, and sampling methodology, her statements do not, in the court's view, demonstrate that the survey is valid and admissible. Each of Howlett's statements is based on a post-deposition conversation with Kozup and his opinions concerning the validity of the survey. (*See id.*, ¶ 26 ("Following my deposition, I contacted Dr. Kozup to ask him about the specific issues that ConAgra's counsel raised during my deposition, and he provided me with responses, which he is also submitting to the Court

(2) Conjoint Analysis

ConAgra next seeks to exclude Howlett's opinions on the basis that she is not qualified to offer testimony concerning the conjoint analysis she states can be used to calculate damages.[88] ConAgra contends that Howlett lacks relevant training and experience to opine on conjoint analysis.[89] It notes that Howlett has published only one peer-reviewed article concerning conjoint analysis, which appeared in the 1990's. It asserts she has never been qualified by any court to testify as an expert on conjoint analysis, has never performed a conjoint analysis to determine or assign a price premium for a particular feature of a product, and is not aware of any conjoint

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through his own declaration. I have reviewed Kozup's soon to be filed declaration, and based on that review and as explained below, I believe his explanations clarify the issues, and indicate that the attention check, manipulation check, and sampling methodology was appropriate").) As discussed *infra*, plaintiffs failed to designate Kozup as an expert witness for purposes of the amended motion for class certification. Plaintiffs' failure to advise ConAgra that they would rely on Kozup's testimony gave ConAgra no opportunity to test his opinions or explanations of the survey methodology, with the result that plaintiffs cannot now rely on Kozup's opinions to show that the survey is reliable. Howlett defends the reliability of the survey on the basis that Kozup believes the methodology is sound. (*See id.*, ¶ 26 ("[H]is explanations clarify the issues, and indicate that the attention check, manipulation check, and sampling methodology was appropriate").) She does not offer opinions based on her own review and analysis of the methodology. As a consequence, and because the court concludes *infra* that plaintiffs cannot rely on Kozup's opinions, Howlett's reply declaration does not change the court's view that the survey must be stricken.

[88] *Id.* at 15-19.

[89] *Id.* at 15-16.

analysis that has been used to estimate a fair price premium.[90]

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

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

Howlett's academic training and practical experience qualify her to testify to the calculation of damages using a conjoint analysis. She holds a Ph.D.

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[90] *Id.*

from Duke University in Marketing, with a focus on Behavioral Decision Research and Theory; her coursework involved conjoint analysis.[91] Howlett has also taught conjoint analysis extensively at the undergraduate and graduate levels, and has conducted more than thirty studies using conjoint analysis.[92] She serves on the editorial review board of the *Journal of Consumer Affairs and the Journal of Public Policy & Marketing*, both of which extensively cover conjoint analysis techniques. Finally, she has been retained as an expert on conjoint analysis in two cases in this district – *Forcellati v. Hyland's, Inc.*, CV 12-1983 GHK (MRWx), and *Fagan v. Neutrogena Corp.*, CV 13-01316 SVW (OPx).[93] Her combination of educational training and professional experience suffices to qualify her under Rule 702.

ConAgra next argues that Howlett's testimony lacks a reliable factual foundation because she "has [not previously] combined the results of a hedonic regression analysis and a conjoint analysis . . . , and is unaware" that "anyone else in any peer-reviewed article . . . has ever [done so] . . . to assign a price premium to a sub-feature."[94] ConAgra contends Howlett's conjoint analysis is unreliable because: (1) she admits that "hedonic regression is 'over her head,'" but accepts Weir's analysis without question; (2) she identifies only six attributes to include in the conjoint analysis, but does not explain how she selected these

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[91] Am. Howlett Decl., ¶¶ 10, 19.

[92] *Id.*, ¶ 19.

[93] *Id.*

[94] Motion to Strike at 16-19.

six; and (3) she proposes a novel and unsupported method of conducting a conjoint analysis.[95]

Plaintiffs counter that ConAgra's criticisms of Howlett's proposed conjoint analysis go to the weight, but not the admissibility, of her opinions.[96] They assert that ConAgra's criticism of Weir's hedonic regression analysis does not impact Howlett's methodology because conjoint analysis occurs independent of hedonic regression; Howlett's conjoint analysis assesses the percentage of the "100% Natural" claim that is attributable to the absence of GMOs as opposed to other "non-natural" aspects of the Wesson Oils. This percentage can then be multiplied against the price premium associated with the "100% Natural" calculated by Weir.[97] Plaintiffs also dispute ConAgra's claim that Howlett has not fully designed the proposed conjoint analysis, noting that she describes at length the procedures and rationale supporting her methodology.[98]

ConAgra's arguments are unavailing. As an initial matter, the court has rejected ConAgra's challenges to Weir's methodology. More fundamentally, as plaintiffs note, Howlett's conjoint analysis will be used to calculate a *percentage* of the price premium attributable to the "100% Natural" label that reflects consumers' belief it means the product contains no GMOs.[99] Even if Weir's methodology were unreliable,

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[95] *Id.*

[96] Motion to Strike Opp. at 14-15.

[97] *Id.* at 15.

[98] *Id.*

[99] *Id.*

this would not make Howlett's methodology unreliable as well; at most, it would affect the accuracy of the damages calculation reached by combining the results of hedonic regression and conjoint analysis. Contrary to ConAgra's suggestion, moreover, Howlett does explain why she chose to limit her analysis to six attributes and why she chose the attributes she did.[100] Finally, the fact that conjoint analysis has not been used to isolate the exact attribute for which Howlett uses it here does not automatically render her methodology and conclusions unreliable. It is Howlett's experience with conjoint analysis and the details of her proposed methodology that determine reliability. Having considered these factors, the court concludes that Howlett's thorough explanation of her methodology and her background in performing similar conjoint analyses suffice to satisfy *Daubert* and Rule 702. Accordingly, ConAgra's motion to strike Howlett's testimony concerning her conjoint analysis is denied.

2. Evidentiary Objections to the Reply Declarations of Plaintiffs' Experts

Plaintiffs submitted reply declarations from their experts Weir, Howlett, Benbrook, and Kozup in response to ConAgra's opposition to plaintiffs' amended certification motion and ConAgra's motion to strike.[101] ConAgra contends each declaration

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[100] *See* Am. Howlett Decl., ¶¶ 109-121.

[101] *See* Reply Declaration of Colin B. Weir in Support of Amended Motion for Class Certification ("Reply Weir Decl."), Docket No. 394 (Oct. 27, 2014); Reply Declaration of Charles M. Benbrook, Ph.D. in Support of Amended Motion for Class Certification ("Reply Benbrook Decl."), Docket No. 395 (Oct. 27, 2014); Reply Declaration of Dr. Elizabeth Howlett in Support of

contains improper new evidence, argument, and opinion raised for the first time in reply and should not be considered by the court.[102]

In general, a court will not consider evidence submitted for the first time in reply without giving the opposing party an opportunity to respond. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (the district court should not consider new evidence presented in a reply without giving the non-movant an opportunity to respond); *see Green v. Baca*, 219 F.R.D. 485, 487 n. 1 (C.D. Cal. 2003) (exercising discretion to consider evidence presented in reply but affording plaintiff an opportunity to depose a key declarant). Evidence submitted in direct response to evidence raised in the opposition, however, is not "new." *Edwards v. Toys "'R' US*, 527 F.Supp.2d 1197, 1205 n. 31 (C.D. Cal. 2007) ("Evidence is not 'new,' however, if it is submitted in direct response to proof adduced in opposition to a motion"); *see Terrell v. Contra Costa County*, 232 Fed. Appx. 626, 629 n. 2 (9th Cir. Apr. 16, 2007) (Unpub. Disp.) (evidence adduced in reply was not new where "[t]he Reply Brief addressed the same set of facts supplied in Terrell's opposition to the motion but provides the full context to Terrell's selected recitation of the facts").

Amended Motion for Class Certification ("Reply Howlett Decl."), Docket No. 396 (Oct. 27, 2014); Reply Declaration of Dr. John C. Kozup in Support of Amended Motion for Class Certification ("Reply Kozup Decl."), Docket No. 400 (Oct. 27, 2014).

[102] Motion to Strike Reply at 19-24.

a. Weir Reply Declaration

ConAgra seeks to strike paragraphs 2-8, 10-11, 13-60, and 64-72 of Weir's reply declaration because "Weir goes far beyond his original opinions, attempting to lend support to Dr. Howlett's methods."[103] The court cannot agree with ConAgra's contention that each paragraph identified in the reply supporting their motion to strike and in their evidentiary objections[104] constitutes "new evidence" or opinions not directly responsive to the arguments in ConAgra's opposition. Paragraphs 2 through 8 provide a summary of Dr. Ugone's criticisms of Weir's amended declaration and his regression methodology, and Weir's responses to each.[105] The information in these paragraphs is directly responsive to Dr. Ugone's critique and ConAgra's arguments and is thus properly submitted in reply.[106]

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[103] *Id*.

[104] Evidentiary Objections in Opposition to Plaintiffs' Declarations in Support of Reply in Support of Plaintiffs' Amended Motion for Class Certification, Docket No. 407 (Nov. 3, 2014).

[105] *See* Reply Weir Decl., ¶¶ 2-8.

[106] There is only one reference made to Dr. Howlett's declaration and methodology in these paragraphs, but Weir provides no substantive opinion regarding either her declaration or methodology. (*See* Reply Weir Decl., ¶ 4 ("Dr. Keith R. Ugone filed a reply declaration criticizing certain aspects of my Amended Declaration as well as the Amended Declaration of Dr. Elizabeth Howlett and the survey of Dr. John C. Kozup. Also on October 6, 2014, ConAgra filed a Motion to Strike Evidence, including my Amended Declaration and Dr. Howlett's declaration on the ground that they fail to meet the standards for admissibility of expert opinions set forth in Federal Rule of Evidence 702 and *Daubert*").) Because Weir offers no new

Similarly, paragraphs 10 and 11 of the Weir reply declaration do not offer new evidence or opinion; rather, they reiterate Weir's "opinion that, if Plaintiffs are correct as to their theory of liability – that it was a violation of law for ConAgra to have placed the '100% Natural' claim on the label of each bottle of Wesson Oil – then the total (i.e. Class-wide) economic harm suffered by Plaintiffs and all other members of the proposed Class is the amount of additional money they paid for Wesson Oil because of the presence of the '100% Natural' claim on the label of every bottle of Wesson Oil they purchased."[107] Because this is not new argument or opinion, and is directly responsive to ConAgra's opposition, the court declines to strike paragraphs 10 and 11 of Weir's reply declaration.

The court also finds unpersuasive ConAgra's assertion that paragraphs 13 through 49 of Weir's reply declaration should be stricken. The information in these paragraphs is *directly responsive* to Dr. Ugone's criticisms of Weir's hedonic regression analysis – indeed, as can be seen from the headings Weir uses,[108] his reply declaration is structured to

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evidence or opinion in this paragraph, even though it references Dr. Howlett's declaration and the Kozup survey, the court refuses to strike this paragraph.

[107] *See id.*, ¶ 10; *see also id.*, ¶ 11 ("In his recent deposition, Defendant's expert Dr. Ugone appears to agree: 'A. The – so, for example, I don't know if I got a picture here or not. I don't have one here. But my understanding is that the claim in dispute is the natural claim and my understanding is that that claim was on the product throughout the class period'").

[108] *See id.*, ¶¶ 18-49 (separating opinions and responses under the following headings: "cross-sectional data is appropriate for use in this litigation"; "Dr. Ugone's technical

respond to *each* criticism Ugone makes. The court thus declines to strike the paragraphs.

The remaining portions of the Weir reply declaration that ConAgra seeks to strike – paragraphs 50-60 and 64-72 – are a closer question. As ConAgra notes, Weir proffers opinions concerning the reliability of Howlett's conjoint analysis, and thus does more than respond to ConAgra's criticism of his methodology and opinions. As the court noted in the first class certification order, however, and as ConAgra is aware, Weir was designated as an expert *both* with respect to hedonic regression analysis and conjoint analysis.[109] Because Weir offers opinions concerning the reliability of Howlett's conjoint analysis that respond directly to ConAgra's criticisms of her methodology, his reply declaration is appropriate. ConAgra cites no authority indicating that an expert who has been designated to testify on

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criticisms of the preliminary results"; "The use of national data and CAG31947"; "The use of expansion in the dataset"; "The accuracy and usefulness of Nielsen/ IRI data"; "Variations such as retail channel, geography, and time can be controlled for in a hedonic regression"; "Omitted variation in labeling claims is insignificant"; "The hedonic regression results are consistent with economic theory"; "There are myriad reasons why the affirmative 'GMO' coefficient might be larger than 'Natural'"; "Dr. Ugone's calculation of a negative price premium for corn oils is erroneous"; "Claims administration does not overwhelm the benefit to the class").

[109] *See* Order at 10 ("The court concludes that Weir's academic training and practical experience qualify him to testify to the calculation of damages using hedonic regression *and conjoint analysis*") (emphasis added). Weir, in fact, offered a conjoint analysis proposal both in his declaration in support of plaintiffs' original motion for class certification and in his declaration supporting the amended motion.

a subject cannot file a reply declaration responding to the opposing party's criticism of a second expert's opinions on that subject. Accordingly, the court declines to strike the remaining paragraphs of Weir's reply declaration because they do not constitute "new evidence," and respond directly to evidence proffered by ConAgra in its opposition. *See Edwards v. Toys 'R' US*, 527 F.Supp.2d 1197, 1205 n. 31 (C.D. Cal. 2007) ("Evidence is not 'new,' however if it is submitted in direct response to proof adduced in opposition to a motion"); *see also Terrell v. Contra Costa County*, 232 Fed. Appx. 626, 629 n. 2 (9th Cir. Apr. 16, 2007) (Unpub. Disp.) (holding that evidence adduced in reply was not new where "[t]he Reply Brief addressed the same set of facts supplied in Terrell's opposition to the motion but provides the full context to Terrell's selected recitation of the facts").

b. Howlett Reply Declaration

ConAgra next argues that the court should strike paragraphs 5-70 of Howlett's reply declaration because in those paragraphs, she offers opinions based on her "post-deposition review" of the Kozup survey, as well as new opinions derived from conversations she had with Dr. Kozup about the survey.[110] It asserts that the new evidence would be prejudicial because it will be unable to respond substantively to the information. The court cannot agree. As an initial matter, the opinions in Howlett's reply declaration respond directly to ConAgra's criticisms of Kozup's survey in its motion to strike. More fundamentally, plaintiffs do not rely on the declaration as support for their amended certification

[110] *Id.* at 21.

motion. Rather, it is apparent that Howlett offers the declaration solely in opposition to ConAgra's motion to strike her original declaration. Accordingly, the new "evidence" and "opinions" are not offered in "reply," but rather in opposition to the motion to strike. ConAgra had adequate opportunity to respond substantively to the declaration in *its* reply supporting the motion to strike; it could, had it wanted, proffered additional evidence that responded directly to the opinions offered in Howlett's declaration. Accordingly, the court concludes that Howlett's reply declaration is not new evidence offered for the first time in reply, and denies ConAgra's request to strike paragraphs 5-70 of the declaration.[111]

c. Benbrook Reply Declaration

ConAgra next argues that Dr. Benbrook should not be permitted to explain his definition of genetically modified food products – which was included in the Kozup survey – because Howlett, who initially presented the survey, was unable to explain why such an "inflammatory description" was used.[112] The court is not persuaded that Benbrook's declaration constitutes "new evidence." Benbrook's opinion

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[111] The court notes, however, that to the extent Howlett recounts the opinions of Dr. Kozup regarding the validity and methodology of the survey, the court declines to consider those opinions because, as discussed *infra*, plaintiffs did not afford ConAgra sufficient opportunity to depose Kozup in connection with the amended certification motion and the court has excluded his reply declaration as a result. Plaintiffs cannot present Kozup's opinions through Howlett to circumvent the court's ruling regarding Kozup.

[112] *Id.* at 22.

responds directly to ConAgra's attack on the definitional language in its opposition and its citation of Howlett's testimony concerning the biased nature of the word choice.[113] Accordingly, ConAgra's request that Benbrook's reply declaration be stricken is denied.

d. Kozup Reply Declaration

Finally, ConAgra contends that Dr. Kozup's reply declaration should be stricken in its entirety because, at no time during the pendency of the litigation have plaintiffs designated Kozup as an expert witness.[114] As a result, ConAgra contends, it has not had an opportunity to depose Kozup or otherwise test the veracity of his statements.[115] Plaintiffs respond that ConAgra cannot claim prejudice because it "knew of Dr. Kozup's involvement since at least June 30, and it could have noticed his deposition at any time but did not."[116]

The purpose of the disclosure requirements of Rule 26 is to avoid surprise and allow each party to

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[113] *See, e.g.*, Benbrook Reply Decl., ¶ 20 ("Thus, the description of the GE process in the Kozup Survey *uses terminology that is commonly found in government, industry, media, regulatory, academic, and organizational documents on the genetic engineering of plants*") (emphasis original); *id.*, ¶¶ 21-31 (discussing publicly available information supporting his description of the genetic engineering process as involving "genetic material from species other than plants (for example certain bacteria or viruses) [being] inserted into the DNA of those plants to make them resistant to certain herbicides and toxic to certain insects").

[114] *Id.* at 22-25.

[115] *Id.*

[116] Motion to Strike Opp. at 13, n. 31.

prepare to cross-examine those experts the opponent has indicated will be called at trial. *See Rembrandt Vision Technologies, L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) ("The purpose of the expert disclosure rule is to 'provide opposing parties reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses,'" quoting *Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2008)). Here, the court issued a modified scheduling order that addressed, *inter alia*, the filing of an amended motion for class certification and set specific dates by which plaintiffs and defendant had to make expert witnesses on whom they intended to rely in connection with the amended motion available for deposition.[117] Plaintiffs did not submit Dr. Kozup's declaration in support of their original class certification motion; rather, they proffered Howlett's testimony to offer opinions concerning the survey. Nor did plaintiffs indicate, at any prior to the filing of his declaration in support of their reply, that they intended to rely on Dr. Kozup's testimony in connection with the amended motion. Given this history, ConAgra could not reasonably have been expected to intuit that plaintiffs intended to offer Kozup's testimony *in reply* to its opposition to the amended motion.

Because ConAgra had no notice that plaintiffs intended to rely on Dr. Kozup as an expert witness and thus no opportunity to depose him or otherwise test the veracity of his statements and opinions,

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[117] Order Setting Briefing Schedule and Continuing Case Management Dates, Docket No. 358 (Aug. 29, 2014).

Kozup's expert declaration, filed for the first time with plaintiffs' reply, is untimely. Thus, the court strikes the Kozup declaration in its entirety and will not consider it in deciding the amended certification motion.[118] *See Provenz*, 102 F.3d at 1483.

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[118] Plaintiffs contend that Dr. Kozup's declaration is admissible because "the operative scheduling order and the understanding of the parties confirm that Plaintiffs were under no obligation to formally designate Dr. Kozup or any other expert prior to filing their Amended Motion, or to provide advance disclosure of any experts they might have used on rebuttal for class certification." (Plaintiffs' Response to Defendant ConAgra Foods, Inc.'s Evidentiary Objections to Plaintiffs' Evidence, Docket No. 410 (Nov. 10, 2014) at 16). As noted, the court issued an order that set a specific date by which experts who were going to submit declarations in support of the amended class certification motion were to be made available for deposition. (*See* Order Setting Briefing Schedule and Continuing Case Management Dates, Docket No. 358 (Aug. 29, 2014) at 1 (setting "[d]ates for Plaintiff to make experts submitting reports available for deposition").) Plaintiffs' insistence that Kozup was "available" for deposition even though they at no point indicated he would provide a report or declaration in connection with the amended class certification motion is inconsistent with both the letter and the spirit of the court's order. While ConAgra certainly could have noticed Kozup's deposition, it had no reason to believe that taking the deposition was necessary because plaintiffs did not designate him as an expert or make him available for deposition in connection with the amended certification motion. The fact that Kozup's declaration may respond to the arguments in ConAgra's opposition (Plaintiffs' Response to Defendant ConAgra Foods, Inc.'s Evidentiary Objections to Plaintiffs' Evidence, Docket No. 410 (Nov. 10, 2014) at 14-16) does not alter the fact that plaintiffs failed to adhere to the court's August 29, 2014 order.

3. Evidentiary Objections to the Testimony of Named Plaintiffs

In support of their amended motion for class certification, plaintiffs submitted the declarations of: (1) Robert Briseno; (2) Jill Crouch; (3) Julie Palmer; (4) Pauline Michael; (5) Dee Hopper- Kercheval; (6) Kelly McFadden; (7) Maureen Towey; (8) Rona Johnston; and (9) Anita Willman.[119] With the exception of Michael, each plaintiff asserts, *inter alia*, that he or she would be "very interested" in buying Wesson Oils labeled "100% Natural" if they did not contain GMOs;[120] each plaintiff alternatively states

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[119] *See* Declarations of Named Plaintiffs in Support of Plaintiffs' Amended Motion for Class Certification ("Plaintiffs' Decls."), Docket No. 370 (Sept. 8, 2014), Exh. A (Declaration of Robert Briseno in Support of Plaintiffs' Motion for Class Certification); Exh. B (Declaration of Plaintiff Jill Crouch in Support of Plaintiffs' Amended Motion for Class Certification); Exh. C (Declaration of Plaintiff Julie Palmer in Support of Plaintiffs' Amended Motion for Class Certification); Exh. D (Reply Declaration of Plaintiff Pauline Michael in Support of Plaintiffs' Motion for Class Certification); Exh. E (Declaration of Plaintiff Dee Hopper-Kercheval in Support of Plaintiffs' Motion for Class Certification); Exh. F (Declaration of Plaintiff Kelly McFadden in Support of Plaintiffs' Motion for Class Certification); Exh. G (Declaration of Plaintiff Maureen Towey in Support of Plaintiffs' Motion for Class Certification); Exh. H (Declaration of Plaintiff Rona Johnston in Support of Plaintiffs' Motion for Class Certification); Exh. I (Declaration of Plaintiff Anita Willman in Support of Plaintiffs' Amended Motion for Class Certification). *See also* Reply Declaration of Plaintiff Pauline Michael in Support of Plaintiffs' Motion for Class Certification, Docket No. 286 (June 30, 2014).

[120] *See id.*, Exh. A, ¶ 8; Exh. B, ¶ 7; Exh. C, ¶ 7; Exh. E, ¶ 6 ("I intend and plan on [purchasing Wesson Oil] in the event that ConAgra stops including GMOs in its '100% Natural' Wesson Oil products"); Exh. F, ¶ 6 ("I intend and plan on [purchasing

that he or she "might consider"[121] or "will consider"[122] purchasing Wesson Oils in the future if they continue to contain GMOs and ConAgra stops labeling them "100% Natural." ConAgra contends that the declarations "strain credulity past the breaking point and should be disregarded by this Court as 'shams' because they are demonstrably attorney-drafted, preprinted forms, placed in front of complicit witnesses and signed without any serious thought by those witnesses as to the truth of the matter asserted, and contrary to all of their prior averments and/or testimony."[123]

a. Whether the Declarations Should Be Stricken Because They Were Not Prepared by the Declarant

As an initial matter, ConAgra contends that the court should strike the declarations because they are "shams" – drafted by someone other than the declarants and signed by the declarants "without any serious thought . . . as to the truth of the matter asserted."[124] As ConAgra and its attorneys well know, most declarations submitted in connection with civil litigation in state and federal courts are prepared by attorneys for clients and witnesses, and thereafter executed by the clients and/or witnesses under

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Wesson Oil] in the event that ConAgra stops including GMOs in its '100% Natural' Wesson Oil products"); Exh. G, ¶ 7; Exh. H, ¶ 7; Exh. I, ¶ 7.

[121] *See id.*, Exh. A, ¶ 9; Exh. B, ¶ 8; Exh. C, ¶ 7; Exh. G, ¶ 8; Exh. H, ¶ 7; Exh. I, ¶ 8.

[122] *See id.*, Exh. E, ¶ 7; Exh. F, ¶ 7.

[123] Motion to Strike at 19-20.

[124] *Id.*

penalty of perjury. If the declaration a lawyer has prepared is incorrect or inconsistent with the declarant's recollection or beliefs, the declarant can refuse to sign the document that has been prepared. *See Kuntz v. Sea Eagle Diving Adventures Corp.*, 199 F.R.D. 665, 669 (D. Haw. 2001) ("The court is at a loss to understand Kuntz's argument that the Declarations Procedure forces his attorneys to 'create' evidence by requiring them to decide what to include and what to omit from a declaration. Attorneys consider exactly the same issues in deciding what to say and what not to say during live testimony. Presumably counsel who questions a live witness is well aware from discovery what counsel may justifiably expect the witness to say. Counsel has the same background with the witness when drafting a declaration. With both live testimony and a declaration, a witness may refuse to state what counsel anticipates. The ethics of the situation simply do not change depending on the medium").[125] The court therefore denies ConAgra's motion to strike the named plaintiffs' declarations on the basis that they were attorney-drafted and signed "without serious thought" by the declarants.

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[125] Chief Judge Mollway made these observations in addressing a plaintiff's request for relief from her civil bench trial procedures, "which, in most cases, require[d] that direct testimony be presented in the form of affidavits or declarations, with witnesses subject to live cross-examination and live redirect examination." *Kuntz*, 199 F.R.D. at 666.

b. Whether the Declarations Should Be Stricken Under the "Sham Affidavit" Rule

ConAgra next asserts that the named plaintiffs' declarations conflict with their theory of the case, and with their prior discovery responses and deposition testimony. In their responses and at their depositions, plaintiffs indicated that they no longer purchased Wesson Oils after learning that they contained GMOs. The declarations they filed in support of the amended certification motion state, however, that they would consider purchasing the products *even if they contained GMOs* so long as ConAgra were required to remove the "100% Natural" label.[126] Plaintiffs counter that the affidavits are not "shams," but provide context for their prior responses and clarify them.[127]

Under the "sham affidavit rule," which is most often invoked in the context of a motion for summary judgment, "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Van Asdale v. International Game Technology*, 577 F.3d 989, 998 (9th Cir. 2009) (citing *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)); *see Agricola Baja Best*, *S. De. R.L. de C.V. v. Harris Moran Seed Co.*, __ F.Supp.2d __, 2014 WL 4385450, *6 (S.D. Cal. Sept. 3, 2014) ("Harris Moran argues that Baja Best's experts' declarations are inadmissible because the declarations contradict prior deposition testimony. Under the sham affidavit rule, 'a party cannot create an issue of fact by an

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[126] *Id.*

[127] Motion to Strike Opp. at 18-20.

affidavit contradicting his prior deposition testimony,'" citing *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (in turn quoting *Van Asdale*, 577 F.3d at 998)); *Pacific Ins. Co. v. Kent*, 120 F.Supp.2d 1205, 1213 (C.D. Cal. 2000) ("Kent points to his later deposition testimony as proof of a genuine issue of fact concerning his ownership experience. But, the 'general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony,'" citing *Kennedy*, 952 F.2d at 266). Where a declaration appears to contradict an earlier declaration or deposition testimony, the court must make a factual determination as to whether the declaration is an attempt to create a "sham" issue of fact. *Kennedy*, 952 F.2d at 267.

An affidavit is not a sham if: (1) it "merely elaborat[es] upon, explain[s] or clarif[ies] prior testimony," *Messnick v. Horizon Industries, Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995); (2) if "the witness was confused at that time of the earlier testimony and provides an explanation for the confusion," *Kent*, 120 F.Supp.2d at 1213 (citing *Kennedy*, 952 F.2d at 266); or (3) if the declaration concerns newly discovered evidence, *id.* *See Agricola*, 2014 WL 4385450 at *6 ("To ensure appropriate application of the rule, the Ninth Circuit imposes two limitations. First, the Court must 'make a factual determination that the contradiction [is] actually a sham. This limitation is intended to ensure the Court 'does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony.' Second, 'the inconsistency between a party's deposition testimony

and subsequent affidavit must be clear and unambiguous.' A declaration that 'elaborates upon, explains, or clarifies prior testimony elicited by opposing counsel on deposition and minor inconsistencies that result from an honest discrepancy [or] a mistake . . . afford no basis for excluding an opposition affidavit'" (citations omitted)).

A court should apply the sham affidavit rule "with caution," *Van Asdale*, 577 F.3d at 998, and only in situations where "the inconsistency between a party's deposition testimony and subsequent affidavit [is] clear and unambiguous," *id.* *See also Agricola*, 2014 WL 4385450 at *6 ("[I]nvoking the rule too aggressively may 'ensnare parties who may have simply been confused during their deposition testimony and may encourage gamesmanship by opposing attorneys,'" citing *Van Asdale*, 577 F.3d at 998).

(1) Whether the Court Should Strike Plaintiffs' Declarations Because They Conflict With the Second Amended Complaint and Plaintiffs' Discovery Responses

ConAgra first asserts that the declarations must be stricken because they are "inconsistent with [p]laintiffs' theory of the case and discovery responses."[128] It cites allegations in the second amended complaint pleading that plaintiffs were harmed because they were "induced" to "consume a product with a GMO," and that they would not have purchased Wesson Oil "but for" the "100% Natural"

[128] Motion to Strike at 22.

label and a belief that it did not contain GMOs.[129] ConAgra also cites interrogatory responses submitted by plaintiffs Johnston, McFadden, Kerchaval, and Willman, which state that "since becoming aware of GMOs in Wesson cooking oils, . . . [they have] not purchased any Wesson cooking oils."[130]

The court cannot conclude that the declarations are shams on the basis that they conflict with plaintiffs' "theory of the case." While the declarations may negatively affect plaintiffs' ability to prove materiality, causation, and/or reliance, this does not compel the conclusion that they are false or directly contradictory of prior testimony.

ConAgra's assertion that the declarations conflict with plaintiffs' interrogatory responses has more force. Ultimately, however, the court does not believe it is appropriate to strike the declarations on this basis. ConAgra maintains that plaintiffs' statements that they "might" or "will consider" purchasing Wesson Oils that contain GMOs if the "100% Natural" label is removed directly conflict with their interrogatory responses. The court discerns no "direct conflict," however. Johnston, McFadden, Kerchaval, and Willman stated in their interrogatory responses that they "have not purchased any Wesson cooking oils" since learning that the products contained GMOs.[131] The responses concern each

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[129] *Id.* (citing SAC, ¶¶ 4, 11-31).

[130] *Id.* (citing RJN, Exh. M (Interrogatory Responses of Plaintiffs Johnston, McFadden, Kerchaval, and Willman, Nos. 1 and 9)).

[131] *See* RJN, Exh. M (Interrogatory Responses of Plaintiffs Johnston, McFadden, Kerchaval, and Willman, Nos. 1 and 9).

plaintiff's present purchasing practices. In contrast, their declarations reference potential future purchasing practices.[132]

While ConAgra may contend that plaintiffs' possible willingness to purchase Wesson Oils in the future is not sufficiently definite to give them standing to represent an injunctive relief class under Rule 23(b)(2), that is a question that must resolved in deciding whether to certify a class. It is not a basis for striking the declarations. The declarations can only be stricken if they clearly and unambiguously contradict sworn statements made earlier in this litigation. Because plaintiffs' interrogatory responses do not address whether they would purchase Wesson Oils in the future, the court cannot conclude that their declarations are "shams." Rather, they appear to "merely elaborat[e] upon . . . prior testimony." Messnick, 62 F.3d at 1231.

(2) Whether the Court Should Strike Briseno's, Crouch's, and Towey's Declarations Because They Conflict With Prior Deposition Testimony

(a) Robert Briseno

ConAgra next contends that the declarations of plaintiffs Briseno, Crouch, and Towey contradict their prior deposition testimony. ConAgra cites Briseno's testimony that he tries to avoid ingesting GMOs and tries to ensure that his family does not as well.[133] ConAgra also cites Briseno's answer to a

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[132] *See* Plaintiffs' Decls., Exhs. A-I.

[133] Motion to Strike at 23; *see* Declaration of Laura Coombe in Support of ConAgra Foods, Inc.'s Opposition to Plaintiffs'

question concerning his willingness to purchase Wesson Oil:

> "Q. If Wesson Oil was priced at a lower price point today, would you buy it?
>
> A. No.
>
> Q. Why not?
>
> A. I feel that, you know, Wesson Oil had – they built up a certain trust and loyalty within me. I wouldn't use other products that I feel the same way about. I wouldn't do business with someone who lied to me, and I feel the same way about Wesson."[134]

Plaintiffs counter that Briseno's declaration does not directly contradict his deposition testimony because he testified that on the day of his deposition he was not interested in purchasing Wesson Oils, but said nothing that foreclosed the possibility he might at some point consider purchasing the products in the future.[135] While, on the surface, Briseno's testimony that he would not purchase Wesson Oil products again, even if offered at a lower price point, appears to conflict directly with the statement in his declaration that he would consider purchasing Wesson Oils in the future if the "100% Natural" label were removed, his declaration offers an explanation for the apparent facial conflict. Briseno states that

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Amended Motion for Class Certification and Motion to Strike Evidence ("Coombe Decl."), Docket No. 386 (Oct. 6, 2014), Exh. D (Deposition Transcript of Plaintiff Robert Briseno ("Briseno Depo.")) at 100:8-12.

[134] Briseno Depo. at 154:24–155:9.

[135] Motion to Strike Opp. at 18-19.

he testified at deposition that he would not purchase Wesson Oils even at a lower price because he felt that he had been misled by ConAgra regarding the presence of GMOs in its products.[136] He notes that if the labeling were corrected, he might consider purchasing Wesson Oils, presumably because ConAgra would no longer be misrepresenting the nature of the product. While close, the court cannot find that the declaration directly contradicts Briseno's deposition testimony; rather it "clarif[ies] [that] prior testimony" by showing that his willingness to purchase Wesson Oils turns primarily on his view of the accuracy of ConAgra's product claims.

Moreover, the fact Briseno states that he would consider purchasing Wesson Oils in the future even if they contained GMOs does not contradict his prior deposition testimony that he "tr[ies] to avoid" products with GMOs when similar products without GMOs are available. [137] Indeed, rather than

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[136] *See* Briseno Decl., ¶ 7.

[137] *See* Briseno Depo. at 100:8-101:14 ("Q. So it's a challenge, but you – it's your testimony that you try to avoid purchasing GMO-ingredient foods for yourself and your family. Is that your testimony? A. Yes. We try to avoid it. Q. And those attempts to avoid it include what? A. Again, being aware of the products that are out there. So for instance, a piece of salmon we know has no GMOs in it. But we have to, at the same token, be aware that any type of wheat product is going to have some sort of genetically modified organism in it. So we try to cut back on those things that aren't whole proteins. The carbohydrates we have to maintain, but we try to eliminate the amount. I don't think we can eliminate them from our lives at this point, especially in a developed country where we're not growing our own food. Q. What do you do, if anything, to avoid food products that contain GMO corn? A. Try to eat less corn products. Q.

contradicting this testimony, Briseno's declaration merely elaborates on his deposition answer; he explains that he takes many factors into account in deciding which foods to purchase. Only one of these, he asserts, is whether the food contains GMOs; as a result, his "preference to avoid GMOs [is] not always absolute."[138]

For all of these reasons, the court cannot find that Briseno's declaration is a sham. *Van Asdale*, 577 F.3d at 998 (stating that the sham affidavit rule can be invoked only if "the inconsistency between a party's deposition testimony and subsequent affidavit . . . [is] clear and unambiguous"); *see School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993) (stating that the sham affidavit rule "should be applied with caution"); *King v. ADT Sec. Services*, Civil No. 06-0519-WS-C, 2007 WL 2713212, * 3 (S.D. Ala. Sept. 17, 2007) ("There being nothing more than a possible inconsistency, and certainly much less than an *inherent* inconsistency, between [a declaration and deposition testimony], the sham affidavit rule has no application"); *see also Brown v. Showboat Atlantic City Propco, LLC*, No. 08-5145 (NLH), 2010 WL 5237855, * 4 (D.N.J. Dec. 16, 2010)

What, if anything, do you do to try to avoid products that contain GMO soy? A. That would be a hard question, because I don't think I eat very much so, so . . . Q. What do you do to try and avoid buying for your family GMO canola? A. We have greatly reduced our number of fried foods that we eat, so we're utilizing less canola oil. So across the board, I think those questions can be answered by avoidance").

[138] Briseno Decl., ¶ 5; *see also id.*, ¶ 6 (stating that Briseno sometimes buys canola oil because it is better for frying food, although he knows it may contain GMOs).

("An inherent requirement of a sham affidavit is that the affiant's statement must contradict deposition testimony. Statements in an affidavit that 'merely . . . conflicts to some degree with an earlier deposition' cannot be disregarded as shams. . . . Courts do not declare these affidavits shams because they do not flatly contradict deposition testimony and, therefore, a reasonable jury may find the affidavit credible and conclude that any discrepancy is inadvertent[,]" citing *Baer v. Chase*, 392 F.3d 609, 625 (3d Cir. 2004)).

(b) Jill Crouch

ConAgra charges that Jill Crouch also submitted a sham affidavit that "directly contradict[s] [her] sworn deposition testimony" in an effort to cure the deficiencies noted in the court's first class certification order regarding the standing requirements for a Rule 23(b)(2) injunctive relief class.[139] It cites Crouch's deposition testimony that at the time of the deposition, she would not purchase Wesson Oils, even at a lower price point, because she felt deceived by ConAgra:

> "Q. Would you buy Wesson oil today if it were at a lower price point?
>
> A. I don't think so.
>
> Q. Would you buy Wesson oil today if it changed its label but the contents were the same?
>
> A. I don't know."[140]

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[139] Motion to Strike at 23-24.

[140] Motion to Strike at 23; Coombe Decl., Exh. E (Transcript of Deposition of Jill Crouch ("Crouch Depo.")) at 180:19-24.

ConAgra also cites various statements Crouch made at her deposition suggesting that "she opposed the use of GMOs categorically" because "[she] do[esn't] know what the outcome is going to be for human beings."[141]

Crouch's statement in her declaration that if ConAgra removed the "100% Natural" label, she "might consider buying Wesson Oil in the future depending on the price and the other products conveniently available" does not directly contradict her deposition testimony that she *did not know* whether she would purchase Wesson Oil "if it changed its label but the contents were the same." Crouch's declaration "elaborates" on prior ambiguous testimony. A statement that she might consider purchasing in the future does not directly conflict with her testimony that she did not know one way or the other whether she would be willing to purchase the products. Rather, it represents an evolution of

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[141] Motion to Strike at 23; *see* Crouch Depo. at 76:23-77:1 ("Q. Do you object to modifying plants for that reason? A. I'm not comfortable with any genetic modifying right now"); *id.* at 78:14-21 ("Q. Do you object to the use of genetic modification for that purpose? A. I'm not comfortable with any form of genetic modification. Q. And that's true even if it would reduce food costs? A. I don't know what the outcome is going to be for human beings"); *id.* at 80:10-25 ("Q. And you don't believe it should be done in any circumstances regardless of the possible benefits of genetic engineering, either for prices or for feeding of populations? . . . A. I'm not sure that we should be messing with the DNA levels of food items until we know more about what it's going to do to us. Q. Is that a yes, you don't believe it should be done regardless of the purposes? A. Correct"); *id.* at 82: 6-10 ("A. I don't care for the genetic modification. I – Q. So regardless of the purpose for which the Canola was modified, you object? A. Yes").

her thinking on the subject, and cannot reasonably be considered a "sham." Crouch's testimony that she finds GMOs and the genetic modification of food products objectionable similarly does not conflict directly with the statements in her declaration. There is nothing "inherently inconsistent" or irreconcilable about an individual's preference for a certain type of food product, i.e., one that is not genetically modified, and the fact that the individual might purchase that type of product depending on the type and price of products conveniently available. *See King*, 2007 WL 2713212 at *3. Accordingly, the court declines to strike Crouch's declaration in support of the amended motion for class certification.

(c) Maureen Towey

ConAgra argues finally that Maureen Towey's deposition testimony directly conflicts with statements in her declaration.[142] ConAgra cites several excerpts from Towey's deposition in which she stated that she does not purchase canola oil because it contains GMOs and that she typically does not purchase food products that she knows have been genetically modified.[143] ConAgra contends that the

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[142] Motion to Strike at 23-25.

[143] *See* Coombe Decl., Exh. F (Transcript of Deposition of Maureen Towey ("Towey Depo.")) at 58:2-8 ("Q. And do you buy products that say natural on the label that have canola or rapeseed as an ingredient? A. No. Q. Why is that? A. Well, now I don't because I know that canola is – uses GMO"); *id.* at 61:2-7 ("Q. Your knowledge of GMOs, has it changed the way you purchase foods? A. Yes. Q. How so? A. I don't – if I know that it's GMO, I don't buy it"); *id.* at 74:13-18 ("Q. You don't bake bread anymore? A. No, not a lot anymore. Q. The Wesson canola oil that you used for baking bread, is that the only time that you baked bread? A. Yeah"); *id.* at 130:16-20 ("Q. Is it fair

statement in her declaration that, if they were no longer labeled "100% Natural," she "might consider buying Wesson Oils depending on the price and the other products conveniently available" directly contradicts Towey's testimony that she does not purchase products that she knows contain GMOs.[144] Plaintiffs counter that Towey's declaration is *consistent* with and elaborates on her deposition answer. They note she states that while she "tr[ies] to avoid products made from GMO ingredients," she realizes that it would be "extremely difficult . . . to avoid GMO ingredients completely," and thus she would consider purchasing Wesson Oils, even if they contained GMOs, if ConAgra removed the "100% Natural" label.[145]

Whether Towey's declaration directly contradicts her prior deposition testimony is a close question. Her deposition testimony was relatively absolute – "if I know that it's GMO, I don't buy it." Nonetheless, the court concludes that the better view of her declaration is that it clarifies her deposition answers. Towey clarifies that she "realizes that it would be extremely difficult . . . to avoid GMO ingredients entirely," and that her purchasing decisions necessarily depend on "price and the products conveniently available."[146] The court therefore declines to strike Towey's declaration as a sham.

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to say you've never purchased canola oil as a general practice, that when you purchased it in 2010 it was sort of a one-time thing? A. Yeah, yes").

[144] Motion to Strike at 23-25.

[145] Motion to Strike Opp. at 19-20.

[146] Towey Decl., ¶¶ 6, 8.

4. Conclusion Regarding ConAgra's Motion to Strike

For the reasons stated, the court denies ConAgra's motion to strike Weir's amended declaration and Howlett's amended declaration. The court also denies ConAgra's motion to strike the supplemental declarations of the named plaintiffs.[147]

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[147] Plaintiffs filed various evidentiary objections to the Declaration of Raquelle Hunter submitted in support of ConAgra's opposition to plaintiffs' initial class certification motion; the court took judicial notice of the Hunter declaration above. (*See* Plaintiffs' Evidentiary Objections to the Declaration of Raquelle Hunter ("Hunter Objections"), Docket No. 397 (Oct. 27, 2014)). For the most part, plaintiffs object that the statements in Hunter's declaration lack foundation. (*See id.* at 3-10.)

Since a motion for class certification is a preliminary procedure, courts do not require strict adherence to the Federal Rules of Civil Procedure or the Federal Rules of Evidence. *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178 (1974) (the class certification procedure "is not accompanied by traditional rules and procedures applicable to civil trials"). At the class certification stage, "the court makes no findings of fact and announces no ultimate conclusions on Plaintiffs' claims." *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 519 (C.D. Cal. 2011) (quoting *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D. Cal. 2008)). Therefore, the court can consider inadmissible evidence in deciding whether it is appropriate to certify a class. *Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 337 n. 3 (N.D. Cal. 2010) ("On a motion for class certification, the Court may consider evidence that may not be admissible at trial"); *see also Waine-Golston v. Time Warner Entertainment-Advance/New House P'ship*, No. 11CV1057-GPB (RBB), 2012 WL 6591610, *9 (S.D. Cal. Dec. 18, 2012) (overruling objections to evidence because "the Court may consider inadmissible evidence at the class certification stage"); *Alonzo*, 275 F.R.D. at 519 ("The court need not address the ultimate admissibility of the parties' proffered exhibits, documents and testimony at this stage, and

B. Plaintiffs' Amended Motion for Class Certification

1. Legal Standard Governing Class Certification

A district court may certify a class only if:

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

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

In addition, a district court must also find that at least one of the several conditions set forth in Rule 23(b) is met. "Rule 23(b)(1) allows a class to be maintained where 'prosecuting separate actions by or against individual class members would create a risk of' either '(A) inconsistent or varying adjudications,' or '(B) adjudications . . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede[ ] their ability to protect their interests.'" *Dukes*, 131 S. Ct. at 2549 n. 2.

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may consider them where necessary for resolution of the [Motion for Class Certification]" (alteration original)). Because the court need not adhere strictly to the Federal Rules of Evidence in deciding the class certification question, it overrules plaintiffs' evidentiary objections to Hunter's declaration.

Rule 23(b)(2) allows class treatment when "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.PROC. 23(b)(2). The Supreme Court has not yet decided whether this rule "applies only to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all." *Dukes*, 131 S. Ct. at 2557. It has concluded, however, "that, at a minimum, claims for individualized relief . . . do not satisfy the Rule." *Id.* Thus, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.*

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

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* at 2551. Thus, "[t]he party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir.),

amended, 273 F.3d 1266 (9th Cir. 2001)); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). A class can be certified only if the court "is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982).

As the Supreme Court has noted, "[f]requently . . . 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. at 2551.

> Plaintiffs seeks to certify twelve statewide classes as follows:
>
> "All persons who reside in the States of California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, or Texas who have purchased Wesson Oils within the applicable statute of limitations periods established by the laws of their state of residence (the 'Class Period') through the final disposition of this and any and all related actions."[148]

2. Whether the Proposed Class Should Be Certified

a. Standing

As a threshold matter, ConAgra contends that the named plaintiffs lack standing because they have suffered no injury.[149] Specifically, ConAgra argues that after filing the lawsuit, plaintiffs continued to purchase cooking oils and other products that were

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[148] Class Cert. Motion at 2.

[149] Class Cert. Opp. at 22.

labeled "natural" but contained non-organic GMO ingredients.[150] ConAgra asserts that plaintiffs cannot prove measurable damages because although they allege they paid a premium for Wesson Oils as a result of the "100% Natural" label, they are unable to determine the price they paid for Wesson products and have no means of acquiring this information.[151] ConAgra made these same arguments in opposition to plaintiffs' original motion for class certification; the court found them unconvincing and continues to do so. As the court noted in its prior order, each plaintiff has testified that he or she purchased Wesson Oils during the class period. Plaintiffs contend they were damaged because ConAgra misleadingly labeled the products "100% Natural," which caused them to pay higher market prices for the products than they would have otherwise have paid. Although plaintiffs' subsequent purchase of products labeled "natural" that contained GMO ingredients may seriously undercut their claim that their purchasing decision was influenced by the "100% Natural" label, the purchases do not deprive plaintiffs of standing to assert the claims they plead in this action. Moreover, although ConAgra argues that plaintiffs' supplemental declarations also indicate they were not injured by the allegedly misleading label, the court cannot agree. As with the plaintiffs' subsequent purchases of products containing GMOs, the fact that the named plaintiffs "might consider" or "will consider" purchasing Wesson Oil products in the future, even if they contain GMOs, does not deprive

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[150] *Id.* at 22-23.

[151] *Id.*

them of Article III standing to assert the claims they plead in their second amended complaint. Such statements are properly considered in assessing the "materiality" of the alleged misrepresentation, but do not compel a conclusion that the named plaintiffs have not suffered the requisite injury in fact to confer Article III standing.

ConAgra also argues that plaintiffs lack standing to represent the putative classes because they "can only speculate as to their damages." Specifically, it asserts that plaintiffs "have not saved receipts, cannot recall what they paid over time, and have no way of finding out."[152] ConAgra contends plaintiffs cannot adduce "foundational evidence" demonstrating that they paid "a 'premium'" because they do not recall the specific price that they paid. . . ."[153] The court cannot agree. As an initial matter, the court has denied ConAgra's motion to strike Weir's declaration in support of the amended certification motion. Thus, plaintiffs have proffered a methodology that they contend can be used to calculate the price premium associated with the "100% Natural" label on Wesson Oils as a percentage of total purchase price.[154]

The fact that plaintiffs cannot recall the specific price they paid for Wesson Oils does not deprive them of standing. Weir states that it is "possible to

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[152] *Id.* at 23-24.

[153] *Id.*

[154] Although plaintiffs assert that this methodology can be used to calculate classwide damages, the court considers *infra* whether it is sufficiently reliable to meet the requirements set forth in Comcast.

determine damages, with a reasonable degree of specificity, certainty, and accuracy, attributable to ConAgra's conduct of placing the '100% Natural' claim on the label of every bottle of Wesson Oil" by performing a hedonic regression analysis using aggregate historical retail price" data.[155] He states that his damages model would rely, *inter alia*, on "scanner data" from market research companies IRI and Nielsen; this data reflects the price paid by consumers in a particular state at a particular time during the class period. Specifically, Weir reports that IRI's scanner data shows the unit price of Wesson Oils on a four-week basis both nationwide and by state.[156] Because plaintiffs' theory, and Weir's regression model, posit that consumers paid a price premium for every bottle of Wesson Oil purchased during the class period, and because Weir states he can obtain data that reflects the historical prices paid by consumers, named plaintiffs' failure to produce evidence of the specific price that each paid does not compel the conclusion that they cannot show injury in fact and lack Article III standing. Moreover, Weir noted that the data in his possession and other data that is obtainable can be formatted to account for variations in pricing among geographical regions and/or pricing changes over time; thus, plaintiffs' failure to provide specifics about "variations in pricing"[157] does not deprive them of standing to assert their claims as ConAgra asserts.

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[155] Am. Weir Decl., ¶ 9.

[156] *Id*., ¶ 36.

[157] Class Cert. Opp. at 23-24.

In short, the data plaintiffs and Weir have identified or proffered provide sufficient "foundational evidence" from which a price premium attributable to ConAgra's use of a "100% Natural" label on Wesson Oils can be calculated. At this stage of the proceedings, the court concludes that plaintiffs have adequately shown that they suffered injury in fact sufficient to confer standing on them to pursue the class claims. Accordingly, the court turns to the merits of plaintiffs' amended motion for class certification.

b. Rule 23(a) Requirements

(1) Whether Plaintiffs Have Proposed an Ascertainable Class

Although not specifically mentioned in Rule 23, plaintiffs must, in addition to showing numerosity, commonality, typicality and adequacy, demonstrate that the members of the class are ascertainable. *See, e.g.*, *Lukovsky v. San Francisco*, No. C 05-00389 WHA, 2006 WL 140574, *2 (N.D. Cal. Jan. 17, 2006) ("'Although there is no explicit requirement concerning the class definition in FRCP 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed,'" quoting *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-80 (S.D. Cal. 1999)); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 163 (C.D. Cal. 2002) ("Prior to class certification, plaintiffs must first define an ascertainable and identifiable class. Once an ascertainable and identifiable class has been defined, plaintiffs must show that they meet the four requirements of Rule 23(a), and the two requirements of Rule 23(b)(3)" (citation and footnote omitted));

O'Connor v. Boeing North American, Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998) (holding that a class definition must be "precise, objective and presently ascertainable"); *Bishop v. Saab Automobile A.B.*, No. CV 95-0721 JGD (JRx), 1996 WL 33150020, *4 (C.D. Cal. Feb. 16, 1996) ("To file an action on behalf of a class, the named plaintiffs must be members of the class that they purport to represent at the time the class action is certified. The named plaintiffs must also demonstrate that the class is ascertainable" (citation omitted)).

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

Plaintiffs argue that the classes they propose are ascertainable because membership in each is governed by a single objective criterion – whether an individual purchased Wesson Oils during the class period.[158] ConAgra argues, as it did in opposition to the original class certification motion, that the classes are not ascertainable because there is no way to determine the identity of consumers who purchased its products. It contends the vast majority of possible class members will be unable "truthfully

[158] Class Cert. Motion at 8-9.

[to] self-identify by providing the most basic information about qualifying purchases – did they make a purchase or purchases within the class period, how many, what sizes, at what prices?"[159]

As the court recognized in its class certification order, "district courts in this circuit are split as to whether the inability to identify the specific members of a putative class of consumers of low priced products makes the class unascertainable."[160] *Compare In re POM Wonderful LLC*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, *6 (C.D. Cal. Mar. 25, 2014) (observing that "[i]n situations where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipts or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible," and holding that a class of consumers of a juice product was not ascertainable, particularly where "[n]o bottle, label, or package included any of the alleged misrepresentations"); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, *5-6 (N.D. Cal. Feb. 13, 2014) ("Plaintiff has yet to present any method for determining class membership, let alone an administratively feasible method. It is unclear how Plaintiff intends to determine who purchased ZonePerfect bars during the proposed class period, or how many ZonePerfect bars each of these putative class members purchased. It is also unclear how Plaintiff intends to weed out inaccurate or fraudulent claims. Without more, the

[159] Class Cert. Opp. at 26-27.

[160] Order at 37.

Court cannot find that the proposed class is ascertainable") *with Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, *5 (C.D. Cal. Apr. 9, 2014) (rejecting an argument that a putative class of consumers of children's cold/ flu products was not ascertainable, and stating that "[g]iven that facilitating small claims is "[t]he policy at the very core of the class action mechanism,' we decline to follow *Carrera [v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013),]" quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)); *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, *8 (C.D. Cal. Jan. 13, 2014) ("*Carrera* eviscerates low purchase price consumer class actions in the Third Circuit. It appears that pursuant to *Carrera* in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, Carrera prohibits certification of the class. While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit. In this Circuit, it is enough that the class definition describes 'a set of common characteristics sufficient to allow' a prospective plaintiff to 'identify himself or herself as having a right to recover based on the description.' As discussed above, the class definition clearly defines the characteristics of a class member by providing a description of the allegedly offending product and the eligible dates of purchase. A prospective plaintiff would have sufficient information to determine whether he or she was an Elations customer who viewed the specified label during the stated time

period,'" quoting *Moreno v. AutoZone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008) (citations omitted)).

The court continues to agree with those courts that have found classes, such as those proposed by plaintiffs, ascertainable. As the court previously noted: "ConAgra's argument would effectively prohibit class actions involving low priced consumer goods – the very type of claims that would not be filed individually – thereby upending '[t]he policy at the very core of the class action mechanism.'"[161]

ConAgra also argues, as it did in its original opposition, that the inclusion of uninjured class members makes the putative classes unascertainable.[162] The court previously found this argument unavailing,[163] and remains unconvinced. Because every putative class member has been exposed to the alleged misrepresentation, the fact that some class members may have not been injured by the "100% Natural" claim does not render the class unascertainable. *See Algrain v. Maybelline LLC*,__F.R.D. __, 2014 WL 1883772, *7 (S.D. Cal. May 12, 2014) ("In the instant case, Plaintiffs have alleged a widespread advertising campaign promoting the alleged misrepresentations as well as uniform labeling for each of the Class Products. That the proposed class may include purchasers who did not rely on the misrepresentations and/or were satisfied with the products does not render the class 'overbroad' where Maybelline has failed to demonstrate a lack of exposure as to some class

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[161] Order at 39 (quoting *Amchem Prods.*, 521 U.S. at 617).

[162] Class Cert. Opp. at 28-29.

[163] Order at 40-42.

members"); *Rodman v. Safeway, Inc.*, No. 11-CV-03003-JST, 2014 WL 988992, *16 (N.D. Cal. May 10, 2014) ("If Defendant is arguing that, even after a plaintiff establishes all of the Rule 23 factors, a defendant can still defeat certification by pointing to the possibility that certain members of the class will not be able to recover on their claims, the Court does not adopt that view of the 'ascertainability' inquiry. This Court joins others in this district that hold that '[w]hen rejecting class certification based on overbreadth . . . the problem lies in the court's ability to ascertain the class, not whether the putative class members have been aggrieved,'" citing *Kurihara v. Best Buy Co., Inc.*, No. 06-CV-01884 MHP, 2007 WL 2501698, *5 (N.D. Cal. Aug. 30, 2007) (in turn citing *Mateo v. M/S Kiso*, 805 F.Supp. 761, 773 (N.D. Cal. 1992)) and collecting cases); *see also DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) ("That a class possibly or even likely includes persons unharmed by a defendant's conduct should not preclude certification"); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (the fact that a proposed class "will often include persons who have not been injured by the defendant's conduct . . . does not preclude class certification," but "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant").

For these reasons, and for the reasons articulated in its August 1 order,[164] the court concludes that plaintiffs have proposed sufficiently ascertainable classes. To the extent ConAgra argues that the

[164] *Id.* at 36-42.

inclusion of uninjured class members prevents the court from certifying the putative classes, its contentions are more properly considered in analyzing whether plaintiffs have satisfied Rules 23(a)(2) and 23(b)(3).

(2) Numerosity

Before a class can be certified under the Federal Rules of Civil Procedure, the court must determine that it is "so numerous that joinder of all members is impracticable." *See* FED.R.CIV.PROC. 23(a)(1). "Impracticability does not mean impossibility, [however,] . . . only . . . difficulty or inconvenience in joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (internal quotation marks omitted). There is no set numerical cutoff used to determine whether a class is sufficiently numerous; courts must examine the specific facts of each case to evaluate whether the requirement has been met. *See General Tel. Co. v. EEOC*, 446 U.S. 318, 329-30 (1980). "As a general rule, [however,] classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (citing 3B J. Moore and J. Kennedy, MOORE'S FEDERAL PRACTICE ¶ 23-05[1] (2d ed. 1987)). ConAgra acknowledges that millions of consumers purchased Wesson Oil products during the class period.[165] Consequently, plaintiffs have met their

[165] Answer to Amended Complaint, ¶ 57.

burden of demonstrating that the proposed classes are sufficiently numerous.[166]

(3) Commonality

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

That said, the putative class's "claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the

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[166] ConAgra does not dispute plaintiffs' showing as to this requirement.

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

As in their original motion for class certification, plaintiffs argue that the commonality requirement is satisfied because all class members were exposed to ConAgra's "100% Natural" label and marketing and their claims thus arise from "a common core of salient facts" and pose a common questions: "whether ConAgra's '100% Natural' marketing and labeling of Wesson Oil products was false, unfair,

deceptive, and/or misleading."[167] As the court previously concluded, such a question is sufficient to satisfy commonality.[168] *See, e.g.*, *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) ("[H]ere, variation 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"); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010) (holding that the commonality requirement was satisfied by allegations that the defendant beverage supplier's 'packaging and marketing materials [were] unlawful, unfair, deceptive or misleading to a reasonable consumer"). Thus, the court finds the commonality requirement satisfied.[169]

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[167] Class Cert. Motion at 7. Plaintiffs also assert that their claims raise additional common questions: (1) whether ConAgra acted knowingly or recklessly; (2) whether plaintiffs and members of the putative classes are entitled to actual, statutory, or other forms fo damages; and (3) whether plaintiffs and the class members are entitled to equitable relief, including, but not limited to, injunctive relief and restitution. (*Id.*)

[168] Order at 44-45.

[169] In its opposition, ConAgra asserts that "[p]laintiffs have not met their burden of providing evidence that there is a 'common' question that can resolve in 'one stroke' all of the [p]laintiffs' claims, under each of the states' laws [p]laintiffs cite." (Class Cert. Opp. at 32.) It then identifies a "myriad of individual reliance, causation, materiality, and damages issues" that it contends affect each of plaintiffs' claims. As the court noted in its August 1 order, however, questions of individualized reliance, causation, materiality, and damages are best addressed in conducting a Rule 23(b) predominance inquiry. (*See* Order at 56-62.)

(4) Typicality

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

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508 (citation and internal quotation marks omitted). Typicality, like commonality, is a "permissive standard[ ]." *Hanlon*, 150 F.3d at 1020. Indeed, in practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 157-58 n. 13. *See also Dukes*, 131 S. Ct. at 2551 n. 5 ("We have previously stated in this context that '[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their

absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest,'" citing *Falcon*, 457 U.S. at 158 n. 13).

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

The named plaintiffs argue that the typicality requirement is satisfied because their claims "'arise[ ] from the same course of events, and each class member makes similar legal arguments to prove [ConAgra's] liability.'"[170] They assert that because the named plaintiffs were all exposed to the "100%

[170] Class Cert. Motion at 7-8.

Natural" claim on Wesson Oil labels, and allege that the claim was a material factor in their decisions to purchase the products, "common evidence [will be presented] based on the same legal theories [ ] to support [the named plaintiffs'] claims and the claims of other [c]lass [m]embers." This suffices, they contend, to satisfy Rule 23's typicality requirement.[171] ConAgra counters with the same arguments it advanced in opposition to plaintiffs' original class certification motion. It contends that plaintiffs' claims are not typical because the evidence demonstrates that the "100% Natural" label was not a significant factor driving purchases of Wesson Oil.[172] ConAgra cites Dr. Hanssens' finding that there is no statistically significant difference between the purchasing decisions of survey respondents shown a "100% Natural" label and those who saw a label without the phrase.[173] It also cites Dr. Hanssens' finding that only 5-6 percent of respondents who saw the "100% Natural" label mentioned "natural" ingredients when describing why they would or would not buy a Wesson Oil product, and identifying the factors that were important to them when purchasing cooking oil.[174] Based on Dr. Hanssens' findings, ConAgra asserts that named plaintiffs are atypical of the classes they seek to represent because they allegedly relied on

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[171] *Id.*

[172] Class Cert. Opp. at 29-30.

[173] *Id.*

[174] *Id.* ConAgra also asserts that the named plaintiffs' lack of standing renders their claims atypical. (*Id.* at 30 n. 17.) As the court has already rejected ConAgra's standing argument, it need not address this issue.

ConAgra's "100% Natural" label in making their purchasing decisions, while "the large majority" of class members did not.[175]

As the court noted in its August 1 order:

> "Because the typicality requirement focuses on whether the named plaintiffs' claims arise from the same course of conduct as the class members' claims, and whether *the named plaintiffs* are subject to unique defenses, . . . and because it is not an onerous requirement, the court concludes that the fact that some class members may not have relied on the '100% Natural' label in purchasing Wesson Oils does not render the named plaintiffs' claims atypical. Stated differently, if the named plaintiffs' claims were subject to the unique defense that they did not rely on the '100% Natural' label in purchasing Wesson Oils, then as to any claims that require

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[175] *Id.* at 30 ("[S]urvey data here proves that if Plaintiffs really (1) purchased Wesson due to the '100% Natural' claim, and (2) believed that the '100% Natural' claim meant Wesson Oil is 'GMO-free' (as opposed to, e.g., 'free of preservatives'), they are in the distinct minority of Wesson Oil consumers and are not typical of the class. Rule 23(a)(3) is not satisfied"). As the court noted in its prior order, plaintiffs have adduced contradictory evidence indicating that pure and natural claims on product labels are a significant factor in consumer purchasing decisions. (*See* Order at 47 ("Plaintiffs assert that Dr. Hanssens' findings are contradicted by ConAgra's own documents, which show the materiality of the '100% Natural' claim. Plaintiffs proffer documents detailing the results of ConAgra's marketing research; they contend this research demonstrates that pure and natural claims play a significant role in consumer purchasing decisions. Because the documents were filed under seal, the court does not detail the findings here. It concurs, however, in plaintiffs' description of the documents").)

> proof of individualized reliance, there might be a concern about typicality. The situation posited by ConAgra is the converse of that, however. . . . Consequently, the court finds the typicality requirement satisfied."[176]

Because ConAgra sets forth no arguments other than those that the court previously found unpersuasive, and because its contentions concerning "materiality" and the need for individualized proof for reliance and causation are better addressed in assessing whether Rule 23(b)(3)'s predominance requirement is satisfied, the court concludes that named plaintiffs have adequately shown that their claims are typical of the claims of the putative class members they seek to represent.

(5) Adequacy

The adequacy of representation requirement set forth in Rule 23(a)(4) involves a two-part inquiry: "(1) do the named plaintiff[ ] and [her] counsel have any conflicts of interest with other class members and (2) will the named plaintiff[ ] and [her] counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020; *accord Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Ellis*, 657 F.3d at 985. Individuals are not adequate representatives of a class when "it appears that they have abdicated any role in the case beyond that of furnishing their names as plaintiffs." *Helfand v. Cenco, Inc.*, 80 F.R.D.

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[176] Order at 49-50 (emphasis original).

1, 7 (N.D. Ill. 1977). As respects class counsel, adequacy of representation turns on counsel's competence and the absence of conflicts of interest. *Falcon*, 457 U.S. at 157 n. 13 ("The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also often tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest"); *Staton*, 327 F.3d at 957 ("To determine whether the representation meets [Rule 23(a)(4)'s] standard, we ask two questions: (1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" citing *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (in turn quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1995)); *Hanlon*, 150 F.3d at 1020.

ConAgra challenges the adequacy of the named plaintiffs on the same grounds that it challenges the typicality of their claims; it challenges the adequacy of class counsel on the same grounds that it raised in its opposition to plaintiffs' original class certification motion.[177] Specifically, it notes: (1) putative class

[177] Class Cert. Opp. at 31-32.

counsel has "inexplicably forfeited even the possibility of certifying classes in Washington, Wyoming, Massachusetts, and New Jersey, failing to prosecute the action adequately on behalf of the lost state classes"; and (2) class counsel has been dilatory in conducting discovery and failed adequately to present plaintiffs' first motion for class certification.[178] As ConAgra observes,[179] the court considered these arguments and found them unavailing in its order denying plaintiffs' first motion for class certification.[180] Faced with the arguments a second time, the court's conclusions remain unchanged. Accordingly, the court finds that named plaintiffs and class counsel satisfy Rule 23(a)'s adequacy requirement.

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[178] *Id.*

[179] ConAgra states that it raises these arguments "simply [to] preserve[ ] [them] for the record." (*Id.* at 32.)

[180] *See* Order at 51 ("While courts have held that counsel who have delayed in seeking class certification or have not diligently sought discovery are not adequate to represent the interests of the class, *see, e.g.*, *Colby v. J.C. Penney Co.*, 128 F.R.D. 247, 250 (N.D. Ill. 1989) (decertifying a class based, *inter alia*, on counsel's lack of diligence in conducting discovery), aff'd on other grounds, 926 F.2d 645 (7th Cir. 1991); *Lau v. Standard Oil Co. of California*, 70 F.R.D. 526, 527-28 (N.D. Cal. 1975) (three year delay in seeking class certification), the court cannot say that class counsel's problems in this case rise to the level that would support such a finding here, particularly given their background in class action litigation. Nor does the court discern any conflict of interest affecting the representation. Consequently, the court finds that the named plaintiffs and class counsel satisfy the adequacy requirement").

c. Rule 23(b) Requirements

Having concluded that Rule 23(a)'s requirements are met, the court turns to Rule 23(b). Plaintiffs seek to certify the proposed classes separately for purposes of injunctive relief and damages under Rules 23(b)(2) and 23(b)(3). In its decision in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), rev'd 131 S. Ct. 2541 (2011), the Ninth Circuit noted that the district court had the option of certifying a Rule 23(b)(2) equitable relief class and a separate Rule 23(b)(3) class for damages if it concluded that it could not certify a single Rule 23(b)(2) class because monetary relief predominated over the equitable relief sought. *Id.* at 620. The Supreme Court later "rejected the 'predominance' test for determining whether monetary damages may be included in a 23(b)(2) certification." *Ellis*, 657 F.3d at 986. Subsequent to the Supreme Court's decision in *Dukes*, however, the Ninth Circuit has suggested on multiple occasions that district courts consider certifying separate Rule 23(b)(2) and 23(b)(3) classes. *See, e.g.*, *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) ("Plaintiffs concede that class certification for their monetary claims under Rule 23(b)(2) cannot stand in light of Wal-Mart. However, the possibility of a Rule 23(b)(2) class seeking injunctive relief remains. Rule 23(b)(2) applies 'when a single injunction or declaratory judgment would provide relief to each member of the class.' . . . *[S]ee* . . . *Ellis*, 657 F.3d at 987 (indicating that the court could certify a Rule 23(b)(2) class for injunctive relief and a separate Rule 23(b)(3) class for damages)"); *see also Dukes*, 603 F.3d at 620 (suggesting the court certify a 'Rule 23(b)(2) class for

equitable relief and a separate Rule 23(b)(3) class for damages')"). Consequently, as in the order denying plaintiffs' first motion for class certification,[181] it appears that the court can separately certify an injunctive relief class and, if appropriate, also certify a Rule 23(b)(3) damages class.

d. Whether Plaintiffs Have Satisfied Rule 23(b)(2)

An injunctive relief class can be certified under Rule 23(b)(2) when "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.PROC. 23(b)(2). As a threshold matter, the court must determine whether the named plaintiffs have standing to seek an injunction requiring ConAgra to cease marketing Wesson Oils as "100% Natural." In its August 1 order, the court noted that plaintiffs had failed to proffer any evidence indicating that they intended to purchase Wesson Oil products in the future and thus lacked Article III standing to represent injunctive relief classes:

> "Applying Article III's requirements, the court agrees with Judge Breyer that a plaintiff does

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[181] Order at 52 ("Consequently, and contrary to ConAgra's argument, it does not appear to be the case that the court can certify a Rule 23(b)(2) class only if the monetary relief sought is purely incidental to the injunctive relief. Rather, Ninth Circuit precedent indicates that the court can separately certify an injunctive relief class and if appropriate, also certify a Rule 23(b)(3) damages class. Consequently, the court turns to consideration of the requirements for certification under Rule 23(b)(2)").

> not lack standing simply because 'he has learned that a label is misleading and therefore will not be fooled by it again.' Rather, a plaintiff lacks standing if he has not 'express[ed] an intent to purchase the products in the future.' *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, *12 (N.D. Cal. June 13, 2014). . . . [T]he court concludes that none of the named plaintiffs has standing to sue for injunctive relief. It declines to certify classes under Rule 23(b)(2) as a result."[182]

Given this finding, each plaintiff seeking to represent a class entitled to seek injunctive relief under his or her respective state's consumer protection laws has submitted a declaration stating that he or she will or may consider purchasing Wesson Oils in the future.[183] The declarations are nearly uniform, and state that: (1) the named plaintiffs purchased Wesson Oils in part because they were labeled "100% Natural"; (2) they deceived by ConAgra's "100% Natural" label because they believed that "100% Natural" meant the product was GMO-free; (3) they typically attempt to avoid purchasing products with GMO ingredients, but

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[182] *See* Order at 55-56.

[183] *See* Plaintiffs' Decls., Exh. A (putative California class); *id.*, Exh. B (putative Colorado class); *id.*, Exh. C (putative Florida class); *id.*, Exh. E (putative Nebraska class); *id.*, Exh. F (putative New York class); *id.*, Exh. G (putative Ohio class); *id.*, Exh. H (putative South Dakota class); *id.*, Exh. I (putative Texas class). As the court has noted, plaintiff Pauline Michael, who seeks to represent a class of Illinois consumers, does not state in her supplemental declaration that she will or may consider purchasing Wesson Oils in the future. (*See id.*, Exh. D.)

realize that it is extremely difficult to avoid GMO ingredients altogether; and (4) if ConAgra removes the "100% Natural" label, they "might consider" or "will consider" purchasing Wesson Oils in the future, depending on price and the availability of alternate products.[184]

ConAgra contends there is no "clear, admissible evidence that [the named plaintiffs] *w[ill] purchase Wesson Oil in the future*."[185] It asserts that plaintiffs' declarations do not provide "clear, unequivocal evidence that [p]laintiffs w[ill] buy the product again," but merely suggest that they "will *consider* buying it again."[186] Plaintiffs argue that the evidence is not "speculative or illusory; rather, it is conditional: ConAgra must change its conduct before those Plaintiffs would consider buying Wesson Oil again, and ConAgra has given no indication that it will engage in honest labeling in the future without the Court's intervention."[187] The court agrees with ConAgra that plaintiffs have again failed to meet their burden of showing that they have standing to represent an injunctive relief class. Although plaintiffs maintain "[they] have met th[e] standard as to the proposed classes for those states [permitting

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[184] *See id.*, Exh. A, ¶¶ 3-9; *id.*, Exh. B, ¶¶ 3-8; *id.*, Exh. C, ¶¶ 3-8; *id.*, Exh. E, ¶¶ 3-7; *id.*, Exh. F, ¶¶ 3-7; *id.*, Exh. G, ¶¶ 3-8; *id.*, Exh. H, ¶¶ 3-8; *id.*, Exh. I, ¶¶ 3-8. Plaintiff Pauline Michael, the named plaintiff representing the putative Illinois class, does not submit a declaration containing statements regarding her future intent to purchase Wesson Oils. (*See* generally *id.*, Exh. D.)

[185] Class Cert. Opp. at 24 (emphasis original).

[186] *Id.* (emphasis original).

[187] Class Cert. Reply at 36.

injunctive relief] under even the strictest interpretation of the law in this Circuit," the court cannot agree.

Plaintiffs contend they have adequately alleged a future intent to purchase Wesson Oil products, citing Judge Breyer's decision in *Jones*, 2014 WL 2702726. There, plaintiffs sued ConAgra for violation of California's Unfair Competition Law, California Business and Professions Code § 17200; misleading advertising in violation of California Business and Professions Code § 17500; violation of California's Consumers Legal Remedies Act; and unjust enrichment. *Id.* at *1. Plaintiffs alleged that ConAgra had mislabeled three products – Hunt's® canned tomatoes, PAM® cooking sprays; and Swiss Miss® hot cocoa; the Hunt's and PAM products were labeled "100% Natural," while the Swiss Miss label stated that the product was a "Natural Source of Antioxidants" or that "Natural Antioxidants Are Found in Cocoa." *Id.* at *2. Plaintiffs sought to certify an injunctive relief class under Rule 23(b)(2). *Id.* at *12. Judge Charles Breyer declined to do so, concluding that named plaintiffs lacked Article III standing because they did not "express an intent to purchase the products in the future." *Id.* at *12-13. Judge Breyer noted that while "[c]ourts have rejected the argument that a plaintiff cannot establish standing if he has learned that a label is misleading and therefore will not be fooled by it again," they "do require [that] plaintiffs . . . express an intent to purchase the products in the future." *Id.* at *12. He observed:

> "Here, Jones testified that he 'stopped buying' Hunt's products once he found out that they

> contained the challenged ingredients, and he did not attest to having any intention of buying Hunt's products in the future. While Jones testified that he makes an effort to seek out natural foods in his diet, he also testified that he might actually prefer products not labeled 'natural' depending on price, content, and flavor. He also, after filing the lawsuit, purchased other brands of canned tomatoes that contained citric acid and calcium chloride. Accordingly, Jones could have testified, if true, that he bought the Hunt's products in reliance on the label because he seeks out natural products, but that he might purchase Hunt's products in the future if they were properly labeled. He did not so testify. . . . Accordingly, the Court finds that Plaintiffs lack standing under Rule 23(b)(2)." *Id.* at *12-13.

Plaintiffs assert that because the named representatives seeking to represent injunctive relief classes have proffered supplemental declarations that precisely track the language in *Jones* – i.e., that state "[they] might purchase [Wesson Oil products] in the future if they were properly labeled," they have adduced evidence that shows they have standing to represent an injunctive relief class. While the quoted portion of Judge Breyer's opinion in *Jones* uses the word "might," it elsewhere notes that the plaintiff must show a "real and immediate threat of repeated injury":

> "[C]ourts do require plaintiffs to express an intent to purchase the products in the future. This is somewhat problematic, policywise: if a plaintiff bought a product that claimed to be 'nutritious' but actually contained arsenic,

> would he have to claim that he intends to buy it again? On the other hand, citric acid is not arsenic, and there is no way around the principle that a plaintiff must establish a 'real and immediate threat of repeated injury' to establish standing for injunctive relief." *Id.* at 12 (citations omitted).

Given that there is "no way around" the threshold showing required to demonstrate Article III standing to assert injunctive relief claims, the court concludes that a statement that a party "will consider" or "might consider" purchasing a product in the future is not sufficiently "concrete" or "real and immediate" to support constitutional standing under either Article III or *Jones*.

Plaintiffs contentions to the contrary are unavailing.[188] While courts have recognized that a plaintiff who has been exposed to a misleading or deceptive label may have Article III standing to represent an injunctive relief class if they intend to purchase the product in the future, *see, e.g.*, *Jou v. Kimberly-Clark Corp.*, No. 3:13-CV-03075, 2013 WL 6491158, *4 (N.D. Cal. Dec. 10, 2013) ("reject[ing p]laintiffs' contention that it [wa]s unnecessary for them to maintain any interest in purchasing the products in the future"), plaintiffs have not adduced evidence that they "would purchase [Wesson Oils] in the future if the[products] were truthfully labeled."[189] Rather, they assert only that they will or may *consider* purchasing the products in the future.

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[188] Class Cert. Motion at 68-69; Class Cert. Reply at 34-36.

[189] Class Cert. Motion at 69-70.

Other courts have questioned whether this type of statement demonstrates there is a real and immediate threat of future injury. *See, e.g.*, *Marty v. Anheuser-Busch Companies, LLC*, __ F.Supp.2d __, 2014 WL 4388415, *21 (S.D. Fla. Sept. 5, 2014) ("plaintiffs . . . maintain that 'Courts find standing to seek injunctive relief under consumer protection laws where the defendant continues the allegedly deceptive labeling or advertising and the plaintiff may purchase the product in the future.' The permissive word 'may' seems at odds with Supreme Court precedent which requires a real and immediate threat of future injury," citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) ((holding that the threat must be "real and immediate" as opposed to "conjectural or hypothetical"); *Smith v. Chrysler Financial Co., L.L.C.*, No. Civ.A.00-CV-6003 DMC, 2004 WL 3201002 (D.N.J. Dec. 30, 2004) ("Plaintiffs have failed to establish a real and immediate threat that they will suffer an injury as the result of any actions or policies of Defendant. The injury which Plaintiffs allege, that they *may* want to buy another Chrysler in the future and may be discriminated against by Defendant, is simply too speculative" (emphasis added)). *See also Miller v. Nissan Motor Acceptance Corp.*, 362 F.3d 209, 223 (3d Cir. 2004) (suggesting, in dicta, that the conclusion that a plaintiff who might default on a lease and might return a leased automobile early and consequently pay an early termination fee had standing was "plainly wrong")); *Freydel v. New York Hosp.*, 242 F.3d 365, 2000 WL 1836755 (2d Cir. Dec. 13, 2000) (Unpub. Disp.) ("While we agree that plaintiff 'may' be referred to NYH in the future, such an indefinite

speculation is insufficient to maintain standing to seek injunctive relief"). *Cf. Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013) (to have standing to sue for injunctive relief, a plaintiff must show that the "'threatened injury [is] *certainly impending*,'" quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added)).

Plaintiffs cite no authority suggesting that allegations they "might" or "will" *consider* purchasing ConAgra's products satisfies Article III, and the court concludes that the weight of authority is to the contrary. *Compare Ries v. AriZona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012) (concluding that named plaintiffs had shown they had Article III standing to seek classwide injunctive relief because they clearly "stated [an] intent to purchase" the challenged product in the future) *with Werdebaugh v. Blue Diamond Growers*, Case No.: 12–CV–2724–LHK, 2014 WL 2191901, *9 (N.D. Cal. May 23, 2014) ("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. 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)," citing *Ellis*, 657 F.3d at 979); *Rahman v. Mott's LLP*, No. CV 13–3482 SI, 2014 WL 325241, *10 (N.D. Cal. Jan. 29, 2014) ("to establish standing [for injunctive relief], plaintiff must allege that he intends to purchase the products at issue in the future"); Jou, 2013 WL 6491158 at *4

("Because Plaintiffs fail to identify any allegation in their Complaint that suggests . . . they maintain an interest in purchasing the diapers or wipes, or both, in the future, Plaintiffs have not sufficiently alleged standing to pursue injunctive relief").

Consistent with Article III's standing requirements, plaintiffs must proffer evidence that there is "a sufficient *likelihood* that [they] will be wronged in a similar way." *Lyons*, 462 U.S. at 111 (emphasis added). Plaintiffs' equivocal, speculative assertion that they "may consider" or "will consider" purchasing Wesson Oils in the future if they are not mislabeled does not satisfy this standard. *See Dabish v. Infinintelabs, LLC*, No. 13-CV-2048 BTM (DHB), 2014 WL 4658754, *5 (S.D. Cal. Sept. 17, 2014) ("[t]o establish standing for prospective injunctive relief, [a p]laintiff 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,'" citing *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (in turn citing *Lyons*, 461 U.S. at 111); *see also Bates*, 511 F.3d at 985 (holding that a plaintiff must establish a "real and immediate threat of repeated injury" to demonstrate Article III standing).[190]

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[190] In their motion, plaintiffs argue that they need not allege a future intent to purchase Wesson Oils to have Article III standing to represent putative state classes seeking injunctive relief. (Class Cert. Motion at 69-73.) Plaintiffs rely on *Henderson v Gruma Corp.*, No. CV 10-04173 AHM (AJWx), 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011), and its progeny as support for this argument. (*Id.*) The court addressed this contention at length in its order denying plaintiffs' original

e. Rule 23(b)(3)

(1) Whether Common Issues Predominate

Certifying a class under Rule 23(b)(3) requires "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.PROC. 23(b)(3); *see Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004). The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a). *Amchem Products*, 521 U.S. at 623-24. If common questions "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then "there is clear justification for handling the dispute on a representative rather than on an individual basis," and the predominance test is satisfied. *Hanlon*, 150 F.3d at 1022. "'[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, [however,] a Rule 23(b)(3) action would be inappropriate.'" *Zinser*, 253 F.3d at

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motion for class certification. It declined to follow *Henderson*, noting, as Chief Judge Moskowitz of the Southern District of California reasoned in *Mason v. Nature's Innovation, Inc.*, No. 12-3109, 2013 WL 1969957, *4 (S.D. Cal. May 13, 2013), that "Article III's standing requirements take precedence over enforcement of state consumer protection laws," and concluding that a plaintiff must "express[ ] an intent to purchase the products in the future." (Order at 54-55.) The court remains unpersuaded by *Henderson* and its progeny, and thus finds plaintiffs' argument that they need not demonstrate an intent to purchase Wesson Oils in the future unavailing.

1190 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778, at 535-39 (1986)). This is because, *inter alia*, "the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Id*.

(a) Reliance and Causation

In its order denying plaintiffs' original motion for class certification, the court concluded that it could not determine whether reliance or causation could "be prove[n] on a classwide basis with respect to each of the claims plaintiffs assert, and each of the classes they propose."[191] It also noted:

> "Even had plaintiffs adequately shown that a classwide inference of reliance and causation is available for all claims and all classes, the court would not be able to find on the present record that they had demonstrated an entitlement to such an inference. Citing California law, the Ninth Circuit has held that if a misrepresentation is not material as to all class members, the issue of reliance 'var[ies] from consumer to consumer,' and no classwide inference arises."[192]

Because plaintiffs had not shown that (1) each putative class's claim could be proved by adducing evidence supporting a classwide inference of reliance and/or causation; and (2) the evidence regarding the

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[191] Order at 57.

[192] *Id.* at 58 (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022–23 (9th Cir. 2011) (in turn citing *In re Vioxx Class Cases*, 180 Cal.App.4th 116, 129 (2009)).

materiality of the "100% Natural" label was in conflict, the court concluded that plaintiffs had not sufficiently shown that common questions predominated over individualized ones.[193]

In support of their amended motion for class certification, plaintiffs argue that "the predominant question under each of the consumer protection statutes at issue in this case is whether the '100% Natural' label on Wesson Oils is objectively false, deceptive, misleading, and/ or unfair to *reasonable consumers*."[194] The threshold question, as the court noted in its August 1 order, is whether each claim sought to be certified under each state requires a showing of reliance and/or causation, and if so, whether such elements may be established on a classwide basis.[195] Accordingly, the court first turns to plaintiffs' showing on this issue.

(i) Whether a Classwide Inference of Reliance and Causation Is Available for Each Putative Class's State Law Claims

(1) California

Plaintiffs seek to certify a California class alleging: (1) violations of California's consumer protection statutes; (2) breach of express warranty; and (3) breach of implied warranty.[196]

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[193] *Id.* at 58-60.

[194] Class. Cert. Reply at 23 (emphasis original).

[195] Order at 57-58.

[196] Class Cert. Motion at 15-21.

(a) Consumer Protection Claims

Courts generally consider claims under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL") and Consumers Legal Remedies Act ("CLRA") together. *See Forcellati*, 2014 WL 1410264 at *9 ("For purposes of class certification, the UCL, FAL, and CLRA are materially indistiguishable," citing *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 589 n. 3 (C.D. Cal. 2011); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 534 (C.D. Cal. 2011)). Each statute allows plaintiffs to establish materiality and reliance (i.e., causation and injury) by showing that a reasonable person would have considered the defendant's representation material. *Forcellati*, 2014 WL 1410264 at *9 (citing *Bruno*, 280 F.R.D. at 534); *see also In re Tobacco II Cases*, 46 Cal.4th 298, 327 (2009); *In re Steroid Hormone Prod. Cases*, 181 Cal.App.4th 145, 157 (2010).

Thus, a California class suing under the state's consumer protection statutes need not show individualized reliance if it can establish the materiality of ConAgra's "100% Natural" label to a reasonable consumer. *See Forcellati*, 2014 WL 1410264 at *9 ("As such, whether or not Defendants' claims are misleading is an objective, classwide inquiry for purposes of the UCL, FAL, and the CLRA. It is simply a matter of common sense that consumers who purchased Defendants' products did so in reliance on Defendants' claims that the products

provided effective relief from cold and flu symptoms," citing *Delarosa*, 275 F.R.D. at 586).[197]

(b) Breach of Express and Implied Warranty Claims

Plaintiffs contend that their California breach of express and implied warranty claims are also susceptible of common proof such that individualized issues do not predominate. The court agrees. California Commercial Code § 2313, which defines express warranty, applies to "transactions in goods."

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[197] ConAgra argues that "in the states requiring some evidence of reliance or causation among class members [such as California], class certification is improper where individualized issues of reliance predominate, as they would in this case." (Class Cert. Opp. at 38.) ConAgra cites cases in which courts in this district have refused to certify classes because individualized inquiries concerning reliance and/or causation predominated. *See, e.g.*, *Turcios v. Carma Labs, Inc.*, 296 F.R.D. 638, 646 (C.D. Cal. 2014) ("Plaintiff cannot show that all class members suffered the same injury because he cannot show that all class members relied on the alleged misrepresentation"); *Hodes v. Van's International Foods*, No. CV 09-01530 RGK (FFMx), 2009 WL 2424214, *4 (C.D. Cal. July 23, 2009) ("Courts in the Ninth Circuit and in California have regularly found that where such inquiries predominate over common questions of law or fact, courts may refuse to certify a class action"). Neither case holds, however, that causation and reliance cannot be proved on a classwide basis if there is evidence that the misrepresentation was material. Rather, they address predominance in situations where plaintiffs cannot show that the misrepresentation was material and misleading to a reasonable consumer. Where no such proof is presented, no classwide inference of reliance and causation arises, regardless of its availability under the California consumer protection statutes.

See CAL. COM. CODE § 2102; *See also* CAL. CIV. CODE § 1791.2(a)(1) (defining an "express warranty" as "[a] written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or to provide compensation if there is a failure in utility or performance"); BLACK'S LAW DICTIONARY at 1582 (7th ed. 1999) (defining "express warranty" as "[a] warranty created by the overt words or actions of the *seller*"); 3 B. Witkin, SUMMARY OF CALIFORNIA LAW, §§ 55-56 (9th ed. 1990); Richard A. Lord, WILLISTON ON CONTRACTS 4TH § 52.45 (4th ed. 2004) ("Under the [Uniform Commercial] Code, an express warranty is usually associated with a contract for the sale of goods, but may be found in connection with other transactions involving goods. . . . There is a division of opinion whether the express warranty concepts in the Code are also applicable or may be extended to service agreements").

An express warranty is a term of the parties' contract. *See A.A. Baxter Corp. v. Colt Industries, Inc.*, 10 Cal.App.3d 144, 153 (1970) ("A warranty is as much one of the elements of sale and as much a part of the contract of sale as any other portion of the contract and is not a mere collateral undertaking. . . . [T]o constitute an express warranty, the statement must be a part of the contract"); WILLISTON, *supra*, § 52.45 (stating that an express warranty is "a term of the parties' contract"); *see Paularena v. Superior Court of San Diego County*, 231 Cal.App.2d 906, 915 (1965) ("The damages which each set of plaintiffs seek[s] through their [breach of warranty] cause[ ] of

action are dependent upon their affirmance of the existence of a contract").

To prevail on a breach of express warranty claim under California law, a plaintiff must prove that: "(1) the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached." *Allen v. ConAgra Foods, Inc.*, Case No. 13–cv–01279–JST, 2013 WL 4737421, *11 (N.D. Cal. Sept. 3, 2013) (citing *Weinstat v. Dentsply International, Inc.*, 180 Cal.App.4th 1213, 1227 (2010)). Proof of reliance on specific promises or representations is not required.[198] *Weinstat*, 180

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[198] Some California courts have concluded that reliance is an element of an express warranty claim under California law. *See Rodarte v. Philip Morris, Inc.*, No. 03-0353 FMC, 2003 WL 23341208, *7 (C.D. Cal. June 23, 2003) (stating that, to prevail on a breach of express warranty claim, plaintiff must prove that the seller: "(1) made an affirmation of fact or promise or provided a description of its goods; (2) the promise or description formed part of the basis of the bargain; (3) the express warranty was breached; and (4) the breach caused injury to the plaintiff," and that plaintiff must allege the "exact terms of the warranty" and that he or she reasonably relied on the warranty, citing *Williams v. Beechnut Nutrition Corp.*, 185 Cal.App.3d 135, 142 (1986)); *see also Nabors v. Google, Inc.*, No. 5:10-CV-03897 EJD (PSG), 2011 WL 3861893, *3 (N.D. Cal. Aug. 30, 2011) ("To plead an action for breach of express warranty under California law, a plaintiff must allege:(1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury"); *Baltazar v. Apple, Inc.*, No. CV-10-3231-JF, 2011 WL 588209, *2 (N.D. Cal. Feb. 10, 2011) (same); *Kearney v. Hyundai Motor America*, No. SACV09-1298-JST (MLGx), 2010 WL 8251077, *7 (C.D. Cal. Dec. 17, 2010) (same).

The court is not persuaded that reliance is an element of a breach of express warranty claim. As an initial matter, the

decisions so holding invariably cite *Williams v. Beechnut Nutrition Corp.*, a Court of Appeal decision that summarily addressed the elements of an express warranty claim, relying on the California Supreme Court's pre-UCC decision in *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682 (1954). *Williams*, 185 Cal.App.3d at 142. As the Court of Appeal in *Weinstat* noted:

> "Pre-Uniform Commercial Code law governing express warranties required the purchaser to prove reliance on specific promises made by the seller. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 . . . , referencing *Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 440 . . . .) The Uniform Commercial Code, however, does not require such proof. Instead, the official comment to section 2313 explains that '[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.' (CAL. U. COM. CODE com, 23A pt. 1, West's Ann. Cal. U. Com. Code (2002 ed.) foll. § 2313, com. 3, p. 296.) The statute thus creates a presumption that the seller's affirmations go to the basis of the bargain."

Indeed, the California Court of Appeal in *Keith v. Buchanan* noted that "[i]t is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." 173 Cal.App.3d 13, 23 (1985) (citing *Interco Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 261 (Mo. App. 1976); *Winston Industries, Inc. v. Stuyvesant Insurance Co., Inc.*, 55 Ala. App. 525, 530 (1975)).

The court agrees with the well-reasoned analysis of the California Court of Appeal in *Weinstat* that, under California

Cal.App.4th at 1227 ("The lower court ruling rests on the incorrect legal assumption that a breach of express warranty claim requires proof of prior reliance. While the tort of fraud turns on inducement, as we explain, breach of express warranty arises in the context of contract formation in which reliance plays no role"); *see Brown v. Hain Celestial Group, Inc.*, 913 F.Supp.2d 881, 899-900 (N.D. Cal. 2012) ("To prevail on a breach of express warranty claim, Plaintiffs must prove: (1) 'the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached.' Proof of reliance on specific promises is not required"); *Rosales v. FitFlop USA, LLC*, 882 F.Supp.2d 1168, 1178 (S.D. Cal. 2012) ("Product advertisements, brochures, or packaging can serve to create part of an express warranty. While this does not require that plaintiff relied on the individual advertisements, it does require that plaintiff was actually exposed to the advertising," *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 754 F.Supp.2d 1145, 1183 (C.D. Cal. 2010)).

Accordingly, courts have found that breach of express warranty claims are appropriate for class treatment where whether defendant misrepresented its product and whether such misrepresentation breached warranties are issues common to members of the putative class. *See, e.g.*, *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 669 (C.D. Cal. 2014) ("Here, each of

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Commercial Code § 2-313, reliance is not a required element of a plaintiff's *prima facie* case for breach of express warranty.

the elements is subject to common proof. Plaintiffs allege that Defendants represented that the products would be effective at treating various ailments, and such representations on the product packaging formed part of the basis of the bargain. Plaintiffs allege that for the reasons discussed above, Defendants' warranty about the effectiveness of their products was breached"); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 505 (S.D. Cal. 2013) ("Common issues also exist and predominate on Plaintiffs' claims for quasi-contract and breach of express warranty as to the products labeled 'Nothing Artificial.' Plaintiff Larsen's claims are based on common contentions of deceptive conduct by Defendant in marketing its products. Specifically, this case concerns whether Defendant's products contained artificial ingredients and whether Defendant made material representations to the contrary. Determinations of whether Defendant misrepresented its products and, as a result, whether warranties were breached, are common issues appropriate for class treatment," citing *Keegan v. American Honda Motor Co., Inc.*, 284 F.R.D. 504, 534-37 (C.D. Cal. 2012)).

As with California's consumer protection statutes, however, class treatment of breach of express warranty claims is only appropriate if plaintiffs can demonstrate that the alleged misrepresentation would have been material to a reasonable consumer. *See Astiana*, 291 F.R.D. at 509 ("Likewise, Plaintiffs' claims for breach of express warranty and quasi contract due to the 'All Natural' representations and the presence of those ingredients are insufficient for class treatment. *Because Plaintiffs make an insufficient showing that the 'All Natural'*

representation is materially misleading, it is fatally unclear whether, from the perspective of the putative class, Defendant breached any express warranty or was unjustly enriched. The individual views of each class member as to the exact nature of Defendant's warranty would predominate over common issues. Plaintiffs' claims regarding the presence of Defendant's 'All Natural' representations on products containing those ingredients accordingly fail to satisfy the commonality and predominance requirements of Rule 23" (emphasis added)). Thus, while plaintiffs' express warranty claim under California law is susceptible of class treatment, the question remains whether plaintiffs have sufficiently established the materiality of ConAgra's misrepresentation and in this way demonstrated that the predominance requirement satisfied and class treatment is appropriate.[199]

The California Commercial Code also "implies a warranty of merchantability that goods '[a]re fit for [the] ordinary purposes for which such goods are used.'" *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (quoting CAL. COM. CODE § 2314(2)(c)). "The implied warranty 'provides for a minimum level of quality.'" *Id.* (quoting *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal.App.4th 1291, 1296 (1995)). "A breach of the warranty of merchantability occurs if the product lacks 'even the most basic degree of

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[199] Under California law, vertical privity is not required for a breach of express warranty claim where "the purchaser of a product relied on representations made by the manufacturer in labels or advertising material." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008); *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 696 (1954).

fitness for ordinary use.'" *Id.* (quoting *Mocek v. Alfa Leisure, Inc.*, 114 Cal.App.4th 402, 406 (2003)). Contrary to plaintiffs' assertions,[200] California law requires that a plaintiff asserting a breach of implied warranty claim be in vertical privity with the defendant; the exception to privity available for breach of express warranty claims is not available for breach of implied warranty claims.[201] *Clemens*, 534 F.3d at 1023; *Burr*, 42 Cal.2d at 696; *see Allen*, 300 F.R.D. 669.

Judge Dolly Gee of this district recently concluded that the predominance requirement was not satisfied with respect to a breach of implied warranty claim that was based on a purported misrepresentation on the product's label because the class members had to show that they were in vertical privity with the defendant. Because they did not purchase the product directly from the defendant, but rather from a retail store, Judge Gee concluded that individual issues predominated over common questions. *See Allen*, 300 F.R.D. at 670 ("Plaintiffs have not adequately demonstrated that common issues of fact and law predominate with respect to this claim, given that each class member will be required to

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[200] Class Cert. Motion at 21; Class Cert. Reply at 27.

[201] The case law is somewhat ambiguous as to when the exception to vertical privity applies. While the Ninth Circuit in *Clemens* suggested that the exception is available if a consumer relies on a manufacturer's written labels or advertisements, *see Clemens*, 534 F.3d at 1023, the California Supreme Court case it cited for this proposition explicitly held that the vertical privity exception for representations on labels or advertisements "[is] applicable *only* to express warranties." *Burr*, 42 Cal.2d at 696 (emphasis added).

demonstrate that he or she is in vertical privity with Defendants. Moreover, the allegations in the operative complaint suggest that class members bought the products from retail stores, and thus, they are not in vertical privity with Defendants. In light of the foregoing, the Court concludes that Plaintiffs have not met the predominance requirement with respect to their breach of implied warranty claim"). The court agrees with Judge Gee's reasoning and her interpretation of *Clemens* and *Burr*, and reaches a similar conclusion here. As each member of the putative California class must establish that he or she was in vertical privity with ConAgra to prove his or her implied warranty claim, the court concludes that individual issues predominate over common ones and certification of a class to pursue the claim is not appropriate.

(c) Conclusion Regarding California Claims

For the reasons stated, the court concludes that plaintiffs' California consumer protection and express warranty claims are susceptible of classwide proof. The court considers *infra* whether plaintiffs have shown that ConAgra's alleged misrepresentation would have been material to a reasonable consumer so as to support a classwide inference of reliance for purposes of plaintiffs' consumer protection claims and a classwide finding of express warranty for purposes of plaintiffs' breach of express warranty claim. The court concludes that individual issues predominate, however, with respect to plaintiffs' California implied

warranty claim, and that class certification of that claim is not appropriate.

(2) Colorado

Plaintiffs representing the putative Colorado class seek to certify four claims: (1) violation of the Colorado Consumer Protection Act ("CCPA"); (2) breach of express warranty; (3) breach of implied warranty; and (4) common law unjust enrichment.[202]

(a) Consumer Protection Claim

The CCPA was "enacted to regulate commercial activities and practices, which because of their nature, may prove injurious, offensive, or dangerous to the public." *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146 (Colo. 2003). More specifically, the CCPA works to deter and punish businesses for consumer fraud. *Id.* The CCPA is liberally construed to serve its broad purpose and scope. *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998).

"In order to prove a private cause of action under the CCPA, a plaintiff must show: '(1) [that] the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered . . . injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury.'" *HealthONE of Denver, Inc. v.*

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[202] Class Cert. Motion at 21-22.

UnitedHealth Group, Inc., 805 F.Supp.2d 1115, 1120 (D. Colo. 2011) (quoting *Rhino Linings*, 62 P.3d at 146-47). The CCPA applies to the type conduct alleged by plaintiffs in this case – i.e., misleading claims or advertising to consumers. *See, e.g.*, *Dawson v. Litton Loan Servicing, LP*, No. 12-CV-01334-CMA-KMT, 2013 WL 1283848, *4 (D. Colo. Mar. 28, 2013) ("The CCPA prohibits a wide variety of 'deceptive trade practices,' including 'mak[ing] false or misleading statements of fact concerning the price of goods' and 'advertis[ing] goods . . . with intent not to sell them as advertised" (citations omitted)); *May Dept. Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 973-75 (Colo. 1993) (concluding that a department store chain's misleading advertisements violated the CCPA).

ConAgra disputes whether the showing of injury, i.e., damages and causation, is susceptible of classwide proof such that the claim satisfies the predominance requirement.[203] To show causation under the CCPA, plaintiffs must show that ConAgra's challenged practice, i.e., the misleading "100% Natural" claim on its Wesson Oil products, injured putative class members. While proof of individual reliance can be used to establish causation, it need not be used; courts have regularly considered "whether the circumstantial evidence common to the class supports an inference of causation." *Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92, 99-100 (Colo. 2011); *see Patterson v. BP Am. Prod. Co.*, 240 P.3d 456, 465-67 (Colo. App. 2010) ("[P]resuming or inferring reliance is proper when plaintiffs are able to

[203] Class Cert. Opp. at 37-38.

establish material misrepresentations to the class on a common basis. . . . [W]e conclude that even without a presumption of reliance, named plaintiffs in a class action may demonstrate ignorance or reliance on a classwide basis, using circumstantial evidence that is common to the class" (citations omitted)). The court must, however, consider whether individualized evidence refutes a classwide inference of causation. *Garcia*, 263 P.3d at 99-100.

Plaintiffs maintain there is circumstantial evidence supporting a classwide inference of causation for purposes of the CCPA claim because there is evidence that the "100% Natural" label was material to the putative class.[204] A violation of the CCPA occurs if the conduct has a "capacity or tendency to deceive a reasonable consumer." *Rhino Linings*, 62 P.3d at 148 n. 11 (stating that CCPA plaintiffs must show a reasonable person would have relied on the misrepresentation at issue). If such a showing is made, it suffices to support a classwide inference of reliance and causation. Thus, the court will consider *infra* whether plaintiffs have sufficiently shown that the misrepresentation was material, i.e., that it had the capacity to mislead a reasonable consumer, such that they have satisfied the predominance requirement with respect to their CCPA claim.

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[204] Class Cert. Motion at 23.

(b) Breach of Express and Implied Warranty Claims

To recover for breach of express warranty under Colorado law, a plaintiff must prove that (1) a warranty existed; (2) the defendant breached the warranty; (3) the breach proximately caused the losses claimed as damages; and (4) timely notice of the breach was given to defendant. *Fiberglass Component Production, Inc. v. Reichhold Chemicals, Inc.*, 983 F.Supp. 948, 953 (D. Colo. 1997) (citing *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984); COLO. JURY INSTR. – Civ. 3d 14:6 (1990)). "An implied warranty of merchantability exists in all contracts for sales of goods unless disclaimed." *Id.* at 957-58; *see also* COLO. JURY INSTR. – Civ. 14:10 (2014). In cases such as this, where plaintiffs allege that the same conduct breached an express and an implied warranty of merchantability, courts analyze the claims together. *See Haffner v. Stryker Corporation*, No. 14-CV-00186-RBJ, 2014 WL 4821107, *6 (D. Colo. Sept. 29, 2014) ("Under Colorado law, an express warranty includes any affirmation of fact, promise, or description of the product by the seller of the goods. Colorado further imposes an implied warranty of merchantability, effectively a guarantee that a product is fit for the ordinary purposes for which it is used. I agree with Stryker's assertion that in this case the breach of warranty claims are essentially identical. Accordingly, they can be discussed together. . . . In both cases, Mr. Haffner contends that the warranties were breached because the Knee System 'had dangerous propensities when put to its

intended use and would cause severe injuries to the user'").

Reliance is not a required element of a Colorado warranty claim, *see Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir. 1991), nor is a showing of privity required, *Hansen v. Mercy Hospital, Denver*, 40 Colo. App. 17, 18 (1977) ("lack of privity no longer presents an obstacle to recovery for breach of implied warranty," citing COLO. REV. STAT. ANN. § 4-2-318 ("A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty")).

Causation, however, *is* a required element. *See Reichhold Chemicals*, 983 F.Supp. at 953 ("To recover for breach of express warranty, a plaintiff must prove that: 1) a warranty existed; 2) the defendant breached the warranty; 3) *the breach proximately caused the losses claimed as damages*; and 4) timely notice of the breach was given to defendant," citing *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984); COLO. JURY INSTR. – Civ. 14:6). Causation is also a required element for a breach of implied warranty claim under Colorado law. *See* COLO. JURY INSTR. – Civ. 14:10 (2014) (noting that to recover on a claim of breach of implied warranty of merchantability, a plaintiff must establish by a preponderance of the evidence, *inter alia*, "[t]his breach of warranty caused the plaintiff (injuries) (damages) (losses)"). At the hearing, plaintiffs argued that their Colorado warranty claims are susceptible of classwide proof because they will be able to show through hedonic regression and conjoint analysis that the "100% Natural" label on bottles of

Wesson cooking oil proximately caused their damages; specifically, they assert they will be able to show that there was a price premium associated with the label that led class members to pay more for each bottle of Wesson Oils they purchased. Plaintiffs contend that payment of the price premium was proximately caused by ConAgra's purported breach of a warranty that Wesson Oils contained no GMOs. They seek to recover the price premium as damages.

The court is persuaded by plaintiffs' argument and agrees that, under Colorado law, causation is susceptible of classwide proof where, as here, plaintiffs may be able to prove that defendant's warranty caused each class member to pay more than he or she otherwise would have paid for the product. Thus, if plaintiffs are able to propose a methodology to calculate the price premium attributable to use of the "100% Natural" label to suggest that Wesson Oils contain no GMO ingredients, the court concludes they will be able demonstrate causation on a classwide basis. The court considers *infra* whether plaintiffs have proposed a viable damages methodology.[205]

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[205] The court's tentative ruling declined to certify Colorado express warranty and implied warranty classes because plaintiffs had failed to address how proximate causation could be proved on a classwide basis, and because they cited no authority suggesting that it could. After consideration of the arguments plaintiffs' counsel made at the hearing, the court concludes the better view is that proximate causation can be proved on a classwide basis where, as here, plaintiffs propose to demonstrate that putative class members paid a price premium for each bottle of cooking oil due to defendant's purported breach of express and implied warranties.

(c) Unjust Enrichment Claim

Unjust enrichment is a judicially-created remedy designed to undo the benefit to one party that comes at the unfair detriment of another. *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000). Unjust enrichment is based on principles commonly associated with restitution. *DCB Constr. Co. v. Central City Dev. Co.*, 965 P.2d 115, 119 (Colo. 1998). "When restitution is the primary basis of a claim, as opposed to a remedy for bargains gone awry, it invokes what has been called a 'contract implied in law.'" *Id.* (citing Joseph M. Perillo, *Restitution in a Contractual Context*, 73 COL. L.REV. 1208, 1212–13 (1973)). It is thus an equitable remedy and does not depend on the existence of either an oral or written contract. *See Cablevision of Breckenridge, Inc. v. Tannhauser Condo. Ass'n*, 649 P.2d 1093, 1097 (Colo. 1982).

To state an unjust enrichment claim under Colorado law, plaintiff must show that "(1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation." *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008) (citing *Salzman*, 996 P.2d at 1266-67). Colorado courts have recognized that unjust enrichment "does not require a promise or privity between the parties." *Salzman*, 996 P.2d at 1265.

Plaintiffs argue that a Colorado unjust enrichment claim does not require proof of "causation, materiality, [or] reliance," and thus that a class should be

certified. [206] While causation, materiality, and reliance are not explicit elements of an unjust enrichment claim under Colorado law, it is clear that plaintiffs must show that ConAgra "received a benefit" from putative class members "under circumstances that would make it unjust for [ConAgra] to retain the benefit without commensurate compensation." *Lewis*, 189 P.3d at 1141. This "highly fact-intensive inquiry," *Duddling v. Norton Frickley & Associates*, 11 P.3d 441, 445 (Colo. 2000), requires that the trial court "'make extensive factual findings to determine whether a party has been unjustly enriched.'" *Redd Iron, Inc. v. International Sales and Services Corp.*, 200 P.3d 1133, 1136 (Colo. App. 2008) (citing *Lewis*, 189 P.3d at 1140).

Given the highly factual nature of this question, the court is concerned that individualized inquiries will be required concerning the motivations and purchasing decisions of each class member, notwithstanding the fact that ConAgra made a uniform representation, i.e., that Wesson Oils were "100% Natural." Plaintiffs cite no authority for the proposition that a Colorado unjust enrichment class should be certified, or that, under Colorado law, the court can draw a common inference that the purchase transactions into which class members entered with ConAgra were unjust, obviating the need for individualized inquiries. The court thus concludes that plaintiffs have failed to demonstrate that common questions predominate over individualized inquiries with respect to their unjust enrichment

[206] Class Cert. Motion at 25.

claim, and that certification of a Colorado unjust enrichment class is appropriate.[207]

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[207] The cases that plaintiffs cite in their motion do not persuade the court otherwise. (Class Cert. Motion at 25.) *In Jackson v. Unocal Corp.*, 262 P.3d 874, 877, 890 (Colo. 2011), the Colorado Supreme Court reversed the Colorado Court of Appeals' decertification of a class alleging nuisance, negligence, trespass, respondeat superior, and unjust enrichment claims. The Court did not substantively analyze certification of an unjust enrichment class, however. *Id.* Moreover, the nature of the claims asserted in *Jackson* are factually distinct from those alleged in this case; this underscores why individualized inquiries did not predominate in *Jackson*, but are likely to predominate here. There, the putative class's claims were each premised on common property defects created by easements granted to an oil company for use of a pipeline and alleged asbestos contamination caused by removal of the pipeline. *Id.* at 877-78. Here, by contrast, the case involves individualized purchasing decisions made by thousands of consumers over a several year period. The individualized nature of the purchasing decisions and the meaning each class member ascribed to the "100% Natural" claim on Wesson Oils presents a completely different type of question than that at issue in *Jackson*. Here, the materiality of the "100% Natural" label and a class member's reliance on it will determine whether it would be unjust for ConAgra to retain any price premium generated by the label.

Similarly inapposite is *Francis v. Mead Jackson & Co.*, No. 1:10-CV-00701-JLK, 2010 WL 3733023, *1 (D. Colo. Sept. 16, 2010). There, the court was not evaluating certification of a class, but a motion to strike class allegations. *Francis*, 2010 WL 3733023 at *1. The court's observation that it might not be "impossible" for plaintiffs to certify the proposed classes, despite their inability to prove that some class members had been injured,does not assist in determining whether plaintiffs have made an adequate showing justifying certification of their unjust enrichment class. Nor does it suggest that the "unjust" prong of a Colorado unjust enrichment claim can be proved on a

classwide basis, nor indicate what must be established for a classwide inference of injustice to arise.

The court notes additionally that it would be inappropriate to certify a Colorado unjust enrichment class for the independent reason that the claim is based on the same wrongful conduct for which the class seeks to recover under the CCPA. The unjust enrichment claim also seeks the same recovery as the CCPA claim, i.e., the price premium paid on each bottle of Wesson Oil purchased. Under Colorado law, if the remedy sought on an unjust enrichment claim is available at law through prosecution of a CCPA claim, the unjust enrichment claim must be dismissed. *Harris Group v. Robinson*, 209 P.3d 1188, 1205-06 (Colo. App. 2009) (holding that unjust enrichment is an equitable remedy that is not available where there is "a plain, speedy, and adequate remedy at law"). In *Francis*, a case on which plaintiffs rely, the court ultimately dismissed the unjust enrichment claim because it was duplicative of plaintiffs' CCPA claim. *See Francis v. Mead Johnson & Co.*, No. 1:10-CV-00701-JLK, 2010 WL 5313540, *9 (D. Colo. Dec. 17, 2010) ("Although Plaintiff has adequately pled the elements of her unjust enrichment claim, it must be dismissed because the CCPA provides an adequate legal remedy. In her unjust enrichment claim, Plaintiff seeks recovery for the same wrongful conduct as in her CCPA claims. Most importantly, Plaintiff seeks the exact same damages for these two claims. Furthermore, because the success of Plaintiff's unjust enrichment claim depends directly upon the success of her CCPA claims, alternative pleading is superfluous"). *Compare Edwards v. ZeniMax Media, Inc.*, No. 12-CV-00411-WYD-KLM, 2013 WL 5420933, *10 (D. Colo. Sept. 27, 2013) (concluding that an unjust enrichment claim should not be dismissed when "the 'equitable remedy' sought by [plaintiff's] unjust enrichment claim appears to be separate from any available remedy at law under the CCPA claim," citing *Colorado Foundation, Inc. v. Am. Cyanamid Co.*, 216 F.Supp.2d 1188, 1200 (D. Colo. 2002); *Robinson*, 209 P.3d at 1205-06)). Because plaintiffs seek the same recovery on both their CCPA and unjust enrichment claims and because injunctive relief is not available as noted *supra*, the court concludes that the Colorado class's unjust enrichment claim would fail because

(d) Conclusion Regarding Colorado Claims

For the reasons stated, the court concludes that plaintiffs have demonstrated that their Colorado consumer protection claim is susceptible of classwide proof concerning the materiality of ConAgra's representation. The court also concludes that the proximate cause element of the Colorado breach of express warranty and breach of implied warranty claims is susceptible of classwide proof. By contrast, the court concludes that individualized inquiries are likely to predominate with respect to the Colorado class's unjust enrichment claim.

(3) Florida

Plaintiffs representing the putative Florida class seek to certify two claims: (1) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); and (2) unjust enrichment.[208]

(a) Consumer Protection Statutes

The FDUTPA is intended to "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Siever v. BWGaskets, Inc.*, 669 F.Supp.2d 1286, 1292 (M.D. Fla. 2009) (quoting

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plaintiffs possess an adequate remedy at law. For this reason as well, the court declines to certify an unjust enrichment class.

[208] *Id.* at 26-30.

FLA. STAT. § 501.204(1)). A claim under the FDUTPA has three elements: (1) a deceptive or unfair practice; (2) causation; and (3) actual damages. *Id.* Conduct that is deceptive or unfair for purposes of the FDUTPA is defined, *inter alia*, by "[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive or unconscionable acts or practices." *Id.* (quoting FLA. STAT. § 501.203(3)(c)); *Nationwide Mut. Co. v. Ft. Myers Total Rehab Ctr, Inc.*, 657 F.Supp.2d 1279, 1290 (M.D. Fla. 2009)). An unfair practice under the FDUTPA is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.'" *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 499(Fla. App. 2001) (quoting *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 293 (7th Cir. 1976)).

Claims under the FDUTPA are governed by a "reasonable consumer" standard, obviating the need for proof of individual reliance by putative class members. *See, e.g.*, *Office of the Attorney Gen. v. Wyndham Int'l, Inc.*, 869 So.2d 592, 598 (Fla. App. 2004) ("When addressing a deceptive or unfair trade practice claim, the issue is not whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances. . . . [U]nlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue"); *Davis v. Powertel, Inc.*, 776 So.2d 971, 974 (Fla. App. 2000) ("A party asserting a deceptive trade practice claim need not show actual reliance on the representation or

omission at issue"). If numerous individualized inquiries are required to determine the reaction of a "reasonable consumer" to the challenged conduct, however, the predominance requirement for class certification cannot be satisfied; stated differently, while reliance may be proved on a classwide basis, a classwide inference of reliance is inappropriate if plaintiffs cannot establish that the conduct would be material to a reasonable person. *See, e.g.*, *In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices*, 715 F.Supp.2d 1265, 1282-83 (S.D. Fla. 2010) ("In this case, . . . the reasonableness conclusion depends on numerous individualized inquiries that would fly in the face of the requirement that individual issues not predominate over those common to the class"). Thus, plaintiffs must show that ConAgra's allegedly misleading representation was "likely to mislead a reasonable consumer acting reasonably under the circumstances, i.e., the plaintiff's circumstances." *Id.* at 1282 (citing *Solomon v. Bell Atl. Corp.*, 777 N.Y.S.2d 50 (N.Y. App. Div. 2004)); *Fitzpatrick v. General Mills, Inc.*, 263 F.R.D. 687, 697 (S.D. Fla. 2010) ("[B]ecause each plaintiff seeking damages under the FDUTPA is only required to prove that [defendant's] conduct would deceive an objective reasonable consumer, and not that the deceptive act motivated their particular purchase decision . . . the putative class members would rely on the same pool of evidence to prove their claims"). The court considers *infra* whether plaintiffs have shown that the "100% Natural" statement was material and thus likely to mislead a reasonable consumer.

(b) Unjust Enrichment

The essential elements that must be shown to prove unjust enrichment under Florida law are a benefit conferred on the defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for it to retain the benefit without paying the value thereof. *Swindell v. Crowson*, 712 So.2d 1162, 1163 (Fla. App. 1998) (citing *Ruck Brothers Brick v. Kellogg & Kimsey*, 668 So.2d 205 (Fla. App. 1995); *Rite-Way Painting & Plastering v. Tetor*, 582 So.2d 15 (Fla. App. 1991)); *see also Florida Power Corp. v. City of Winter Park*, 887 So.2d 1237, 1241 n. 4 (Fla. 2004); *Rollins, Inc. v. Butland*, 951 So.2d 860, 876 (Fla. App. 2006). Florida courts have concluded that privity is not a required element of an unjust enrichment claim. *See MacMorris v. Wyeth, Inc.*, No. 2:04-CV-596-FTM-29DNF, 2005 WL 1528626, *4 (M.D. Fla. June 27, 2005) (observing that "indirect purchasers have been allowed to bring an unjust enrichment claim against a manufacturer").

Plaintiffs argue that predominance is satisfied because "[c]ourts have found that common questions predominate for Florida unjust enrichment claims where defendant's conduct was the same as to all class members."[209] Plaintiffs are correct that some Florida courts have certified unjust enrichment classes where the defendant's business practices were the same as to all class members and defendant failed to disclose the same material information to

[209] Class Cert. Motion at 29-30.

the class. *See, e.g.*, *In re Checking Account Overdraft Litigation*, 286 F.R.D. 645, 657-58 (S.D. Fla. 2012) ("Unjust enrichment claims can be certified for class treatment where there are common circumstances bearing on whether the defendant's retention of a benefit received from class members was just or not. That situation exists in this case. Based on the evidence presented, class-wide proof is available to show that Comerica deliberately concealed from all customers important information about its overdraft policy – including the existence and amount of customers' overdraft Matrix limits – factors which bear on the justness of Comerica's retention of excess overdraft fees it collected as a result"); *James D. Hinson Elec. Contracting Co., Inc. v. BellSouth Telecommunications, Inc.*, 275 F.R.D. 638, 647 (M.D. Fla. 2011) ("Although unjust enrichment ordinarily requires individualized inquiries, this is not an ordinary case. . . . BellSouth's conduct was the same with regard to each class member in all relevant respects. The issue of whether it is equitable for BellSouth to retain the full amount of its bills when such amounts exceeded what BellSouth could recover in an action at law thus appears to be subject to common proof. BellSouth has failed to explain why it would be equitable for it to retain the amounts collected from some of the putative class members, but inequitable to retain the amounts collected from others").

As the *BellSouth Telecommunications* court recognized, however, Florida courts frequently conclude that unjust enrichment classes cannot be certified because "unjust enrichment claims 'typically require individualized inquiries into the equities.'"

BellSouth Telecommunications, 275 F.R.D. at 647. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) ("Due to the necessity of [an] inquiry into the individualized equities attendant to each class member, . . . common questions will rarely, if ever, predominate an unjust enrichment claim"). The *In re Checking Account Overdraft Litigation* court concluded that plaintiffs in that case did not assert a "typical" unjust enrichment claim because, unlike *Vega*, where employees had varying levels of knowledge and understanding about a commission policy that was uniformly applied, the bank customer plaintiffs were uniformly impacted by a common scheme whose "true nature" they never learned; there was thus no question of the customers having different levels of knowledge or different reactions to the practice. *See In re Checking Account Overdraft Litigation*, 286 F.R.D. at 658. Similarly, *BellSouth Telecommunications* was not a "typical" unjust enrichment case because the same billing policy applied to all putative class members, and defendants adduced no evidence that class members knew of the practice. *See BellSouth Telecommunications*, 275 F.R.D. at 647.

Despite the fact that ConAgra's alleged misconduct was common to all class members, cases in which plaintiffs assert that they were misled by a representation in advertising or on a product label and that they purchased a product they otherwise would not have are the type that require individualized inquiries similar to those discussed by the *Vega* court. Where individualized inquiries concerning the reasons class members purchased a product are required, Florida courts find that those

inquiries predominate over common questions, and that class certification is inappropriate.[210] *Green v. McNeil Nutritionals, LLC*, No. 2004-0379-CA, 2005 WL 3388158, *1 (Fla. Cir. Ct. Nov. 16, 2005), is particularly instructive on this point.

In *Green*, plaintiffs filed a putative class action against McNeil alleging violations of the FDUPTA and unjust enrichment; they asserted that McNeil's use of a "SUGAR" label of Splenda® packets was "unfair, false, and misleading." *Id.* at *1. Plaintiffs moved to certify an unjust enrichment class under Florida law and the court denied the motion, concluding that individualized inquiries concerning each class member's reasons for purchasing Splenda® would be required. It stated:

> "Under Rule 1.220(b)(2), *Green* must show that McNeil 'acted or refused to act on grounds generally applicable to all members of the class.'

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[210] These deceptive labeling cases are distinguishable from *In re Checking Account Overdraft Litigation* and *BellSouth Telecommunications*. In those cases, as noted, the courts concluded that unjust enrichment classes could be certified because defendants' business practice affected each putative class member in the same way, and individual class members had no way to learn of the practice or its "true nature" so as to formulate an individualized reaction to it, *see In re Checking Account Overdraft Litigation*, 286 F.R.D. at 658; *BellSouth Telecommunications*, 275 F.R.D. at 647. By contrast, as the cases cited *infra* indicate, unjust enrichment claims premised on representations in product advertising or labeling often involve situations in which individual class members have varying levels of knowledge regarding the nature of the product and/or the defendant's allegedly misleading conduct, and also understand the representations in different ways. Neither consideration was implicated in *In re Checking Account Overdraft Litigation* or *BellSouth Telecommunications*.

> FLA.R.CIV.P 1.220(b)(2). However, where 'factual differences amongst the class members' will 'translate into significant legal differences' class certification is not appropriate. *Chase Manhatten Mortgage Corp. v. Porcher*, 898 So.2d 153, 159 (Fla. 4th DCA 2005). *See also Gilman v. John Hancock Variable Life Ins. Co.*, No. 02-00051 AB, 2003 WL 23191098, at *5 (Fla. Cir. Ct. Oct. 20, 2003) (denying certification under (b)(2) when claims would 'require individualized determination as to whether damages exist and, if so, the amount of damages each individual class member sustained'). . . . In the unjust enrichment count, each member would have to show evidence as to why the purchase was made to determine whether equity warrants the return of the purchase price. Unjust enrichment may not be appropriate if a consumer did not rely on the alleged deceptive acts. It would be unjust to compensate a consumer under this equitable theory if the consumer purchased the product without relying on the alleged deceptive practices. Under such facts any unjust enrichment of McNeil would not be at the expense of that individual class member. *See Avis Rent A Car Systems, Inc. v. Heilman*, 876 So.2d 1111 (Ala. 2003) (denying class certification on an unjust enrichment claim holding unjust enrichment requires an individualized inquiry into the subjective 'state of mind' of each class plaintiff)." *Id.* at *9.

The court finds the reasoning of the *Green* court persuasive, and concludes that individualized inquiries concerning the reasons each class member

purchased Wesson Oils will be required in order to determine whether ConAgra's retention of the purported price premium would be "unjust" or otherwise inequitable. In contrast to *BellSouth Telecommunications*, it is not "difficult to conceive of . . . significant equitable differences between class members." *BellSouth Telecommunications*, 275 F.R.D. at 647. Indeed, as the class is currently defined, it includes all consumers who purchased Wesson Oils during the class period – whether or not they relied on the "100% Natural" label and regardless of the meaning they ascribed to the term. Even if plaintiffs can prove that the "100% Natural" was false, it does not necessarily follow that ConAgra's retention of the full purchase price would be inequitable with respect to a consumer who did not notice or did not rely on the "100% Natural" claim. Plaintiffs cite no authority suggesting that the need for individualized inquiries described in *Green* can be obviated by submitting classwide proof of the materiality of the representation. Accordingly, the court concludes that even though ConAgra made a common representation, individualized inquiries concerning the equities of individual class members' transactions will be required such that common questions do not predominate with respect to plaintiffs' unjust enrichment claim.

(c) Conclusion Regarding Florida Claims

For the reasons stated, the court concludes that the Florida class's FDTUPA claim may be susceptible of class treatment if plaintiffs can establish that ConAgra's "100% Natural" claim was both common to

all members of the class and material, i.e., that it led class members to purchase the Wesson Oils believing that they contained no GMOs. As noted, however, the court concludes that the Florida class's unjust enrichment claim will require individualized inquiries concerning the equities of each class member's purchase transactions. It thus finds that plaintiffs have failed to satisfy the predominance requirement as to that claim.[211]

(4) Illinois

Plaintiffs seek to certify an Illinois class to assert claims for violation of the Illinois Consumer Fraud Deceptive Business Practices Act ("ICFA") and unjust enrichment.[212]

(a) Consumer Protection Claim

An ICFA claim requires: "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception." *De Bouse v. Bayer*, 235 Ill.2d 544, 550 (2009) (citing *Zekman v. Direct American Marketers, Inc.*, 182 Ill.2d 359, 373 (1998)). The last two elements of the claim

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[211] ConAgra argues that because of privity requirements, a Florida breach of warranty claim is not susceptible of classwide proof because individualized inquiries regarding privity predominate over common questions. (Class Cert. Opp. at 39-40.) Plaintiffs, however, do not seek to certify a warranty claim on behalf of the putative Florida class. (Class Cert. Motion at 26-30.)

[212] Class Cert. Motion at 30-33.

require a showing that the allegedly deceptive act "proximately caused any damages" suffered by the plaintiff. *De Bouse*, 922 Ill.2d at 550 (citing *Oliverira v. Amoco Oil Co.*, 201 Ill.2d 134, 149 (2002)). To be actionable under the ICFA, a representation must be "material"; this is established by applying a reasonable person standard. *See Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 505 (1996) (an omission or misrepresentation is material if it "concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase"); *see also Cirone-Shadow v. Union Nissan of Waukegan*, 955 F.Supp. 938, 944 (N.D. Ill. 1997) ("The standard for materiality under the ICFA is an objective standard").

Plaintiffs maintain that common issues predominate over individualized inquiries with respect to the ICFA claim because "individual reliance is not an ICFA element," and the materiality of a misrepresentation is judged by whether a reasonable person would have been deceived by the defendant's conduct.[213] Plaintiffs are correct that the reliance and materiality inquiries do not preclude certification of the class on predominance grounds. *See Cozzi Iron & Metal, Inc. v. U.S. Office Equipment, Inc.*, 250 F.3d 570, 576 (7th Cir. 2001) ("[T]he Illinois Supreme Court has repeatedly held that, unlike a claim for common law fraud, reliance is not required to establish a consumer fraud claim," citing *Connick*, 174 Ill.2d at 499; *Martin v. Heinhold Commodities*, 163 Ill.2d 33, 76 (1994); *Siegel v. Levy Organization Development Co., Inc.*, 153 Ill.2d 534, 542 (1992)); *see*

[213] Class Cert. Motion at 30-31.

also Connick, 174 Ill.2d at 499 ("Plaintiff's reliance is not an element of statutory consumer fraud," citing *Harkala v. Wildwood Realty, Inc.*, 200 Ill.App.3d 447, 453 (1990)); *Martin*, 163 Ill.2d at 76 ("[The ICFA] does not require actual reliance"); *Siegel*, 153 Ill.2d at 542 ("On its face, it appears that all a plaintiff need prove to establish a violation of the [ICFA] is: (1) a deceptive act or practice, (2) intent on the defendants' part that plaintiff rely on the deception, and (3) that the deception in the course of conduct involving trade or commerce. *Significantly, the Act does not require actual reliance*" (emphasis added)).

The same is not true of proximate causation, however. As noted, an ICFA plaintiff must show that defendant's deception proximately caused his or her damage. *See Clark v. Experian Information Solutions, Inc.*, 256 Fed. Appx. 818, 821 (7th Cir. Nov. 30, 2007) (Unpub. Disp.) ("We concluded that 'a private cause of action under the ICFA requires a showing of proximate causation,'" citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514-15 (7th Cir. 2006) (in turn citing 815 ILL. COMP. STAT. 505/10a); *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 149 (2002) ("Unlike an action brought by the Attorney General under [815 Ill. Comp. Stat. 505/2], which does not require that 'any person has in fact been misled, deceived or damaged[,]' . . . a private cause of action brought under section [505/10a(a)] requires proof of 'actual damage' . . . [and] proof that the damage occurred 'as a result of' the deceptive act or practice.' As noted previously, this language imposes a proximate causation requirement [and] proof that the damage occurred 'as a result of' the deceptive act or practice")).

"To be sure, individual issues will almost always be present in consumer fraud actions." *Langendorf v. Skinnygirl Cocktails, LLC*, __ F.R.D. __, 2014 WL 5487670, *6 (N.D. Ill. Oct. 30, 2014). As the Seventh Circuit recently noted, however, it is legally erroneous to hold that individual issues necessarily predominate in [all] cases requiring individual subjective inquiries into causality. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 759 (7th Cir. 2014); *see also Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) ("While consumer fraud class actions present problems that courts must carefully consider before granting certification, there is not and should not be a rule that they never can be certified").

In cases like this one where the representation being challenged was made to all putative class members, Illinois courts have concluded that causation is susceptible of classwide proof and that individualized inquiries concerning causation do not predominate if plaintiffs are able to adduce sufficient evidence that the representation was material. *See, e.g.*, *In re Synthroid Marketing Litigation*, 188 F.R.D. 287, 292-93 (N.D. Ill. 1999) ("The defendants argue that class certification under Rule 23(b)(3) is precluded because individualized issues relating to causation and damages predominate over the common issues in this lawsuit. First, defendants argue that certification is precluded because plaintiffs cannot demonstrate liability and causation with class-wide proof. According to defendants, causation depends upon individualized inquiries into decisions of consumers, physicians, and pharmacists to purchase, prescribe and dispense Synthroid as well as a careful investigation of the individual facts

surrounding each [plaintiff's] knowledge and policies with respect to Synthroid. The plaintiffs, however, allege a pattern of standardized conduct by the defendants, consisting mainly of a fraudulent scheme to conceal scientific information regarding the bioequivalency of Synthroid and other levothyroxine drugs. These allegations involve a common course of conduct that leads to injury of all the class members, citing *Toney v. Rosewood Care Center, Inc. of Joliet*, No. 98 C 0693, 1999 WL 199249, *9 (N.D. Ill. Mar. 31, 1999) (in turn citing *McDonald v. Prudential Ins. Co. of America*, No. 95 C 5186, 1999 WL 102796, *2 (N.D. Ill. Feb. 19, 1999)); *Garner v. Healy*, 184 F.R.D. 598, 602 (N.D. Ill. 1999) ("In *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330 (N.D. Ill. 1997), Chief Judge Aspen grappled with the identical distinction raised by Plaintiffs in this case and noted that [w]hen the fraud was perpetrated in a uniform manner against every member of the class, such as when all plaintiffs received virtually identical written materials from the defendants, courts typically hold that individual reliance questions do not predominate. This court concurs with Judge Aspens reasoning in *Rohlfing*, and sees no reason why individual reliance questions should predominate over the alleged misrepresentations or scheme to defraud in this case. So far as the issue of proximate cause is concerned, the Court is of a similar mind. To establish proximate cause, Plaintiffs must demonstrate that their purchases occurred after the allegedly fraudulent statements were made, and that the alleged fraud directly or indirectly injured Plaintiffs. This will invariably turn on the nature or character of the material misrepresentation. In other words, if

Plaintiffs paid money for a wax, but instead received a worthless non-wax product, then issues of proximate cause would be relatively simple to resolve on a classwide basis"); *Tylka v. Gerber Products Co.*, 178 F.R.D. 493, 499 (N.D. Ill. 1998) (concluding, in an ICFA case challenging, *inter alia*, Gerber's representation on its label that its products were pure and natural, that individualized issues concerning proximate causation did not predominate, and noting that "[b]ecause proximate cause under the ICFA is inextricably tied to the character of the material misrepresentation, . . . individualized proof of causation cannot be an impediment to class certification if materiality is not" (citations omitted)); *see also Suchanek*, 764 F.3d at 760 (reversing the district court's denial of class certification, remanding for further consideration and observing, although not deciding whether common issues predominated over individualized inquiries, that if the class prevailed on the common issue[, i.e., that the representation was material because the packaging was likely to mislead a reasonable consumer], it would be a straightforward matter for each purchaser to present her evidence on reliance and causation). Here, it is undisputed that ConAgra made the same alleged misrepresentation on each bottle of Wesson Oils purchased by class members during the class period. The court thus concludes that, if plaintiffs can demonstrate that ConAgra's "100% Natural" claim was material, i.e., that it led class members to purchase the Wesson Oils believing they contained no GMOs, they will be able to prove proximate cause on a classwide basis as well.[214]

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[214] The court is aware that other courts in the Seventh

Circuit have reached the opposite conclusion as to whether individualized issues concerning proximate cause predominate where class claims are based on an alleged misrepresentation. *See, e.g.*, *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 748 (7th Cir. 2008) (concluding that common issues did not predominate where each class member's claim turned on the extent to which she relied on and was damaged by an alleged deception); *Langendorf*, 2014 WL 5487670 at *6-7 (concluding that common issues did not predominate where plaintiff "offer[ed] no evidence" concerning what percentage of the proposed class was likely deceived by "all natural" representations in defendant's marketing); *In re Sears, Roebuck & Co. Tools Marketing and Sales Practices Litigation*, Nos. 05 C 4742, 05 C 2623, 2007 WL 4287511, *9 (N.D. Ill. Dec. 4, 2007) (concluding that common issues concerning deception and causation did not predominate over individualized factual inquiries). These cases are distinguishable, however, and do not persuade the court that individualized inquiries concerning causation will necessarily be required or predominate over common questions.

In *Thorogood*, the Seventh Circuit directed the district court to decertify an ICFA class challenging Sears's representation that its dryers had a "stainless steel drum." *Thorogood*, 547 F.3d at 748. Thorogood alleged the representation was misleading because the dryer drum was not 100% stainless steel. The court faulted the district court for presuming that "the other half million buyers, apart from Thorogood, shared his understanding of Sears's representations and paid a premium [based on that understanding]." *Id.* Specifically, the court questioned whether *any other class member* understood "stainless steel drum" in the same manner as plaintiff. *Id.* at 747 ("The plaintiff claims to believe that when a dryer is labeled or advertised as having a stainless steel drum, this implies, without more, that the drum is 100 percent stainless steel because otherwise it might rust and cause rust stains in the clothes dried in the dryer. Do the other 500,000 members of the class believe this? Does *anyone* believe this besides Mr. Thorogood? It is not as if Sears advertised the dryers as eliminating a problem of rust stains by having a stainless steel drum. There is no suggestion of that. It is not as if rust stains

were a common concern of owners of clothes dryers. There is no suggestion of that either, and it certainly is not common knowledge" (emphasis original)). As plaintiffs proffered no evidence concerning consumers' interpretation of Sears's representation, and thus no evidence indicating that the representation was material to a reasonable consumer, the Seventh Circuit concluded that individualized issues were likely to predominate.

Similarly, in *Langendorf*, a Northern District of Illinois court concluded that individualized issues concerning proximate cause predominated over common questions and precluded certification of an ICFA class. *Langendorf*, 2014 WL 5487670 at *6-7. Critical to this conclusion was the fact that Langendorf had adduced no evidence concerning the materiality of defendant's purportedly misleading "all natural" claim on its product labels:

> "Langendorf argues that it is irrelevant why each class member purchased the product, because 'the simple fact is that Plaintiff and the Class did not get what they paid for, i.e. 'All Natural' or 'Blue Agave.' But 'what they paid for' is precisely the question, and it is an individual one. That common issues predominate over individual ones is a requirement for class certification, and Langendorf has the burden of demonstrating it by a preponderance of the evidence – attorney assertions do not suffice.
>
> Next, Langendorf argues that 'the fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.' But even if that were a correct statement of the law (for these claims, in this Circuit), Langendorf has produced no evidence to show that causation will be defeated only as to 'a few' class members; in other words, she has not demonstrated the

> materiality of the 'all natural' text. As defendants point out, such a showing could have been attempted through survey evidence. Langendorf submitted no evidence, survey or otherwise, to show what portion of purchasers likely relied on the 'all natural' text, or the degree to which the label 'all natural' had a tendency to influence the decision to purchase the product. She has therefore failed to carry her burden to show that common issues predominate." *Id.* at *5.

As can be seen, *Thorogood* and *Langendorf* do not stand for the proposition that causation cannot be proven on a classwide basis. They merely reflect the fact that, under the specific circumstances of those cases, plaintiff did not carry his or her burden of proving that the purported misrepresentation was material to consumers, i.e., that consumers understood the representation in the same way, and purchased the product as a result of that understanding. Here, in contrast to both *Thorogood* and *Langendorf*, plaintiffs have proffered evidence concerning the materiality of ConAgra's "100% Natural" claim, which the court considers *infra* to determine if it is sufficient to demonstrate the materiality of the misrepresentation.

In re Sears, 2007 WL 4287511 at *9, is also distinguishable. There, the court concluded that individualized issues were likely to predominate over common questions with respect to plaintiff's ICFA and unjust enrichment claims, noting, *inter alia*, that "each plaintiff will have been exposed to a different representation or mix of representations," and that "each class member's motivation for buying Craftsman products would be highly individualized." *Id.* In contrast here, it is undisputed that each class member was exposed to the *same representation*, which appeared on each bottle of Wesson Oils sold during the class period. Regarding the *In re Sears* court's observation that "highly individualized" inquiries concerning class members' motivations for purchasing Craftsman tools would be necessary, plaintiffs here have proffered some evidence demonstrating that class members understood that the "100% Natural" claim meant Wesson Oils contained no GMOs and that they purchased the product as a result. Because under Illinois law, causation can

(b) Unjust Enrichment Claim

To state an unjust enrichment claim under Illinois law, a plaintiff must allege that the defendant unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violated fundamental principles of justice, equity, and good conscience. *See Drury v. County of McLean*, 89 Ill.2d 417, 425-26 (1982); *Kenneke v. First National Bank*, 65 Ill.App.3d 10, 12 (1978). As is true of unjust enrichment claims in other states, privity is not required. *Muehlbauer v. General Motors Corp.*, 193 Ill.App.3d 448, 450 (1990) (noting that the focus of unjust enrichment is not privity, but rather "the defendant's retention of benefits").

In cases where plaintiffs plead ICFA and unjust enrichment claims based on the same deceptive and/or fraudulent conduct, Illinois courts apply the same predominance analysis to both claims. *See Oshana*, 225 F.R.D. at 586 (concluding that "[t]he same analysis applies to Oshana's unjust enrichment claim" as to her ICFA claim because "Oshana allege[d] class members were 'tricked' by Coca-Cola's marketing scheme into purchasing fountain diet Coke that they would not have otherwise purchased"); *see also Lipton v. Chattem, Inc.*, 289 F.R.D. 456, 462 (N.D. Ill. 2013) (analyzing predominance jointly with respect to plaintiffs' ICFA, intentional representation,

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be proved on a classwide basis if a uniform, material misrepresentation has been made, the court considers *infra* whether the evidence plaintiffs have adduced could suffice to prove materiality and hence causation.

and unjust enrichment claims); *Clark v. Experian Information, Inc.*, 233 F.R.D. 508, 511-12 (N.D. Ill. 2005) (same).

Indeed, the Seventh Circuit has recognized that where, as here, an unjust enrichment claim is based on the same alleged wrongdoing that forms the basis for an ICFA claim, the "unjust enrichment claim will stand or fall with the related [ICFA] claim." *Clearly v. Philip Morris, Inc.*, 656 F.3d 511, 517 (7th Cir. 2011) ("[I]f an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim – and, of course, unjust enrichment will stand or fall with the related claim" (citations omitted)); *see Ass'n Benefit Servs. v. Caremark Rx, Inc.*, 493 F.3d 841, 855 (7th Cir. 2007) ("[W]here the plaintiff's claim of unjust enrichment is predicated on the same allegations of fraudulent conduct that support an independent claim of fraud, resolution of the fraud claim against the plaintiff is dispositive of the unjust enrichment claim as well").

As discussed, to prove ConAgra's liability under the ICFA, plaintiffs must show that its allegedly misleading "100% Natural" label proximately caused their damage. To make such a showing on a classwide basis, moreover, plaintiffs must demonstrate that "100% Natural" claim was material to a reasonable consumer. Because the court has concluded that common issues will predominate over individualized inquiries if plaintiffs make a sufficient showing of materiality, and because plaintiffs unjust enrichment claim based on the same allegedly wrongful conduct "stands or falls" with the ICFA claim, *Clearly*, 656 F.3d at 517, the court concludes

that plaintiffs' unjust enrichment claim under Illinois law is similarly amenable to class treatment if plaintiffs can sufficiently demonstrate that ConAgra's "100% Natural" label was material to a reasonable consumer.

(c) Conclusion Regarding Illinois Claims

For the reasons stated, the court concludes that the putative Illinois class's ICFA and unjust enrichment claims are susceptible of classwide proof if plaintiffs can establish that ConAgra's "100% Natural" claim was material.

(5) Indiana

Plaintiffs seek to certify a putative Indiana class to assert breach of express warranty, breach of implied warranty, and unjust enrichment claims.[215]

(a) Unjust Enrichment Claim

There are three elements of an unjust enrichment claim under Indiana law: (1) a benefit conferred upon another at the express or implied request of the other party; (2) allowing the other party to retain the benefit without restitution would be unjust; and (3) plaintiff expected payment. *Kelly v. Levandoski*, 825 N.E.2d 850, 861 (Ind. App. 2005). Stated differently, "a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust. One who

[215] Class Cert. Motion at 33-35.

labors without an expectation of payment cannot recover in quasi-contract." *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991); *see Meridian Financial Advisors, Ltd. v. Pence*, 763 F.Supp.2d 1046, 1065 (S.D. Ind. 2011) ("To recover under a theory of unjust enrichment, 'a party must show that a measurable benefit has been conferred on a party under such circumstances that retention of the benefit without payment would be unjust.' . . . In other words, unjust enrichment recovery is possible only where disgorgement of the benefit received by the defendant is possible. . . . In addition, Indiana law only permits recovery under the equitable principle of unjust enrichment when no adequate remedy at law exists").

The court concludes that the Indiana plaintiffs' unjust enrichment claim satisfies the predominance requirement. Indiana courts considering unjust enrichment claims asserted on behalf of a class have found them appropriate for certification if the defendant's allegedly deceptive or fraudulent conduct is common to all class members. *See ConAgra, Inc. v. Farrington*, 635 N.E.2d 1137, 1143 (Ind. App. 1994) (concluding that the predominance requirement was satisfied where plaintiffs showed that defendant made misleading and/or fraudulent statements to which all class members were exposed); *see also Wal-Mart Stores, Inc. v. Bailey*, 808 N.E.2d 1198, 1207 (Ind. App. 2004) (noting, in remanding to the trial court, that "it may ultimately be necessary that the class action be maintained for certain issues, such as whether Wal-Mart was unjustly enriched or whether certain elements of unjust enrichment were met"). As in *Farrington*, plaintiffs here assert that ConAgra engaged in deceptive conduct by labeling Wesson Oils

"100% Natural." ConAgra's conduct was indisputably uniform with respect to all members of the putative class. The court therefore concludes that plaintiffs have shown that common questions predominate over individualized inquiries with respect to their Indiana unjust enrichment claim and that the claim is susceptible of class treatment and proof.

(b) Express and Implied Warranty Claims

"In order to prevail on a cause of action based on breach of [express] warranty [under Indiana law], the plaintiff must provide 'evidence showing not only the existence of the warranty but that the warranty was broken and that the breach of warranty was the proximate cause of the loss sustained.'" *U.S. Automatic Sprinkler Co. v. Reliable Automatic Sprinkler Co.*, 719 F.Supp.2d 1020, 1027 (S.D. Ind. 2010).

The court concludes that plaintiffs have not made a sufficient showing that common issues predominate over individualized inquiries with respect to their breach of express warranty claim. In Indiana, a plaintiff suing for breach of an express warranty must be in privity with the defendant. *See Atkinson v. P&G-Clairol, Inc.*, 813 F.Supp.2d 1021, 1026 (N.D. Ind. 2011) ("[V]ertical privity is required for claims of breach of express warranty. . . . *Pizel v. Monaco Coach Corp.*, 364 F.Supp.2d 790, 793 (N.D. Ind. 2005) (stating that the holding in [*Hyundai Motor America, Inc. v.*] *Goodin*, [822 N.E.2d 947 (Ind. 2005),] was limited to abolishing the vertical privity requirement for claims of breach of the implied warranty of merchantabilty). . ."); *Davidson v. John Deere & Co.*,

644 F.Supp. 707, 713 (N.D. Ind. 1986) (finding that plaintiff did not have a claim for breach of express warranty because "[p]rivity has not been abrogated as a requirement in contract actions for breach of warranty"); *see also Thunander v. Uponor, Inc.*, 887 F.Supp.2d 850, 865 (D. Minn. 2012) ("In Indiana, vertical privity must be shown in order to sue for breach of an express warranty. Vertical privity exists only between immediate links in the chain of distribution. A buyer in the same chain who did not purchase directly from a seller is 'remote' to that seller," citing *Atkinson*, 813 F.Supp.2d at 1026; IND. CODE ANN. § 26-1- 2-318).

The Indiana Court of Appeals, however, has recognized an "exception" to the privity requirement for breach of express warranty claims against a manufacturer that are based on representations in advertisements and/or on a product label. In *Prairie Production, Inc. v. Agchem Division-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. App. 1987), the court held that where a manufacturer has made representations to a buyer in the chain of distribution in advertisements or on product labels, and the buyer relied on those representations, the buyer could assert a breach of express warranty claim notwithstanding the lack of privity between plaintiff and defendant. *Id.* at 1303-04; *see also Ryden v. Tomberlin Auto. Group*, No. 1:11-CV-1215-RLY-DML, 2012 WL 4470266, *2 (S.D. Ind. Sept. 27, 2012) ("In *Prairie Production*, the Indiana Court of Appeals relied on the New York case of *Randy Knitwear, Inc. v. Am. Cyanamide Co.*, 11 N.Y.2d 5 [ ] (N.Y. 1962), and held that where a manufacturer had made representations to a buyer in the chain [of] distribution through advertisements

and product labels, and the buyer in fact relied upon those representations, the buyer could maintain a claim for breach of an express warranty"). To invoke this "exception," *Ryden*, 2012 WL 4470266 at *2 ("[Courts] do not treat the case as a general repudiation of privity, but as an exception to it"), however, the representation must have become part of the basis of the bargain, *Prairie Production*, 514 N.E.2d at 1304 ("[T]he seller's representation rises to the level of an express warranty only if it becomes part of the basis of the bargain"). Stated differently, express warranty claims falling within the *Prairie Production*/*Randy Knitwear* privity exception must satisfy "the conditions of representation and reliance."[216] *Ryden*, 2012 WL 4470266 at *2 ("The cases that have followed [*Prairie Production* and] *Randy Knitwear* only allow express warranty claims where the conditions of representation and reliance are met").

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[216] Plaintiffs cite the Indiana Court of Appeals' opinion in *Essex Group, Inc. v. Nill*, 594 N.E.2d 503 (Ind. App. 1992), for the proposition that "reliance is not required on a warranty claim." (Class Cert. Motion at 35.) In *Essex Group*, the court considered the *prima facie* elements of a breach of warranty claim under Indiana law and observed that "reliance is not an element. . . ." *Essex Group*, 594 N.E.2d at 506-07. *Prairie Production* did not alter the *prima facie* elements of a breach of express warranty claim, however; instead, it created an exception to the privity requirement that is one of those elements. To invoke the exception, a plaintiff must establish his or her reliance on a representation made by the manufacturer. While proof of reliance is not generally required to prove a breach of warranty claim, therefore, it *is required* in situations such as this where plaintiffs do not allege that they are in privity with the manufacturer, and seek to take advantage of the *Prairie Production* exception.

Plaintiffs do not address either the privity requirement for breach of express warranty claims or the *Prairie Production* privity exception. They neither argue nor cite authority for the proposition that there will be no need for individualized inquiries concerning each class member's purchase of Wesson Oils to determine if the privity requirement has been satisfied if the exception does not apply. They also proffer no evidence suggesting that the proof of reliance that is required to invoke the *Prairie Production* exception is susceptible of classwide proof. Specifically, they cite no authority indicating that a classwide inference of reliance arises under Indiana law if they prove that the label was material to a reasonable consumer. The court's own survey of Indiana cases does not suggest that privity and reliance can be proved on a classwide, rather than an individual, basis. Thus, the court concludes that individualized inquiries will predominate over common questions respecting the putative Indiana class's breach of express warranty claim, and thus denies plaintiffs' motion to certify a class asserting that claim.

"Under Indiana law, an action based on breach of the implied warranty of merchantability 'requires evidence showing not only the existence of the warranty but also that the warranty was broken and that the breach was the proximate cause of the loss.'" *Hughes v. Chattem, Inc.*, 818 F.Supp.2d 1112, 1120 (S.D. Ind. 2011) (quoting *Irmscher Suppliers, Inc. v. Schuler*, 909 N.E.2d 1040, 1048 (Ind. App. 2009)). Indiana courts have held that a plaintiff need not prove vertical privity with the defendant to recover for breach of the implied warranty of merchantability.

See Hoopes v. Gulf Stream Coach, Inc., No. 1:10-CV-365, 2014 WL 4829623, *10 (N.D. Ind. Sept. 29, 2014) ("The Indiana Supreme Court held that 'Indiana law does not require vertical privity between a consumer and a manufacturer as a condition to a claim by the consumer against the manufacturer for breach of [the] implied warranty of merchantability'" (citations omitted)); *Lautzenhiser v. Coloplast A/S*, No. 4:11-CV-86-RLY-WGH, 2012 WL 4530804, *5 (S.D. Ind. Sept. 29, 2012) ("The warranty of merchantability attaches automatically if the seller is a vendor of the goods in question. . . . Unlike the warranty of fitness for a particular purpose, vertical privity is not required"); *Goodin*, 822 N.E.2d at 959 ("[W]e conclude that Indiana law does not require vertical privity between a consumer and a manufacturer as a condition to a claim by the consumer against the manufacturer for breach of the manufacturer's implied warranty of merchantability").

A plaintiff asserting a claim for breach of the implied warranty of merchantability must still prove that the breach was a proximate cause of his or her loss, however. *See Irmscher Suppliers, Inc.*, 909 N.E.2d at 1048; *Frantz v. Cantrell*, 711 N.E.2d 856, 860 (Ind. App. 1999) ("'Any action based on breach of warranty requires evidence showing not only the existence of the warranty but that the warranty was broken and that the breach of warranty was the proximate cause of the loss sustained,'" citing *Richards v. Goerg Boat and Motors, Inc.*, 179 Ind. App. 102, 108-09 (1979)).

Plaintiffs argue that, as with their Colorado warranty claims, their Indiana implied warranty claim is susceptible of classwide proof because they

will be able to demonstrate through their damages methodology that the allegedly misleading "100% Natural" label proximately caused their damages, i.e., they will be able to show that a price premium attributable to the label resulted in Indiana class members paying more for each bottle of Wesson Oils than they otherwise would have. Plaintiffs contend that payment of the price premium was proximately caused by ConAgra's purported breach of a warranty that Wesson Oils contained no GMOs. They seek to recover the price premium as damages.

The court is persuaded and agrees that, under Indiana law, causation is susceptible of classwide proof where, as here, plaintiffs may be able to prove that defendant's warranty caused each class member to pay more than he or she otherwise would have paid for the product. Thus, if plaintiffs are able to propose a methodology to calculate the price premium associated with use of the "100% Natural" label to suggest that Wesson Oils contain no GMO ingredients, the court concludes they will be able demonstrate causation on a classwide basis. The court considers *infra* whether plaintiffs have proposed a viable damages methodology.

(c) Conclusion Regarding Indiana Claims

For the reasons stated, the court concludes that common questions predominate over individualized issues as respects plaintiffs' Indiana unjust enrichment and implied warranty claims. The same is not true of the Indiana class's breach of express warranty claim, however. The court concludes that these claims are not susceptible of classwide proof

and that the predominance requirement is not satisfied with respect to them.

(6) Nebraska

Plaintiffs seek to certify a Nebraska class to assert breach of express and implied warranty claims, as well as a claim for unjust enrichment.[217]

(a) Unjust Enrichment

Nebraska recognizes the doctrine of unjust enrichment only when the parties do not have an express contract. *See Washa v. Miller*, 249 Neb. 941, 950 (1996) (noting that the doctrine cannot "rescue a party from the consequences of a bad bargain"). To recover on an unjust enrichment claim, a plaintiff must prove that defendant "received and retained [benefits] under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor." *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 69 (1987).

Plaintiffs argue that they have satisfied the predominance requirement with respect to their Nebraska unjust enrichment claim because the elements of the claim are susceptible of common proof.[218] They cite *Cortez v. Nebraska Beef, Inc.*, 266 F.R.D. 275 (D. Neb. 2010), a district court case in which the court certified a class alleging various state law claims related to wage and hour violations under Nebraska law; one of the claims was unjust enrichment. *Id.* at 280-81. The court certified the class, concluding that common questions

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[217] Class Cert. Motion at 35-38.

[218] *Id.* at 36.

predominated over individual issues because all class member employees had been exposed to "non-unique employee training sessions and other non-unique representations [that formed] the basis of the oral contracts at issue." *Id.* at 293. So too here, the putative class has been exposed to non-unique representations by ConAgra on its bottles of Wesson Oils. Under Nebraska law, this common fact predominates over "differences in individual experiences." *Id.* Thus, the court concludes that individualized issues will not predominate over issues subject to common proof, i.e., ConAgra's representations to the putative class, with respect plaintiffs' unjust enrichment claim under Nebraska law.

(b) Express and Implied Warranty Claims

Under Nebraska law, "[t]o maintain a warranty action, several factors must be proved: (1) The plaintiff must prove the defendant made a warranty, express or implied, under §§ 2-313, 2-314, or 2-315; (2) the plaintiff must prove the goods did not comply with the warranty, i.e., the goods were defective at the time of the sale; (3) the plaintiff must prove the injury was caused, proximately and in fact, by the defective nature of the goods; and (4) the plaintiff must prove damages." *Divis v. Clarklift of Nebraska, Inc.*, 256 Neb. 384, 393 (1999) (citing *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275 (1992); *Delgado v. Inryco, Inc.*, 230 Neb. 662 (1988); *England v. Leithoff*, 212 Neb. 462 (1982); *Geiger v. Sweeney*, 201 Neb. 175 (1978)).

Plaintiffs assert in their breach of express warranty claim under Neb. Rev. Stat. U.C.C. § 2-313, arguing that the "100% Natural" label on Wesson Oils was a factual affirmation by ConAgra concerning the quality and characteristics of the products; the court agrees that this type of claim on a label can serve as the basis for an express warranty claim under Nebraska law. *See* NEB. REV. STAT. U.C.C. § 2-313 ("Express warranties by the seller are created as follows: . . . (a) [a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise; (b) [a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description"); *see also Peterson v. North American Plant Breeders*, 218 Neb. 258, 262-63 (1984) ("The existence of an express warranty depends upon the particular circumstances in which the language is used and read. . . . A catalog description or advertisement may create an express warranty in appropriate circumstances. . . . The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. . . . The test is 'whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment,'" citing *Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286, 1290-91 (6th Cir. 1982)). *Compare Sherman v. Sunsong America, Inc.*, 485 F.Supp.2d 1070, 1088 (D. Neb. 2007) ("In this case,

the Plaintiffs argue that the label on the Product – specifically, the words 'Misuse may result in injury or fire'– creates an express warranty that if all of the instructions on the Product's label are followed, injury will not result. Although well taken, I do not believe that there was an express warranty made as contemplated by Nebraska law because I do not find that 'misuse may result in injury' is an express affirmation that 'proper use will not result in injury.' In other words, there was no affirmative statement made to serve as the basis for an express warranty claim. Consequently, the seventh cause of action, based on breach of an express warranty, will be dismissed as to Winco and Shiu Fung").

Although plaintiffs have sufficiently alleged an affirmative representation that could constitute an express warranty under Nebraska law, they must also show that they relied on the representation to prevail. *See Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 241 (1990) ("[S]ince an express warranty must have been 'made part of the basis of the bargain,' it is essential that the plaintiffs prove reliance upon the warranty,'" citing *Wendt v. Beardmore Suburban Chevrolet*, 219 Neb. 775, 780 (1985)). Plaintiffs argue they can satisfy the reliance requirement on a classwide basis by showing the "materiality of the '100% Natural' claim to reasonable consumers."[219] They proffer no authority supporting this assertion, however. Absent authority to the contrary, the court concludes that a plaintiff must prove actual reliance under Nebraska law to maintain a breach of express warranty claim, and

[219] Class Cert. Motion at 37.

that such reliance must be proved on an individual basis. *See Hillcrest Country Club*, 236 Neb. at 241 ("It is essential that plaintiffs prove reliance upon the warranty"); *see also In re General Motors Corp. Dex-Cool Products Liability Litigation*, 241 F.R.D. 305, 320-21 (S.D. Ill. 2007) (observing that a breach of express warranty claim under Nebraska law, as well under the laws of several other states, requires a showing of specific reliance, and rejecting plaintiffs' suggestion that the court could "employ[ ] a classwide presumption of reliance" because "states that require proof of actual reliance in order to maintain a claim for breach of express warranty under the UCC," like Nebraska, do not presume "a buyer's reliance on a seller's affirmations of fact or promises relating to goods"). The court thus concludes that individualized inquiries will be required to prove plaintiffs' express warranty claim under Nebraska law, and that these will predominate over common questions.

To prove a breach of the implied warranty of merchantability under Nebraska law, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that the deviation caused plaintiff's injury. *Mennonite Deaconess Home and Hospital, Inc. v. Gates Engineering Co., Inc.*, 219 Neb. 303, 314 (1985) (citing *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170 (1984)). Under Nebraska law, goods are defective, i.e., not merchantable, if they do not "conform to the promises or affirmations of fact made on the container or label." *See* NEB. REV. STAT. U.C.C. § 2-314 ("Goods to be merchantable must be at least such as . . . conform to the promises of fact made on the container or label if any"). Nebraska courts have

recognized that, unlike a breach of express warranty claim, a cause of action for breach of the implied warranty of merchantability does not require proof of reliance by plaintiffs. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 702 (1978) ("In order for goods to be merchantable under section 2-314, they must be at least such as are fit for the ordinary purpose for which such goods are used. Under this implied warranty, no reliance upon the seller need be shown").

It is nonetheless necessary that a plaintiff show the defective nature of the goods, i.e., the merchant's "deviation from the standard of merchantability at the time of sale," and that such deviation was the proximate cause of his or her injury. *See In re Saturn L-Series Timing Chain Products Liability Litigation*, MDL No. 1920, 2008 WL 4866604, *10 (D. Neb. Nov. 7, 2008) ("In Nebraska, 'to establish a breach of the implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact'"); *Sherman v. Sunsong America, Inc.*, 485 F.Supp.2d 1070, 1086-87 (D. Neb. 2007) ("The Plaintiffs' Second Amended Complaint includes a claim for breach of an implied warranty of merchantability. In order to recover damages for breach of an implied warranty of merchantability, the Nebraska Supreme Court has held that 'there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact,'" citing *Delgado v. Inryco, Inc.*, 230 Neb. 662, 666-67 (1988)).

While plaintiffs contend that the implied warranty class can be certified because reliance and privity are not required elements of an implied warranty claim,[220] they must also demonstrate that proximate cause can be proven on a classwide basis. Plaintiffs have adequately made this showing for class certification purposes. As with the Colorado and Indiana breach of warranty claims, plaintiffs contend they will be able to prove causation on a classwide basis by showing that each class member paid more for each bottle of Wesson Oils purchased as a result of the allegedly misleading "100% Natural" label. If their damages methodology provides proof of the price premium associated with use of the label to suggest that the product contained no GMOs, a question the court addresses *infra*, the court will conclude that the breach of implied warranty class satisfies Rule 23's predominance requirement.

(c) Conclusion Regarding Nebraska Claims

For the reasons stated, the court concludes that common questions predominate over individualized inquiries with respect to the Nebraska class's unjust enrichment and breach of implied warranty claims. The class's breach of express warranty claim, however, will require individualized inquiries concerning each class member's reliance on the warranty such that class treatment of the claim is not appropriate.

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[220] Class Cert. Motion at 37-38.

(7) New York

Plaintiffs seek to certify a New York class to assert claims for violation of the New York Consumer Protection Act ("GBL"), breach of express warranty, and unjust enrichment.[221]

(a) Consumer Protection Claim

New York General Business Law ("GBL") § 349 creates a private cause of action for any person injured by "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" in New York. N.Y. GEN. BUS. LAW § 349. To state a claim under § 349, a plaintiff must allege that: (1) the challenged act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) plaintiff was injured as a result. *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *Bosch v. LaMattina*, 901 F.Supp.2d 394, 406 (E.D.N.Y. 2012). To be consumer-oriented, conduct must have a "broad impact on consumers at large." *U.W. Marx, Inc. v. Bonded Concrete, Inc.*, 776 N.Y.S.2d 617, 619 (2004).

ConAgra argues that individualized issues concerning reliance predominate over the common issues raised by plaintiffs' GBL claim. The New York Court of Appeals recently clarified, however, that proof of reliance and scienter are not elements of a GBL claim. *See Koch v. Aker, Merrall & Condit Co.*, 18 N.Y.3d 940, 941-41 (2012). Rather, "each [GBL] claim includes the requirement that a reasonable consumer could have been misled by defendants'

[221] Class Cert. Motion at 38-43.

conduct." *Ackerman v. Coca-Cola Co.*, No. CV-09-0395 JG (RML), 2010 WL 2925955, *15 (E.D.N.Y. July 21, 2010). As a result, individualized issues concerning reliance and scienter do not preclude classwide proof of plaintiffs' GBL claim. Plaintiffs must, however, show materiality to demonstrate that common questions predominate over individualized issues. The court considers below whether plaintiffs have adduced sufficient evidence that the "100% Natural" claim was material such that it is appropriate to certify the class because plaintiffs may be able to prove that "a reasonable consumer could have been misled" by the label claim. *Ackerman*, 2010 WL 2925955 at *15; *see also Haynes v. Planet Automall*, Inc., 276 F.R.D. 65, 78-79 (E.D.N.Y. 2011) ("Whether acts or practices are deceptive is determined using an objective test. Representations or omissions are considered deceptive when they are 'likely to mislead a reasonable consumer acting reasonably under the circumstances,'" citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995)).

(b) Express Warranty Claim

"Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." *Avola v. La.-Pac. Corp.,* No. 11–CV–4053 (PKC), 2013 WL 4647535, *6 (E.D.N.Y. Aug. 28, 2013) (quoting N.Y. U.C.C. § 2–313(1)(a)); *accord Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 689 F.Supp.2d 585, 604 (S.D.N.Y. 2010) (describing an express warranty as an

affirmation of fact or promise that naturally tends to induce the buyer to purchase and upon which buyer relies to his detriment).

To state a breach of express warranty claim under New York law, a plaintiff must allege (1) the existence of a material statement amounting to a warranty, (2) the buyer's reliance on the warranty as a basis for the contract with the immediate seller, (3) a breach of the warranty, and (4) injury to the buyer caused by the breach. *Avola*, 2013 WL 4647535 at *6 (citing *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 502–04 (1990)); *accord Liberty Media Corp. v. Vivendi Universal, S.A.*, Nos. 02 Civ. 5571(RJH), 03 Civ. 2175(RJH), 2004 WL 876050, *10 (S.D.N.Y. Apr. 21, 2004) (plaintiffs must allege "the existence of an express warranty, reliance on that warranty as part of the agreement between the parties, and that the warranties were false or misleading when made, proximately causing plaintiff's loss," citing *Rogath v. Siebenmann*, 129 F.3d 261, 264 (2d Cir.1997); *CBS Inc.*, 75 N.Y.2d 496).

A buyer may assert an express warranty claim against a manufacturer from which he did not purchase a product directly, since an express warranty can "include specific representations made by a manufacturer in its sales brochures or advertisements regarding a product upon which a purchaser relies." *Arthur Glick Leasing, Inc. v. William J. Petzold, Inc.*, 51 A.D.3d 1114, 1116, (App. Div. 2008) (citing *Randy Knitwear*, *Inc.*, 11 N.Y.2d at 14 (no privity requirement where a manufacturer makes express representations to induce reliance by remote purchasers)); *accord Daniels v. Forest River, Inc.*, No. 07–4227, 2013 WL 3713464, *3 (N.Y. Sup.

Ct. June 28, 2013). A plaintiff alleging breach of express warranty must "set forth the terms of the warranty upon which he relied," however. *Parker v. Raymond Corp.*, 87 A.D.3d 1115, 1117 (App. Div. 2011).

New York law requires "no more than reliance on the express warranty as being a part of the bargain between the parties." *CBS, Inc.*, 75 N.Y.2d at 503. Stated differently, "[t]he critical question is not whether the buyer believed in the truth of the warranted information, but 'whether [it] believed [it] was purchasing the [seller's] promise [as to its truth].'" *Id.* (alterations original). While plaintiffs need not prove that they believed the truth of the warranted information, they must establish, via classwide proof, that the representation was "material and actionable" before certification of a New York express warranty class is appropriate. *See Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 7 102 (N.Y. App. Div. 1986) ("[O]nce it has been determined that the representations alleged are material and actionable . . . the issue of reliance may be presumed, subject to such proof as is required on the trial"). Accordingly, plaintiffs must adduce sufficient evidence that the representation was material on a classwide basis to support certification of an express warranty class. The court examines below whether they have done so.

(c) Unjust Enrichment Claim

To state an unjust enrichment claim under New York law, a plaintiff must plead that (1) the defendant was enriched (2) at the plaintiff's expense

and (3) the circumstances were such that equity and good conscience require that the defendant make restitution. *Hughes v. Ester C Co.*, 930 F.Supp.2d 439, 471 (E.D.N.Y.2013); *accord Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012) ("The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which 'in equity and good conscience' should be paid to the plaintiff"). Unjust enrichment is available as a cause of action "only in unusual situations whe[re], though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello*, 18 N.Y.3d at 790. Under New York law, "[i]t does not matter whether the benefit is directly or indirectly conveyed [to the defendant]." *Manufacturers Hanover Transp. Co. v. Chem Bank*, 160 A.D.2d 113, 117 (N.Y. App. Div. 1990). Privity, moreover, is not required for an unjust enrichment claim. *See Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012) ("a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, [but] there must exist a relationship or connection between the parties that is not too attenuated").

Plaintiffs have not adequately shown that common questions predominate with respect to their New York unjust enrichment claim. New York courts regularly conclude that unjust enrichment classes cannot be certified because individualized inquiries as to whether "equity and good conscience require restitution" are not susceptible of classwide proof. *See, e.g.*, *Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 75-76 (S.D.N.Y. 2013) ("Plaintiff's attempt to certify a class as to his unjust enrichment claim

fails, in part, because the elements of the cause of action are not susceptible to classwide proof. Specifically, plaintiff cannot prove through common evidence that equity and good conscience require restitution. An 'indispensable ingredient' of the equity and good conscience requirement is the existence of 'an injustice as between the two parties involved.' In this case, plaintiff cannot demonstrate through classwide evidence that it was unjust for XM to collect fees from all of the customers whose service was renewed. . . . Plaintiff's inability to prove the elements of his claim through common evidence, in and of itself, defeats Rule 23(b)(3)'s predominance requirement," citing *In re Jetblue Airways Corp. Privacy Litig.*, 379 F.Supp.2d 299, 230 (E.D.N.Y. 2005)); *Dungan v. Academy* at *Ivy Ridge*, 249 F.R.D. 413, 427 (N.D.N.Y. 2008) (holding that the predominance requirement was not satisfied where individual inquiries would be necessary to determine whether equity and good conscience required restitution).

As in these cases, individualized inquiries will be required here to determine whether it would be "unjust" for ConAgra to retain the price paid by each class member for Wesson Oils during the class period. As noted in connection with the court's analysis of the Illinois class's unjust enrichment claim, a class member's ability to recover for unjust enrichment under New York law will turn on individual questions concerning proximate causation, deception and conferral of a benefit. Accordingly, the court concludes that plaintiffs have not shown that

common questions predominate with respect to their New York unjust enrichment claim.[222]

(d) Conclusion Regarding New York Claims

For the reasons stated, the court concludes that the GBL and express warranty claims of the putative New York class may be susceptible of classwide proof.

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[222] Plaintiffs' attempt to certify an unjust enrichment class fails for the independent reason that the claim is duplicative of plaintiffs' GBL claim. Under New York law, as noted, "unjust enrichment is not a catchall cause of action to be used when others fail." Rather, "it is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello*, 18 N.Y.3d at 790. Where, as here, an unjust enrichment claim merely duplicates a conventional contract or tort claim, courts routinely conclude that plaintiffs have an adequate remedy at law and find that an independent cause of action for unjust enrichment will not lie. *See id.* at 790-91 ("An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim," citing *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70, 81 (2008); *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388-89 (1987); *Town of Wallkill v. Rosenstein*, 40 A.D.3d 972, 974 (N.Y. App. 2007)); *see also id.* at 791 ("Here, plaintiffs allege that Verizon committed actionable wrongs, by trespassing on or taking their property, and by deceiving them into thinking they were not entitled to compensation. To the extent that these claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects. The unjust enrichment claim should be dismissed"); *Samiento*, 10 N.Y.3d at 81 ("As to plaintiffs' third cause of action for unjust enrichment, this action does not lie as plaintiffs have an adequate remedy at law and therefore the claim was likewise properly dismissed"). The court therefore declines to certify a New York unjust enrichment class for this reason as well.

The court cannot determine if certification of such classes is appropriate, however, until it evaluates whether plaintiffs have adduced sufficient evidence indicating that they may be able to prove the materiality of ConAgra's representations on a classwide basis. As respects the putative class's unjust enrichment claim under New York law, the court concludes that individualized issues predominate and that a class cannot be certified.

(8) Ohio

Plaintiffs seek certification of an Ohio class alleging violation of the Ohio Consumer Sales Practices Act ("OCSPA").[223] Under Ohio law, a class action for violation of the OCSPA can be maintained to redress a "deceptive act [that] has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts. Courts . . . apply a reasonableness standard in determining whether an act amounts to deceptive, unconscionable, or unfair conduct." *Shumaker v. Hamilton Chevrolet, Inc.*, 920 N.E.2d 1023, 1030-31 (Ohio App. 2009). A classwide inference of reliance is permitted where defendant's fraudulent or deceptive conduct is common to all consumers. *See Washington v. Spitzer Mgmt. Inc.*, No. 81612, 2003 WL 1759617, *6 (Ohio App. Apr. 3, 2003) (Unpub. Disp.) ("If a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis. In such cases, 'reliance . . . may be sufficiently established by inference or presumption,'" citing *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 84 (1998)); *Amato v. General Motors Corp.*, 11

[223] Class Cert. Motion at 43-47.

Ohio.App.3d 124, 127-28 (1982) ("The second assignment [of error] has much in common with the first. There is an interdependency. For exposure without reliance would necessarily block recovery. The problem is how is reliance to be proven. . . . '[I]f the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class. Defendants may, of course, introduce evidence in rebuttal.' . . . [I]t is held here and now that proof of reliance may be sufficiently established by inference or presumption from circumstantial evidence to warrant submission to a jury without direct testimony from each member of the class. Accordingly, the second assignment of error lacks merit," quoting *Vasquez v. Superior Court of San Joaquin County*, 4 Cal.3d 800, 814-15 (1971)). As plaintiffs note, Ohio courts "allow[ ] an inference of reliance where there was uniform nondisclosure of a material fact, satisfying predominance." [224] Materiality under the OCSPA is measured by assessing whether an omitted or misrepresented fact would likely have been "material to a consumer's decision" to purchase the product involved. *See, e.g.*, *In re Porsche Cars North America, Inc.*, 880 F.Supp.2d 801, 871 (S.D. Ohio 2012) ("Omissions are actionable under the OCSPA if they 'concern a matter that *is or is likely to be material to a consumer's decision to purchase the product or service involved*,'" citing *Temple v. Fleetwood Enterprises, Inc.*, 133 Fed. Appx. 254, 265 (6th Cir. May 25, 2005) (Unpub. Disp.) (in turn citing *Richards v. Beechmont Volvo*, 127 Ohio

[224] *Id.* at 46 (citing *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 696 N.E.2d 1001, 1008 (1998)).

App.3d 188, 190 (1998)) (emphasis added)); *Lump v. Best Door and Window, Inc.*, Nos. 8-01-09, 8-01-10, 2002 WL 462863, *12 (Ohio. App. Mar. 27, 2002) (Unpub. Disp.) (reversing the entry of summary judgment on an OCSPA claim based on misrepresentations by defendant after concluding that plaintiff had adduced sufficient evidence to establish that "[the] representations or omissions [ ] were material and of a nature likely to misled consumers acting reasonably under the circumstances"). Accordingly, to determine whether common questions predominate over individual issues with respect to plaintiffs' OCSPA claim, the court must consider whether plaintiffs have adduced sufficient evidence showing that they may be able to prove ConAgra's use of the "100% Natural" label misrepresented a material fact to reasonable consumers.

(9) Oregon

Plaintiffs seek certification of an Oregon class asserting claims for violation of the Oregon Unfair Trade Practices Act ("OUTPA") and unjust enrichment.[225]

(a) Consumer Protection Claim

> "Private plaintiffs may bring OUTPA actions under ORS 646.638(1), which provides, in part: '[A]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of willful use or employment by another person of a method, act or practice declared

[225] *Id.* at 47-50.

> unlawful by ORS 646.608, may bring an individual action in an appropriate court to recover actual damages or statutory damages of $200, whichever is greater. The court or the jury, as the case may be, may award punitive damages and the court may provide the equitable relief the court considers necessary or proper.'" *Pearson v. Philip Morris, Inc.*, 257 Or.App. 106, 116-17 (2013).

To prevail in an action for damages under § 646.638(1), a plaintiff must establish that he or she suffered an ascertainable loss as a result of an unlawful trade practice by the defendant. *Id.* "In other words, the plaintiff must prove an unlawful trade practice, causation, and damages." *Id.* (citing *Feitler v. The Animation Celection, Inc.*, 170 Or.App. 702, 708 (2000)).

The causation/reliance element of an OUTPA claim is susceptible of classwide proof. *See Strawn v. Farmers Ins. Co. of Oregon*, 350 Or. 336, 358-59 (2011) ("To prevail in a class action for fraud, the class plaintiff must prove reliance on the part of all class members. Direct evidence of reliance by each of the individual class members is not always necessary, however. Rather, reliance can, in an appropriate case, be inferred from circumstantial evidence. For that inference to arise in this context, the same misrepresentation must have been without material variation to the members of the class. In addition, the misrepresentation must be of a nature that the class members logically would have had a common understanding of the misrepresentation, and naturally would have relied on it to the same degree and in the same way"); *see also id.* at 356-57 ("And

although *Newman* [*v. Tualatin Development Co., Inc.*, 297 Or. 47 (1979),] did not declare when reliance can be determined through common, rather than individualized evidence, it at least suggested an answer – *viz*., when the same misrepresentation was made to all individual class members and was sufficiently material or central to the plaintiff's and the defendant's dealings that the individual class members naturally would have relied on the misrepresentation. Such a standard for inferring classwide reliance from evidence common to the class accords with what we consider to be the better-considered authority in other jurisdictions").

Plaintiffs argue that reliance is susceptible of classwide proof because ConAgra made the same alleged misrepresentation – the "100% Natural" claim – to all class members, and it was material.[226] The court agrees that reliance can be proven on a classwide basis if plaintiffs can demonstrate that the representation was material. Whether they have adduced sufficient evidence indicating that they can do so, such that it is appropriate to certify a class, is a question the court considers *infra*.

(b) Unjust Enrichment

"It is well-settled [under Oregon law] that, to establish unjust enrichment, a plaintiff must establish that (1) the plaintiff conferred a benefit on the defendant; (2) the defendant was aware that it had received a benefit; and (3) under the circumstances, it would be unjust for the defendant to retain the benefit without paying for it." *Winters v.*

[226] *Id.* at 47-49.

County of Clatsop, 210 Or.App. 417, 421 (2007) (citing *Volt Services Group v. Adecco Employment Services*, 178 Or.App. 121, 133,(2001), rev. den. 333 Or. 567 (2002)); *see Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 562 (D. Or. 2009) ("On the unjust enrichment/quantum meruit claim, plaintiffs have to show (1) a benefit conferred by the plaintiffs; (2) awareness by the recipient that a benefit has been received; and (3) under the circumstances, it would be unjust to allow retention of the benefit without requiring the recipient to pay for it," citing *Summer Oaks Ltd. P'ship v. McGinley*, 183 Or.App. 645, 654 (2002); *L.H. Morris Elec., Inc. v. Hyundai Semiconductor Am., Inc.*, 203 Or.App. 54, 66 (2005)). To state a claim, plaintiff need not show that he or she was in privity with the defendant. *See Rosenblum v. First State Bank of Elgin*, 283 Or. 123, 128-29 (1978) ("[P]rivity of the contractual type need not exist between the parties," citing *Smith v. Rubel*, 140 Or. 422, 427-28 (1932)).

The court concludes that individualized inquiries will not predominate over common issues with respect to the Oregon unjust enrichment claim. Oregon courts have certified unjust enrichment claims where members of a putative class were subjected to "uniform treatment" by the defendant. *See, e.g.*, *Phelps*, 261 F.R.D. at 563 ("[T]he evidence will be common because of defendant's uniform treatment of [the putative class members]. All of the [putative class members'] contracts will be adjudged in the same fashion on this issue. Thus, common issues predominate in the unjust enrichment/quantum meruit claim"); *see also Sobel v. Hertz Corp.*, 291 F.R.D. 525, 543 (D. Nev. 2013)

(citing *Phelps* with approval in interpreting a substantially similar unjust enrichment claim under Nevada law, and concluding that Rule 23(b)'s predominance requirement was satisfied because "[a]ny putative class members who were overcharged . . . would be in exactly the same position" given defendant's common treatment of the putative class). Because the putative class was subject to uniform treatment by ConAgra, i.e., ConAgra's allegedly misleading statements were on each bottle of Wesson Oil purchased by a class member during the class period, the court concludes that common questions predominate under Oregon law and that plaintiffs have satisfied Rule 23(b)'s predominance requirement with respect to their Oregon unjust enrichment claim.

(c) Conclusion Regarding Oregon Claims

For the reasons stated, the court concludes that plaintiffs' Oregon consumer protection claim may be susceptible of classwide proof if plaintiffs can show that class members would logically have understood the "100% Natural" label to mean no use of genetically modified organisms and naturally have relied on it in the same way. If plaintiffs are able to adduce sufficient evidence of this, common questions will likely also predominate with respect to the Oregon class's unjust enrichment claim.

(10) South Dakota

Plaintiffs also seek certification of a South Dakota class to assert claims for violation of the South Dakota Deceptive Trade Practices and Consumer

Protection Law ("SDDTPL") and unjust enrichment.[227]

(a) Consumer Protection Claim

A claim for damages under the SDDTPL requires "proof of an intentional misrepresentation or concealment of a fact on which [the] plaintiff relied and that caused an injury to plaintiff." *Northwestern Public Service, a Div. of Northwestern Corp. v. Union Carbide Corp.*, 236 F.Supp.2d 966, 973-74 (D.S.D. 2002).

Plaintiffs argue they will be able to prove reliance by the South Dakota class on a classwide basis by adducing circumstantial evidence of the materiality of ConAgra's "100% Natural" claim and its adverse impact on all class members.[228] As support, they cite the South Dakota Supreme Court's decision in *Thurman v. CUNA Mut. Ins. Society*, 836 N.W.2d 611 (S.D. 2013).[229] There, the court concluded that the trial court had erred in denying plaintiffs' motion for certification of a class pleading claims, *inter alia*, for violation of the SDDTPL. *Id.* at 615, 623. Specifically, it held that the trial court erred in concluding that individualized inquiries concerning a statute of limitations defense predominated over common questions. *Id.* at 620-21. The Court reasoned:

> "The common questions need not be dispositive of the entire action. In other words,

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[227] *Id.* at 50-52.

[228] Class Cert. Motion at 50-51.

[229] *Id.*

> 'predominate' should not be automatically equated with 'determinative.' Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* at 620 (citing 7AA Wright & Miller's FEDERAL PRACTICE AND PROCEDURE - Civil 1778 (3d ed.)).

Plaintiffs contend that, as in *Thurman*, individualized inquiries concerning class members' damages or ConAgra's affirmative defenses will not predominate because they will be able to demonstrate classwide reliance by adducing evidence of the materiality of ConAgra's claim.[230]

Plaintiffs proffer no authority indicating that reliance or causation can be proved on a classwide basis, however. ConAgra, for its part, cites no authority at all. The court itself has surveyed South Dakota law, and can find nothing directly addressing the issue. It nonetheless concludes that reliance and causation can be proved on a classwide basis by showing that the "100% Natural" claim was material. In reaching this conclusion, the court is guided by the broad, remedial purpose of the SDDTPL, which is designed to provide relief to victims of deceptive trade practices, *see Moss v. Guttormson*, 551 N.W.2d 14, 17 (S.D. 1996) (noting that the SDDTPL "assists consumers seeking relief as victims of deceptive trade

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[230] *Id.*

practices" and contains "broad statutory language [that] [encompasses] more than only consumers"); *see also Rainbow Play Systems, Inc. v. Backyard Adventure, Inc.*, No. CIV 06-4166, 2009 WL 3150984, *7 (D.S.D. Sept. 28, 2009) (same). It is also guided by the South Dakota Supreme Court's suggestion in *Thurman* that "class certification 'is favored by courts in questionable cases.'" *Thurman*, 836 N.W.2d at 618 (citing *Beck v. City of Rapid City*, 650 N.W.2d 520, 525 (S.D. 2002)). Accordingly, the court concludes that plaintiffs' SDDTPL claim is susceptible of classwide proof if plaintiffs are able to prove materiality, an issue it considers *infra*.

(b) Unjust Enrichment

Under South Dakota law, "[u]njust enrichment occurs 'when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.'" *Hofeldt v. Mehling*, 658 N.W.2d 783, 788 (S.D. 2003) (quoting *Parker v. Western Dakota Insurors, Inc.*, 605 N.W.2d 181, 192 (S.D. 2000)); *accord Miller v. Jacobsen*, 714 N.W.2d 69, 81 (S.D. 2006); *Juttelstad v. Juttelstad*, 587 N.W.2d 447, 451 (S.D. 1998); *see Sporleder v. Van Liere*, 569 N.W.2d 8, 12 (S.D. 1997); *Randall Stanley Architects, Inc. v. All Saints Community Corp.*, 555 N.W.2d 802, 805 (S.D. 1996). When a plaintiff proves unjust enrichment, "the law implies a contract obligating the beneficiary to compensate the benefactor for the value of the benefit conferred." *Hofeldt*, 658 N.W.2d at 788; *accord Mack v. Mack*, 613 N.W.2d 64, 69 (S.D. 2000).

To prove unjust enrichment, three elements must be shown: (1) a benefit was received; (2) the recipient

was cognizant of that benefit; and (3) the retention of the benefit without reimbursement would unjustly enrich the recipient. *Hofeldt*, 658 N.W.2d at 788; *Action Mechanical, Inc. v. Deadwood Historic Preservation Comm'n*, 652 N.W.2d 742, 750 (S.D. 2002); *Mack*, 613 N.W.2d at 69;, 605 N.W.2d at 192; *Juttelstad*, 587 N.W.2d at 451; *Bollinger v. Eldredge*, 524 N.W.2d 118, 122–23 (S.D. 1994). Privity is not required. *Anderson v. Dunn*, 4 N.W.2d 810, 812 (S.D. 1942).

At least one district court has certified an unjust enrichment class under South Dakota law. In *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605 (D.S.D. 2004), plaintiffs filed a putative class action alleging claims for violations of the Packers and Stockyards Act ("PSA"), 7 U.S.C. §§ 181-229, and unjust enrichment. *Id.* at 607-08. Considering plaintiffs' motion for class certification, the court concluded that plaintiffs' PSA and unjust enrichment claims raised common questions, particularly given that defendants' conduct toward all class members was uniform and there was no "practical difference" between "a practice that is 'unfair' and a practice that results in 'unjust enrichment.'" *Id.* at 612-13. The court also concluded that common questions as to whether defendants' actions were "unfair" and resulted in "unjust enrichment" predominated over individualized inquiries such that a South Dakota unjust enrichment class should be certified. *Id.* at 617-18.

The court finds *Schumacher* instructive. Like the plaintiffs in *Schumacher*, ConAgra's conduct toward each member of the plaintiff class was uniform, purportedly "unfair," and allegedly resulted in

ConAgra's "unjust enrichment." *Schumacher* indicates that whether a defendant's actions resulted in unjust enrichment is a question susceptible of classwide proof, and that common questions predominate over individualized inquiries when each plaintiff was exposed to the same allegedly wrongful conduct. Because plaintiffs here were exposed to the same allegedly deceptive representation that Wesson Oils were "100% Natural," the court concludes that common issues predominate over individualized inquiries and that the South Dakota unjust enrichment class satisfies Rule 23(b)'s predominance requirement.

(c) Conclusion Regarding South Dakota Claims

For the reasons stated, the court concludes that plaintiffs may be able to show on a classwide basis that the "100% Natural" label had a common meaning that was material to members of the putative class. The court considers *infra* whether plaintiffs have made a sufficiently adequate showing that certification of a class is appropriate. The court also concludes that common issues predominate over individualized inquiries with respect to plaintiffs' South Dakota unjust enrichment claim, and that Rule 23(b)'s predominance requirement is therefore satisfied.

(11) Texas

Plaintiffs seek certification of a Texas class asserting claims for violation of the Texas Deceptive

Trade Practices-Consumer Protection Act ("TDTPA") and unjust enrichment.[231]

(a) Consumer Protection Claim

To prove a claim under the TDTPA, a plaintiff must establish that defendant violated the specific prohibitions of Texas Business and Commercial Code Annotated §§ 17.46 and 17.50; one of these is using deceptive representations in connection with goods or services. The Texas Supreme Court has held that a plaintiff can prove a "false, misleading, or deceptive act" as defined in the TDTPA by demonstrating "an act or series of acts which has the capacity or tendency to deceive an average or ordinary person, even though that person may have been ignorant, unthinking, or credulous." *Spradling v. Williams*, 566 S.W.2d 561, 562-64 (Tex. 1978).

While the TDTPA requires a showing that defendant's misrepresentation was a cause in fact of plaintiff's injury, the Texas Supreme Court has held that reliance and causation can be proved on a classwide basis when appropriate. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2003) ("This does not mean, of course, that reliance or other elements of their causes of action cannot be proved classwide with evidence generally applicable to all class members; classwide proof is possible when classwide evidence exists"). Thus, the court concludes that plaintiffs' TDTPA claim is susceptible of classwide proof if common evidence exists regarding class members' reliance on the purported "100% Natural" misrepresentation. Plaintiffs assert

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[231] *Id.* at 52-54.

such proof is available, citing evidence they have adduced concerning the materiality of the "100% Natural" label;[232] the court considers the sufficiency of that evidence *infra*.

(b) Unjust Enrichment

Under Texas law, unjust enrichment occurs when a defendant wrongfully secures a benefit or passively receives a benefit that it would be "unconscionable" for it to retain. *See Tex. Integrated Conveyor Sys. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App. 2009). Privity between plaintiff and defendant is not required. *See Miekow v. Faykus*, 297 S.W.2d 260, 264 (Tex. App. 1956) ("For a quasi contract neither promise nor privity, real or imagined, is necessary").

Plaintiffs assert they can use common proof to prevail on their Texas unjust enrichment claim because ConAgra received a benefit, in the form of increased revenue from the higher price it was able to charge as a result of its false "100% Natural" claim.[233] The court cannot agree that common questions would predominate over individualized inquiries with respect to the Texas unjust enrichment claim. The Texas Supreme Court has held that, even in situations where the benefit received, i.e., the price paid by class members to the defendant, is uniform, "individual differences between each class member's experience" will necessitate individualized inquiries to "determine in whose favor the equities weigh in

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[232] *Id.* at 53.

[233] Class Cert. Motion at 54.

resolving [class members'] claims." *Best Buy Co. v. Barrera*, 248 S.W.3d 160, 163-64 (Tex. 2007) ("We recognize that the claim Barrera asserts involves issues that are common to the class; presumably, the restocking fee was uniformly calculated and applied when consumers returned the specified items. But just as in *Stonebridge*, there are 'inescapably individual differences between each class member's experience . . . that could determine in whose favor the equities weigh in resolving their claims.' We conclude that Barrera failed to prove at the outset that individual issues governing a class claim for 'money had and received' can be considered in a fair, manageable, and time-efficient manner on a class-wide basis, and thus failed to satisfy [the] predominance requirement," citing *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201, 206 (Tex. 2007) (in turn citing *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435-36 (Tex. 2000)).

Here, individualized inquiries will be required to determine whether ConAgra's conduct was "unconscionable" vis-á-vis each individual class member such that it would be unjust for it to retain the benefit it received from that individual. Plaintiffs proffer no authority indicating that it is possible to dispense with such inquiries through the presentation of classwide proof. Accordingly, the court concludes that the Texas unjust enrichment class does not satisfy Rule 23(b)'s predominance requirement.

(c) Conclusion Regarding Texas Claims

For the reasons stated, the court concludes that plaintiffs' Texas consumer protection claim may be susceptible of classwide proof if plaintiffs can show the materiality of ConAgra's representation on a classwide basis. The court considers *infra* whether they have adduced sufficient evidence of an ability to do so that certification is warranted. As respects plaintiffs' claim for unjust enrichment under Texas law, the court concludes that individualized inquiries will predominate over common issues and declines to certify the class.

(ii) Whether Plaintiffs Have Established that Materiality Can Be Proved on a Classwide Basis

Plaintiffs assert they have submitted substantial evidence demonstrating that the materiality of ConAgra's misrepresentation can be established by common survey proof. Plaintiffs proffer various third party surveys to support their contention that the "100% Natural" label is material to Wesson Oil buyers.[234] Specifically, they rely on a report by the Consumer Reports National Research Center, which surveyed a nationally representative sample of consumers and found that 59% look for a "natural" claim when shopping for packaged or processed foods, such as Wesson Oils.[235] Plaintiffs also cite a 2010

[234] Class Cert. Motion at 9-10.

[235] *See* Declaration of David Azar ("Azar Decl."), Exh. 31.

survey in which 65% of respondents were "somewhat interested" or "very interested" in purchasing natural products and a substantial majority of consumers attested that it was worth paying more for "natural" products.[236]

Plaintiffs also rely on portions of ConAgra's market research as support for their contention that a classwide inference that the "100% Natural" label on Wesson Oils is material.[237] The marketing research purportedly show that consumers exposed to a "100% Natural" or "Natural" claim on ConAgra product labels generally consider the representation a significant factor in their purchasing decisions.[238] Plaintiffs argue that the materiality of the "100% Natural" claim can also be inferred from ConAgra's internal strategy documents, which identify a "100% Natural" claim as a favorable product attribute in the view of consumers.[239] None of the three surveys plaintiffs cite directly links consumers' understanding of the "100% Natural" label to the specific issue raised in this case – i.e., whether consumers believe the label means the product contains no genetically modified organisms or GMO ingredients. Nonetheless, the surveys tend to show that, however they interpret it, consumers find the "100% Natural" claim material to their purchasing decisions.

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[236] *Id.*, Exh. 32 at 15, 44.

[237] *See* Class Cert. Motion at 11-12. Because this evidence has been filed under seal, the court does not detail the findings or conclusions it contains.

[238] *See, e.g.*, Azar Decl., Exhs. 3, 8, 12, 25, 36.

[239] *Id.*, Exhs. 24, 28.

Plaintiffs contend the survey data also adequately shows that the "100% Natural" label causes consumers to believe that Wesson Oils do not contain genetically modified organisms. They cite survey findings that consumers believe "natural" means, among other things, no GMOs.[240] The Consumer Reports survey, published in June 2014, found that 64% of respondents believed that a "natural" claim on food products meant that the product contained "no GMOs" or "genetically modified ingredients."[241] Plaintiffs also reference two studies by the Hartman Group that found, *inter alia*, that a majority of consumers understood "natural" to mean an "absence of genetically modified foods,"[242] and that "[c]onsumers perceive [GMO] foods as inherently unnatural and worry about adverse health effects" from such foods.[243] Finally, plaintiffs cite a HealthFocus International study, which concluded that a substantial majority of consumers associate a "natural" claim with the absence of GMOs.[244]

As respects ConAgra products specifically, plaintiffs adduce evidence that the company received consumer complaints about the "100% Natural" label

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[240] Class Cert. Motion at 13; *see, e.g.*, Azar Decl., Exh. 31 (64% of respondents understood "natural" to mean, among other things, "no GMOs"); *id.*, Exh. 33 (61% of consumers understood "natural" to include the "absence of genetically modified goods").

[241] *See* Azar Decl., Exh. 31.

[242] *Id.*, Exh. 33.

[243] *Id.*, Exh. 47.

[244] *Id.*, Exh. 34.

on Wesson Oils after discovering that they contained GMOs.[245]

The court concludes that plaintiffs have made a sufficient showing for purposes of class certification that the "100% Natural" claim is material and that consumers generally understand it, *inter alia*, as a representation that Wesson Oils do not contain GMOs. Plaintiffs need not prove at this stage that *every* ConAgra customer would find the "100% Natural" claim material or would believe that it meant the products contained no GMOs. Rather, they need only demonstrate that a reasonable consumer would understand it in that way and find it material. Courts, moreover, have found a representation material when significantly smaller percentages of consumers than those reflected in the surveys here viewed it in that light. *See, e.g.*, *Oshana v. Coca-Cola Co.*, No. 04 C 3596, 2005 WL 1661999, *9 (N.D. Ill. July 13, 2005) ("Coca-Cola provides no authority that a misrepresentation is immaterial if only 24% of consumers would behave differently. . . . [T]here is sufficient evidence to raise a genuine issue of fact as to whether the alleged misrepresentations are material to a reasonable consumer").

ConAgra counters that plaintiffs have failed to adduce sufficient evidence of the materiality of the "100% Natural" claim to the putative class or reasonable consumers and therefore that individualized inquiries will predominate over

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[245] *Id.*, Exh. 5. Plaintiffs also rely on the Kozup Survey, which purportedly shows that ConAgra consumers associate a "100% Natural" claim with the absence of GMOs. Because the court has concluded that the Kozup Survey is inadmissible, it disregards it.

common questions.[246] It notes that the court concluded that plaintiffs had not satisfied the predominance requirement in their original motion for class certification because they had not produced reliable evidence that "the 100% Natural label on Wesson Oils [was] material to all class members and [ ]that consumers generally believe . . . the label means the product contains no genetically modified organisms or GMO ingredients."[247] At the time the court decided the original motion, however, several of the third party surveys that have now been proffered were not in evidence because plaintiffs failed to submit them with their moving papers.[248] Plaintiffs properly submitted the third party surveys in support of their amended motion, and as noted, they provide substantial support for plaintiffs' contention that the "100% Natural" claim is material to consumers, and is understood, *inter alia*, as an indication that the products do not contain GMOs.

ConAgra next asserts that plaintiffs cannot establish the materiality of the "100% Natural" claim because the FDA has refused to designate genetically engineered foods and food ingredients non-natural and has concluded that the presence of GMOs is not a "material fact" that must be disclosed under FDA regulations.[249] The relevant question, however, is whether a reasonable consumer would have

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[246] Class Cert. Opp. at 41-43.

[247] *Id.* at 43.

[248] *See* Order at 59 n. 131 (rejecting plaintiffs' request to take judicial notice of third party surveys and refusing to consider the contents of the surveys).

[249] Class Cert. Opp. at 45-46.

understood the term in that manner and found it material to his or her purchasing decision. It is not how the FDA views genetically engineered foods.

ConAgra contends that the named plaintiffs' supplemental declarations significantly undercut their assertion that they considered the "100% Natural" label on Wesson Oils material to their purchasing decision because they believed it meant the products contained no GMOs.[250] It cites specifically plaintiffs' statement that they "might" be interested in purchasing Wesson Oils containing GMOs in the future.[251] While these statements could support an inference that plaintiffs' belief Wesson Oils did not contain GMOs was not material to *their* purchasing decision, the court does not believe that the named plaintiffs' declarations are sufficient to demonstrate that the claim would not be material to a *reasonable consumer*, particularly in light of the survey evidence plaintiffs have adduced.

ConAgra also relies on *Jones*. It contends that as in that case, the "100% Natural" claim is susceptible of numerous interpretations and thus materiality cannot be established on a classwide basis.[252] The court is not persuaded. In *Jones*, the court denied plaintiffs' motion for class certification on the grounds, *inter alia*, that plaintiffs had failed to adduce evidence of the impact of the challenged label statements on consumers. *See Jones*, 2014 WL 2702726 at *16 ("While the Court has no trouble believing that the '100% natural' claim is material to

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[250] Class Cert. Opp. at 47-49.

[251] *See* Plaintiffs' Decls., Exhs. A-I.

[252] Class Cert. Opp. at 50-52.

some customers, Caswell's testimony does not demonstrate that it is necessarily 'material to reasonable consumers.' This court held in *Badella v. Deniro Mktg., LLC*, No. 10-3908, 2011 WL 5358400, *9 (N.D. Cal. Nov. 4, 2011), that '[m]ateriality is an objective standard, but still, Plaintiffs will need to point to some type of common proof, particularly given Defendant's arguments that people join Amateur Match for many different reasons and for many different purposes.' Here, although only two challenged label statements are at issue, there are numerous reasons a customer might buy Hunt's tomatoes and there is a lack of evidence demonstrating the impact of the challenged label statements. Accordingly, Plaintiffs lack common proof of materiality," citing *Astiana*, 291 F.R.D. at 508). Unlike *Jones*, plaintiffs here have adduced evidence of the "impact of the challenged label statements," i.e., the "100% Natural" claim, on consumers. They have also proffered sufficient evidence that reasonable consumers associate the claim, *inter alia*, with the fact that the products contain no GMOs. The court thus finds *Jones* distinguishable.[253]

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[253] ConAgra also cites *Allen v. Hyland's, Inc.*, 300 F.R.D. 643 (C.D. Cal. 2014), and *Astiana*, 291 F.R.D. 493, for the proposition that a classwide inference of reliance cannot arise where there are "differing understandings of the word 'natural' and variations in the importance consumers place on the 'natural' label." (Class Cert. Opp. at 49-52.) These cases are also distinguishable. In *Allen*, the court declined to certify classes alleging that a "100% Natural" label was misleading because "[p]laintiffs [ ] ha[d] not demonstrated that 'natural' has a fixed meaning, nor ha[d] they introduced evidence that 'a significant portion of the general consuming public or of targeted

Because plaintiffs have adduced sufficient evidence that the "100% Natural" label is material to a reasonable consumer and that the consumer would understand it to mean, *inter alia*, that a product labeled in this fashion contains no GMOs, the court concludes that materiality can be proved on a classwide basis.[254]

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consumers' would rely on the 'natural' label." *Allen*, 300 F.R.D. at 668. Likewise, the *Astiana* court, citing the Ninth Circuit's opinion in *Stearns*, concluded that an inference of reliance did not arise because "[p]laintiffs fail[ed] to sufficiently show that 'All Natural' has any kind of uniform definition among class members, that a sufficient portion of class members would have relied to their detriment on the representation, or that [d]efendant's representation of 'All Natural' in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members." *Astiana*, 291 F.R.D. at 508.

Unlike *Allen* and *Astiana*, plaintiffs have adduced evidence in this case of the "impact of the challenged label statements" on consumers, and have proffered sufficient evidence showing that a reasonable consumer would conclude the "100% Natural" label meant Wesson Oil products contained no GMOs.

[254] At the hearing, ConAgra argued that the Ninth Circuit's opinion in *Stearns* and subsequent district court decisions applying *Stearns* preclude a finding here that plaintiffs' evidence gives rise to an inference of reliance for purposes of their California consumer protection claims. ConAgra contends that *Stearns* stands for the proposition that an inference of reliance cannot arise "unless a misrepresentation is understood the same way by all members of the proposed class." (Class Cert. Opp. at 49.)

In *Stearns*, the Ninth Circuit reviewed a district court's denial of a motion for class certification. *Stearns*, 655 F.3d at 1016-18. Plaintiffs sought to certify classes asserting claims under California's consumer protection statutes based on defendant's purportedly deceptive website. *Id.* Ticketmaster and a business partner, Entertainment Publications, LLC

("EPI") operated separate websites; EPI's website offered an online coupon program called Entertainment Rewards. *Id.* at 1017. Entertainment Rewards allowed members, for a monthly membership fee, to download printable coupons that they could use to obtain discounts at various retail establishments. *Id.* EPI's website was linked to Ticketmaster's website, such that when a customer made a purchase on Ticketmaster, he or she was shown an ad on the confirmation page offering a "$25 Cash Back Award." *Id.* If customers clicked on the ad, they were taken to EPI's website, where they were enrolled in the Entertainment Rewards program if they entered their email address or clicked a "Sign Me Up" or "Yes" button. *Id.* Once enrolled, Ticketmaster transferred the customer's credit card information to EPI and the customer was charged a monthly membership fee for the Entertainment Rewards program. *Id.* at 1017-18. Plaintiffs sought to certify classes alleging claims under California's consumer protection statutes; the district court declined to certify UCL and CLRA classes, concluding that individualized proof of reliance and causation would be required to prove each claim. *Id.* at 1020-23.

The Ninth Circuit concluded that the district court had erroneously declined to certify a UCL class because a classwide inference of reliance arises under the UCL unless "there [is] no cohesion among the members [of the class] because they were exposed to quite disparate information from various representations of the defendant." *Id.* at 1020. It held, by contrast, that the district court had properly declined to certify a CLRA on the basis that reliance would require individualized inquiries. *Id.* at 1022. The court observed that, unlike the UCL, the CLRA requires that each class member have suffered actual injury as a result of the unlawful practice. Nonetheless, it stated, causation can be established on a classwide basis by showing the materiality of the defendant's representation, because if material misrepresentations were made to an entire class "an inference of reliance arises as to the class." *Id.* (citing *Vioxx*, 180 Cal.App.4th at 129). The court cautioned that if the representation or omission was "not material as to all class members," then "the issue of reliance 'would vary from consumer to consumer,'" and a class should not be certified. *Id.* at 1022-23. In the case before it, the court reasoned that,

although the websites were "materially deficient," i.e., materially misleading, as to some class members, there was no evidence they were "materially deficient as to the entire class" because there were "myriad reasons that someone who was not misled and intentionally signed up might have chosen not to take advantage of the available product by actually printing a coupon or obtaining a rebate for some period." *Id.* at 1024. Because the class encompassed anyone enrolled in Entertainment Rewards who did not print a coupon or apply for a cashback award, and because there were multiple reasons other than being deceived that a class member might have signed up for the Entertainment Rewards program, but not have taken advantage of its discounts, the court concluded that the district court had not abused its discretion in denying plaintiffs' certification motion. *Id*.

ConAgra contends that under *Stearns*, a classwide inference of reliance cannot arise if there is the possibility that some members of a putative class suffered no injury. The court cannot agree. The California Court of Appeal's opinion in *Vioxx* – a case on which the Ninth Circuit relied in *Stearns* – is instructive in this regard. The *Vioxx* court discussed the CLRA's causation requirement and how causation can be proved on a classwide basis:

> "The language of the CLRA allows recovery when a consumer 'suffers damage as a result of' the unlawful practice. This provision 'requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm.' Causation, on a class-wide basis, may be established by materiality. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class. This is so because a representation is considered material if it induced the consumer to alter his position to his detriment." *Vioxx*, 180 Cal.App.4th at 129 (citing *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282, 1292

(2002); *Caro v. Procter & Gamble Co.*, 18 Cal.App.4th 644, 668 (1993)).

Critically, the *Vioxx* court noted that the fact "[t]hat the defendant can establish a lack of causation as to a handful of class members does not necessarily render the issue of causation an individual, rather than a common, one." *Id.* This is because "plaintiffs may satisfy their burden of showing causation as to each by showing materiality as to all." *Id.*

Under California law, "a misrepresentation or omission is material 'if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Stearns*, 655 F.3d at 1022 (citing *In re Steroid Hormone Prod. Cases*, 181 Cal.App.4th 145, 157 (2010)). In *Stearns*, the court concluded that the form and content of the Ticketmaster and EPI websites were not materially deficient as to all class members. *Id.* at 1024. The court, however, did not discuss the evidence adduced by plaintiffs that supported the district court's finding of non-materiality. Here, plaintiffs have adduced substantial evidence that a "100% Natural" claim on a food product is material to consumers; the industry studies and surveys they proffer indicate that a majority of consumers consider the claim material to their purchasing decision, and that consumers of Wesson Oils understand that "100% Natural" means, *inter alia*, that Wesson Oils do not contain GMOs. Nothing in *Stearns* suggests that similar evidence proffered in that case would not have sufficed to show materiality for certification purposes. More fundamentally, as the Ninth Circuit was applying the abuse of discretion standard of review, it is far from clear that it would have concluded that the district court had abused its discretion had it certified the class. *Id.* ("As it is, we cannot say that on the record before it the district court abused its discretion when it failed to certify the proposed CLRA class").

Following *Stearns*, district courts in this circuit have concluded that an inference of classwide reliance can arise under California law if plaintiffs adduce evidence that a uniform misrepresentation was material. The court's decision in *Werdebaugh* is particularly instructive. There, plaintiff sought certification of a CLRA class challenging Blue Diamond's "All

Natural" claims on its products. *Werdebaugh*, 2014 WL 2191901 at *1. *Werdebaugh* argued that the representation was deceptive because of a single ingredient the products contained – potassium citrate. *Id.* at *2. Blue Diamond asserted that plaintiff had not shown commonality or predominance; specifically, it urged that she was "not entitled to a presumption of reliance because what is material varies from consumer to consumer" and because "All Natural" has no common definition. *Id.* at *12-13. The court disagreed, concluding that Werdebaugh had satisfied the commonality and predominance requirements with respect to her "All Natural" claim. *Id.* at *14, 18-20. It noted that "[w]hether Blue Diamond's label statements constitute material misrepresentations [did] not depend on the subject motivations of individual purchasers, and [that] the particular mix of motivations that compelled each class member to purchase the products in the first place [was] irrelevant." *Id.* at *12. Because the case concerned "misrepresentations common to the class," rather than "individualized representations to class members," the court concluded that there a presumption of could arise with respect to the entire class if Werdebaugh proffered adequate evidence to show that the representations were material to a reasonable person. It thus found that common questions, rather than individualized issues, would predominate if the class were certified. *Id*. at *12-14, 18-20.

Here, as in *Werdebaugh*, ConAgra uniformly made a single representation to all class members – that Wesson Oils were "100% Natural." Plaintiffs have adduced evidence that the claim was material to class members and to a reasonable consumer. The evidence in the record is sufficient to support a finding that the "100% Natural" claim was a material misrepresentation. If such a finding were made, an inference of reliance would arise. Consequently, the court finds that plaintiffs have met their burden of showing that individualized issues of reliance will not predominate over common questions. *See, e.g.*, *Lilly v. Jamba Juice Company*, No. 13-CV-02998-JST, 2014 WL 4652283, *8 (N.D. Cal. Sept. 18, 2014) (concluding that common questions predominated over individualized issues regarding reliance); *Werdebaugh*, 2014 WL 2191901 at *12-14, 18-20 (same), class decertified on other grounds, 2014 WL

(b) Damages

Rule 23(b)(3) is satisfied only if plaintiffs can show that "damages are capable of measurement on a classwide basis." *Comcast*, 133 S. Ct. at 1433. The Supreme Court in *Comcast* held that plaintiffs' method of proving damages must be tied to their theory of liability. *See id.* ("If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure *only those damages attributable to that theory*. 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)" (emphasis added)).

The court previously rejected plaintiffs' damages methodology, noting that Weir's hedonic regression analysis "calculate[d only] the price premium attributable to ConAgra's use of the term '100% Natural,'" rather than the portion of that premium attributable to plaintiffs' theory of liability – i.e., that ConAgra's "100% Natural" label on Wesson Oils caused putative class members to believe the products contained no genetically modified organisms or GMO ingredients.[255] The court reasoned:

7148923 (N.D.Cal. Dec 15, 2014); *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 2466559, *7-9, 11-12 (N.D. Cal. May 30, 2014), class decertified on other grounds, 2014 WL 5794873, *1 (N.D. Cal. Nov. 6, 2014) (same).

[255] Order at 61-62.

"Weir proposes to calculate the price premium attributable to ConAgra's use of the term '100% Natural.' He concedes, however, that '100% Natural' and 'non-GMO' are not equivalent. Specifically, he testified at his deposition that he did not believe the terms were equivalent 'because non-GMO is extremely specific about one thing and I – my understanding of the general claim of 'All Natural' is that it has many implications.' This is confirmed by the studies Benbrook cites, which list multiple possible characteristics that consumers associate with a 'natural' label. Plaintiffs' specific theory of liability in this case is that the '100% Natural' label misled consumers and caused them to believe that Wesson Oils contained no genetically modified organisms or GMO ingredients. Under *Comcast*, therefore, Weir must be able to isolate the price premium associated with misleading consumers in that particular fashion. It does not appear from his declaration and deposition testimony that he intends to do so. Rather, it appears he intends merely to calculate the price premium attributable to use of the term '100% Natural' and all of the meanings consumers ascribe to it. This does not suffice under *Comcast*. *See Vaccarino v. Midland Nat. Life Ins. Co.*, No. 2:11–cv–05858–CAS (MANx), 2014 WL 572365, *7 (C.D. Cal. Feb. 3, 2014) ('In *Comcast*, the plaintiffs advanced four separate theories of antitrust violation, which collectively resulted in subscribers overpaying for cable TV service. The district court only accepted one of these four

> theories as susceptible of classwide proof. The plaintiffs' method of computing damages, however, did not segregate out the harm caused by each of the four theories of antitrust violation proffered by the plaintiffs. The Supreme Court found that this damages model did not satisfy the requirements of Rule 23(b)(3) because it conflated all four theories of antitrust violation without differentiating between the harms caused by each theory' (citations omitted))."

Weir again fails to provide an acceptable damages methodology that isolates and quantifies damages associated with plaintiffs' specific theory of liability – that they were misled to believe that Wesson Oils contained no GMOs or GMO ingredients because of the "100% Natural" label. As he did in support of plaintiffs' original motion for class certification, Weir focuses solely on the "price premium" attributable to the "100% Natural" label; he makes no efforts to segregate the price premium attributable to a consumer's understanding that "100% Natural" means the cooking oils contain no genetically modified organisms.[256] Thus, although Weir has

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[256] *See* Am. Weir Decl., ¶ 7 ("Thus, it is my opinion that, if Plaintiffs are correct as to their theory of liability – that it was a violation of the law for ConAgra to have placed the '100% Natural' claim on the label of each bottle of Wesson Oil – then the total (i.e., Classwide) economic harm suffered by Plaintiffs and all other members of the proposed Class is the amount of additional money they paid for Wesson Oil because of the presence of the '100% Natural' claim on the label of every bottle of Wesson Oil they purchased"); *id.*, ¶ 8 ("In my opinion, the individual meaning any one consumer ascribes to the term '100% Natural' is irrelevant to this analysis because their individual subjective belief does not alter the market price of Wesson Oil

provided more details concerning his methodology and conducted a preliminary regression analysis, his analysis does not satisfy *Comcast* because it does not isolate the price premium attributable to consumers' belief that ConAgra's products did not contain GMOs. *See Vaccarino*, 2014 WL 572365 at *7.

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nor does their individual subjective belief alter the amount they paid for Wesson Oil at retail. Regardless of whether an individual consumer believed '100% Natural' meant GMO-free, preservative free, nothing artificial, or a combination of these attributes, or even nothing at all, that individual consumer still paid more for Wesson Oil because of the presence of the '100% Natural' claim on the label because it is the market as a whole, and not the individual consumer, that determines the retail price of Wesson Oil – and the market as a whole places a premium on natural products. Individual Class Members have no control over the price of Wesson Oil, or the price premium resulting from the '100% Natural' claim. Individual reasons consumers may have for purchasing Wesson Oil do not alter this price premium, nor do they alter the injury arising from paying that premium because the price, and resulting price premium are set by the market. Thus, individual interpretation of the claim is not relevant for the determination of class-wide damages. The '100% Natural' label is a binary 'yes or no question' – the label either says it or it does not. Calculating a but-for price premium does not depend on interpretation of the label"); *id.*, ¶ 20 ("The presence of the '100% Natural' label claim is a binary 'yes or no question' – the label either says '100% Natural' or it does not. As such, we are dealing with a simple but-for question: What did the Class pay for Wesson Oil with the '100% Natural' Claim (i.e., the actual, historical sales data), and what would they have paid had the Claim not been made (the but-for, hypothetical price had ConAgra not violated the law). Calculating a but-for price premium does not depend on an individual interpretation of the Claim because there is no middle ground. If the market price for Wesson Oils was higher as a result of the '100% Natural' claim, then ALL consumers will have paid a higher price than if the claim had not been made").

While Weir's proposed hedonic regression alone does not satisfy *Comcast*, the court concludes that his hedonic regression and Howlett's conjoint analysis in combination meet *Comcast's* requirements for class certification purposes. Howlett proposes to use consumer surveys to segregate the percentage of the price premium specifically attributable to a customer's belief that "100% Natural" means "no GMOs." She proposes to take the total price premium calculated by Weir and multiply it by the percentage derived from her conjoint analysis. Such a calculation would necessarily produce a damage figure attributable *solely to ConAgra's alleged misconduct* – i.e., misleading consumers to believe that Wesson Oils contain no GMOs by placing a "100% Natural" label on the products.

At the hearing, ConAgra disputed this, arguing that Howlett's conjoint analysis was not sufficiently reliable to produce a viable damages model capable of satisfying *Comcast*. ConAgra emphasized the criticisms raised by Ugone in his declaration in opposition to plaintiffs' motion. Ugone contends there are three major "drawbacks that [ ] render [Howlett's conjoint analysis] inappropriate for use in the two-step hybrid method."[257] He maintains that the conjoint analysis is not sufficiently reliable to provide a viable damages model because: (1) Howlett's proposed analysis measures only the "relative importance" of certain product features, and this does not correlate to the price premium paid; (2) Howlett's proposed analysis involves collecting future data concerning consumer impressions, which

[257] Reply Ugone Decl., ¶ 11

renders it "incapable of evaluating the importance of the claimed 'GMO-Free' interpretation during the past portions of the putative Class period(s)"; and (3) Howlett's proposed analysis overemphasizes certain product attributes and thus "may yield a conclusion that the 'GMO-Free' interpretation is material when it was not."[258]

Plaintiffs addressed Ugone's first criticism at the hearing, arguing that Ugone's assertion that the "relative importance" of product features does not correlate with a price premium misapprehends conjoint analysis and merely attacks the premise behind conjoint analysis. As noted, Ugone contends that Howlett's conjoint analysis – which measures consumer perceptions of the "relative values associated with the various components of a 'Natural' claim" – cannot be used to measure the portion of the price premium associated with the claim that is attributable to an understanding that "100% Natural" is equivalent to "GMO-Free."[259] He maintains that because Howlett does not account for certain "supply" factors "that might influence prices (and therefore price premiums)," e.g., "features and prices of other products," "costs of production and distribution," and "practical pricing considerations," consumer opinions concerning the value of the attribute "are not the same as the price of (or the price premium associated with) that product or feature."[260] Because Howlett did not account for these factors, Ugone asserts "there may be no nexus between [ ] some consumers'

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[258] *Id.*

[259] *Id.*, ¶ 100.

[260] *Id.*, ¶¶ 101-02.

perception of the 'relative importance' of a particular attribute of '100% Natural' and [ ] a manufacturer's or retailer's ability to charge an actual price premium on that specific attribute . . . [,] and thus the attribute's 'relative importance' will likely have little, if any, correlation with an actual price premium."[261] Weir disputes this; he asserts Ugone fails to recognize that Weir's hedonic regression takes supply factors and other market forces in account in calculating the actual *price premium attributable* to the "100% Natural" label. As a consequence, he contends, there is no need for Howlett's conjoint analysis to consider the factors.[262]

Based on the present record, the court cannot find that Ugone's criticism renders Howlett's proposed conjoint analysis unreliable or demonstrates that the hybrid damages model plaintiffs propose does not satisfy *Comcast*. Marketers and marketing researchers have used conjoint analysis since the early 1970's to determine the values consumers ascribe to specific attributes of multi-attribute products and to understand the features driving product preferences. [263] The contribution of an attribute to overall product preference, i.e., the "relative importance" of a particular attribute, is the attribute's "partworth."[264] Partworth estimates can be used to assess how consumers value the elements of a specific product variable.[265] Howlett suggests

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[261] *Id*., ¶ 102.

[262] Reply Weir Decl., ¶ 64.

[263] Am. Howlett Decl., ¶ 95.

[264] *Id*.

[265] *Id*., ¶¶ 136-39.

that the price premium calculated by Weir can be multiplied by the value of the partworth associated with a "GMO-free" interpretation of "100% Natural" to determine the price premium attributable to that attribute.[266] Despite ConAgra's arguments to the contrary, other district courts have concluded that translating a partworth, i.e., the "relative importance" of a particular attribute, into a price premium satisfies *Comcast*. *See, e.g.*, *Guido v. L'Oreal, USA, Inc.*, Nos. 2:11-CV-01067 CAS (JCx), 2:11-CV-05465 CAS (JCx), 2014 WL 6603730, *1 (C.D. Cal. July 24, 2014); *Khoday v. Symantec Corp.*, No. 11-180 (JRT/TNL), 2014 WL 1281600, *1 (D. Minn. Mar. 13, 2014).

In *Guido*, Judge Christina A. Snyder granted plaintiffs' motion for class certification, concluding that their proposed damages model, a conjoint analysis that calculated the price premium attributable to a flammability warning on defendant's hair products, complied with *Comcast* and satisfied Rule 23's predominance requirement. *Guido*, 2014 WL 6603730 at *10-14. Plaintiffs' expert, Dr. Misra, proposed use of conjoint analysis to "estimate[ ] how much consumers value the perceived risk of flammability[ ] versus the other features" of the product, and to use this estimate to calculate "the portion of the [product's] market price attributable to the lack of a flammability warning." *Id.* at *5. Dr. Misra proposed to conduct this analysis using surveys that required "consumers to choose between [products] that differed in price, brand, and the presence of a flammability warning." *Id.* He then

[266] *Id.*, ¶ 139.

proposed to use regression to generate "a function that captures the value of the product as a function of various product features," i.e., the feature's partworth. *Id.* Finally, he opined that the partworth – i.e., the percentage/"relative importance" of the particular attribute – could be used to estimate the price premium attributable to the presence or lack of a flammability warning. *Id.* ("This function [the partworth], in turn, will estimate the portion of the Serum's market price attributable to the lack of a flammability warning [i.e., the price premium]"). Judge Snyder found that this proposed analysis satisfied *Comcast*; specifically, she concluded that common issues concerning damages predominated over individualized issues because Dr. Misra's conjoint analysis could be used to predict the "value of the product without a flammability warning." Consequently, she certified a class. *Id.* at *11.

Similarly, in *Khoday*, the court found that a damages model that employed conjoint analysis to estimate the "relative value of [ ] product feature[s]" and thus the price premium consumers paid for a particular feature," satisfied *Comcast*. *Khoday*, 2014 WL 1281600 at *10-11, 32-33. There too, the conjoint analysis proposed involved comparison of the relative importance (i.e., partworth) of different product features to isolate the price premium attributable to a particular feature. *Id.*

This case is similar to *Guido* and *Khoday*, as plaintiffs propose a damages model that uses conjoint analysis to "predict the 'value of the [Wesson Oil products]'" without ConAgra's representation that the oils were "100% Natural" and thus contained no GMOs or GMO- ingredients. As in those cases,

Howlett proposes to use the "relative importance," or partworth, of the GMO-free feature to estimate the price premium attributable to this interpretation of "100% Natural." Specifically, the total price premium Weir calculated will be multiplied by the partworth of the GMO-free feature. The court agrees with the *Guido* and *Khoday* courts that this methodology is capable of calculating damages attributable to plaintiffs' specific theory of liability on a classwide basis, notwithstanding the fact that it employs the "relative importance" of product attributes to consumers to calculate the relevant price premium. Conjoint analysis is regularly used in litigation to translate the "relative importance" of a product feature into a price premium paid by consumers.[267] The assertedly imperfect correlation between the relative importance of a product feature to consumers and the price premium attributable to that feature about which ConAgra complains has not been an obstacle to certification of classes in other cases, and the court cannot conclude, at this stage, that Howlett will be unable to calculate the price premium attributable to a "GMO-free" interpretation of the "100% Natural" label. To the extent ConAgra faults Howlett for failing to consider supply factors in measuring the "relative importance" of product attributes to consumers, and using a specific attribute's relative importance to calculate the price premium attributable to it, as Weir notes, and as the court discusses elsewhere in this order, the proposed hedonic regression accounts for the supply and market factors Ugone identifies.[268] For all of these

[267] Am. Howlett Decl., ¶ 95.

[268] Reply Weir Decl., ¶ 64.

reasons, the court finds Ugone's first criticism of Howlett's proposed conjoint analysis unpersuasive.

The court also finds Ugone's remaining criticisms unavailing. He asserts that Howlett's conjoint analysis is deficient because, although it purports to calculate the importance of a "GMO-Free" interpretation of Wesson Oils' "100% Natural" label in the past, i.e., during the class period, it will be based on yet-to-be-collected survey data.[269] Ugone states that "[s]urvey methodologies such as conjoint analysis generally measure the value of features of the product at the point in time of the survey and cannot easily determine the value of features in the past."[270] The fact that Howlett intends to use future surveys to determine the "relative importance" of a "GMO-Free" interpretation of the "100% Natural" label does not make her methodology unreliable or fail to satisfy *Comcast*. *Any* use of conjoint analysis for litigation purposes will have the same "shortcoming" Ugone identifies. Indeed, Weir confirms in his reply declaration that using current research results to draw inferences about past consumer behavior is a regular practice in litigation.[271] Courts have found conjoint analysis to

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[269] Ugone Decl., ¶ 11.

[270] *Id*., ¶ 103.

[271] *See* Reply Weir Decl., ¶ 71 ("It is commonplace to use current research results to make inferences about past consumer behavior as evidenced by the large number of cases that have been used in litigation. For example, Bird and Steckel (Steckel being an affiliated expert at the same firm as Defendant's expert Dr. Ugone) highlight a large number of surveys used in litigation that apply results over a historical time period").

be sufficiently reliable to satisfy *Comcast* in situations like this one where plaintiffs must isolate a price premium attributable to a particular product feature based on the use of "future data," and apply that price premium to the product's historical market price. *See, e.g.*, *Guido*, 2014 WL 6603730 at *14 (concluding that plaintiffs' proposed conjoint analysis satisfied *Comcast* and Rule 23(b)(3)'s predominance requirement where the analysis was to be based on future survey data and the product's historical price). Accordingly, Howlett's proposed use of future survey data does not make her methodology unsound or unable to satisfy *Comcast*. Moreover, there is no basis in the present record to question Howlett's assumption that the value attributable to a "GMO-Free" interpretation of "100% Natural" can be applied across the class period.[272] Indeed, the *Guido* court permitted plaintiffs to calculate one consumer value for a flammability warning on a product and apply it equally to purchases made over the a six year period. *Guido*, 2014 WL 6603730 at *2, 14.

Ugone's final criticism is that Howlett's "[c]onjoint analysis necessarily draws attention to features used in the survey exercise" and thus "runs the risk of assigning a larger value to the 'GMO-Free' aspect than that which would actually be observed in the marketplace."[273] The fact that Howlett will select certain product attributes for inclusion in the

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[272] *See* Reply Weir Decl., ¶ 72 ("Thus far, I have seen no evidence that would suggest that the proposed conjoint survey would not provide accurate insights about the class [over the class period], especially given the screening requirements that will ensure that respondents are actual cooking oil consumers").

[273] Ugone Decl., ¶ 105.

proposed surveys to the exclusion of others does not render her analysis unreliable or indicate that it cannot satisfy *Comcast*. As already noted, Howlett has explained why she chose certain product attributes and not others, and why she did not identify more than six. More fundamentally, the court is not persuaded that the survey will necessarily focus consumers on the "GMO-Free" interpretation to the exclusion of other interpretations included in the survey. First, as Weir observes in his reply declaration, the survey treats "GMO-Free" the same way it does every other attribute, and notes that Howlett has taken steps to ensure that respondents' attention is not drawn to the "GMO-Free" attribute.[274]

ConAgra also contends that the attributes Howlett has selected will confine a respondent's choices and cause the respondent to select "GMO-Free" or another attribute he or she might not consider in purchasing a Wesson Oil product. Howlett has

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[274] *See* Reply Weir Decl., ¶¶ 74-75 ("[E]very possible effort has been taken to ensure that the GMO-free sub-attribute – the attribute of interest in this litigation – has no 'attention drawn' to it. Importantly, the proposed conjoint [analysis] does not treat the GMO-free interpretation of the 'Natural' claim any differently than any of the other six attributes being included in the survey. The GMO-free attribute will not be highlighted, bolded, italicized, or presented in any different light from the other corresponding interpretations. The overt inclusion of attributes is the gold standard of conjoint analysis. Moreover, the survey instructions and prompts only raises the issue of the '100% Natural' label. Nothing in the proposed survey passes any judgment on GMO-free. The survey could not be more neutral as to the characterization of GMO-free, vis-a-vis all of the included attributes").

adequately explained why she limited the attributes to six. She asserts that her proposed analysis has several safeguards that will confirm the validity of a respondent's attribute choices and ensure that each attribute selected reflects a significant meaning the consumer ascribes to "100% Natural." She explains that she will conduct focus groups and a serious of pilot tests to confirm that "the six chosen attributes are the most significant meanings that Wesson purchasers ascribe to the '100% Natural' claim."[275] The focus groups and pilot tests will help to ensure that the variables tested are attributes consumers and survey respondents consider in making their purchasing decisions. Howlett notes that the focus groups and pilot tests will also help to ensure that there is no material overlap between the attributes selected; if such an overlap is observed, i.e., if consumers believe that two separate attributes have the same meaning, the attributes can be adjusted.[276] Howlett states that the conjoint analysis will produce statistical measures that she can use to determine whether the tested variables are valid and reliable, i.e., whether they correspond to the attributes consumers actually consider when purchasing.[277] By evaluating these statistical measures, Howlett reports, she will be able to determine "how well the selected attributes actually account for the decisions of the respondents."[278] Thus, contrary to Ugone's assertion, it appears the conjoint analysis will be able

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[275] Am. Howlett Decl., ¶ 118.

[276] *Id*.

[277] *Id*., ¶¶ 119-21.

[278] *Id*., ¶ 119.

to measure those attributes that actually account for purchasing decisions, and provide an accurate estimation of the importance of the "GMO-Free" interpretation of the "100% Natural" claim.[279]

To the extent Ugone suggests the number of attributes Howlett proposes to use will "draw [undue] attention" to a few attributes, the court concludes that this, too, does not preclude certification of a Rule 23(b)(3) class. Howlett explains her underlying rationale for only selecting six attributes. [280]

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[279] *See also* Reply Weir Decl., ¶¶ 58-60 ("Accepting, *arguendo*, that the proposed study has not included a relevant sub-attribute interpretation of the '100% Natural' label claim, there are numerous checks and balances to identify such a situation, and to correct for it. First, the Howlett Declaration makes abundantly clear that prior to fielding the conjoint analysis, Plaintiffs would conduct numerous focus group studies to confirm the selection of attributes to be included in the study. If an additional attribute is identified in these focus groups, it can easily be added to the conjoint survey. Second, as the Howlett Declaration also specifies, the conjoint study will be pretested before the final full study is deployed. This pretest will give plaintiffs an additional opportunity to gauge the survey design. Should the pretest identify any issues surrounding the included attributes, they can be addressed before the final survey is deployed. Finally, conjoint analysis, like many economic techniques, produces a number of metrics that can be used to measure the reliability of the survey results including if there appears to be any misspecification of the included attributes. Common, objective, metrics such as the R-squared, F- statistic, T-statistic, and confidence level will give the Court ample information to gauge the reliability of the survey results. Defendant's own expert has discussed the use of these objective metrics").

[280] Am. Howlett Decl., ¶ 117 ("Based on more than twenty years of work and study in the fields of marketing research and food labeling, it is my opinion that consumers in general do not place high importance on more than six independent meanings

Furthermore, she explains that the survey can be modified to include different or additional attributes if warranted such that the survey will be an "adequate [ ] fit" with consumer interpretations of "100% Natural."[281] Stated differently, Howlett can modify that the survey model if her belief that consumers ascribe only six meanings to the "100% Natural" claim proves to be incorrect. This adequately addresses Ugone's objection. Indeed, other courts have concluded that objections that conjoint analysis does not include sufficient variables does not preclude certification at this stage. *See, e.g.*, *Khoday*, 2014 WL 1281600 at *33 ("Defendants' expert takes issue with the precise model prepared by Gaskin – in that it measures only the value of the automatic injection and not, for example, the possible value of having the download insurance automatically 'remember' what type of software was originally purchased, and therefore also disputes the estimated value found by Gaskin of between $0.05 and $0.16 for each purchase of download insurance. But disputes about the precision of the particular model developed by Gaskin do not indicate that damages will not be measurable on a classwide basis. In other words, Plaintiffs have presented a method that allows for a determination of the actual value to

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of claims made on food labels (and often fewer). Therefore, I anticipate that [any] meaning of 'natural' not included in the six selected attributes would . . . represent an insignificant factor in the beliefs of Wesson Oils consumers overall").

[281] *Id.*, ¶ 121 ("If pretest CBC results do not show an adequate model fit at a 95% level of significance, different attributes can be included and/or the number of attributes can be increased until the level is reached").

consumers of the download insurance products. Defendants do not dispute that the conjoint analysis will be capable of measuring damages on a classwide basis. . . . *They argue only that Gaskin's model may need to include several more variables in order to be a completely accurate measure of damages. Such a dispute does not prevent the Court from certifying the class at this stage of litigation*," citing *Vaccarino*, 2013 WL 3200500 at *14 ("[P]laintiffs must . . . offer a method that tethers their theory of liability to a methodology for determining the damages suffered by the class"); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (explaining that plaintiffs need only identify a proposed method for evaluating class damages) (emphasis added)).

For all of these reasons, Ugone's criticisms of Howlett's proposed conjoint analysis are unavailing and concludes that her proposed conjoint analysis is, at this stage, sufficiently reliable to be used in calculating class-wide damages. Accordingly, the court concludes that this hybrid damages methodology, which takes into account both Weir's hedonic regression and Howlett's conjoint analysis, satisfies *Comcast*.

ConAgra next argues that, even if a viable damages methodology has been proposed, individualized inquiries will be necessary and will predominate due to variations in the "number, price, size, location, discount or promotion, and time period" of each class member's purchase(s) of Wesson Oils.[282] It notes that Wesson Oils are sold by retailers, who set the price of the product, and thus that the price

[282] Class Cert. Opp. at 53-54.

paid will have varied among consumers. At this stage, the court is not persuaded that this precludes class certification. The damages methodology plaintiffs have proposed allows Weir to perform refined regressions that focus solely on Wesson Oils and competitor products in specific retail channels and geographic areas.[283] Given this fact, it appears Weir's hedonic regression analysis, coupled with historical pricing data, will be able to account for the price variations that ConAgra asserts require individualized inquiries. The cases it cites are not to the contrary.

In *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 459-61 (S.D. Cal. 2014), the court rejected the price premium methodology plaintiffs proposed for calculating damages because they proffered nothing more than speculation that a price premium existed. Here, by contrast, Weir has conducted a preliminary hedonic regression that indicates there is a price premium associated with the "100% Natural" label on Wesson Oils. The *Algarin* court also concluded that it was inappropriate to use a price premium methodology because of variability in the retail price

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[283] *See, e.g.*, Am. Weir Decl., ¶ 39 (describing a data set that can be used in the regression analysis and noting that "[t]he data includes dollar sales, unit sales, units sold, and the average price per unit (on both promoted and non-promoted basis). The data can be further broken down as coming from particular geographic locations (i.e., Los Angeles, Chicago, etc.), particular retailers (i.e., Publix, Ralley's, etc.), or particular groups of retailers (i.e., Food, Drug, or Mass Merchandiser retailers). The data from this spreadsheet, after being properly formatted, can be used as an input into a hedonic regression analysis (or as the basis for a conjoint analysis) to determine more geographically, temporally, or promoted product group specific price premiums").

of the class products and competing products; it noted that plaintiffs had failed to suggest a viable means of accounting for such variations. *Algarin*, 300 F.R.D. at 460-61. Weir, by contrast, proposes a methodology that can be refined to account for variations in retail prices among retailers, and across time periods, and geographic areas. He also asserts he can take into account promotional prices and other attributes. Weir opines that the various attributes that are considered in the analysis can be controlled to produce an accurate and reliable price premium solely attributable to the "100% Natural" claim.[284]

ConAgra also relies on *Astiana*. There, the court denied certification on predominance grounds because plaintiff had not proffered expert testimony that the market price of Ben & Jerry's ice cream labeled "all natural" was higher than the market price of the ice cream without that label. Nor did she proffer evidence that a consumer would be willing to pay a premium for "all natural" ice cream. *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, *12-13 (N.D. Cal. Jan. 7, 2014). The court also noted that "[e]stablishing a higher price for a comparable product would be difficult because prices in the retail market differ and are affected by the nature and location of the outlet in which they are sold." *Id*. As noted, plaintiffs here have adduced evidence in the form of Weir's preliminary hedonic regression analysis that a price premium exists; they have also proffered a viable damages methodology

[284] *Id*., ¶¶ 75-87.

that can account for the variables the *Astiana* court found predominated over common questions.[285]

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[285] ConAgra also contends that individual inquiries regarding the price paid by each consumer for Wesson Oil products and the quantity of bottles purchased will predominate over common questions such that a class should not be certified. (Class Cert. Opp. at 53-54.) The court cannot agree. The Ninth Circuit has noted that "the amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie, et. al v. Barrack, et al.*, 524 F.2d 891, 905 (9th Cir. 1975); *see Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 670 (C.D. Cal. 2009) ("[W]ith regard to Dannon's arguments that consumers purchased the Products at different prices, which would affect the amount of their damages, the Ninth Circuit has explicitly held that '[t]he amount of damages is invariably an individual question and does not defeat class action treatment'"). In *Wiener*, the court rejected defendant's contention that individualized issues regarding the varying prices paid by consumers were sufficient to defeat class certification. It noted that "although [there] are problems inherent in calculating damages for a class action based on consumer products sold at varying prices," it believed "a workable method of calculating damages for the proposed class could be achieved." *Wiener*, 255 F.R.D. at 670-71. Specifically, the court noted that individualized inquiries would not predominate over common questions concerning actual damages on several of plaintiffs' claims because "the[ ] actual damages for the[ ] claims c[ould] be calculated by subtracting the value of the products without the claimed health benefits, a uniform value to be determined based on the evidence presented at trial, from the price that the particular class member is able to prove he or she paid"; such a calculation, the court concluded, was not "individualized and unique as to each class member." *Id.* Similarly, as respects restitutionary relief, the court noted it had "very broad discretion to determine an appropriate . . . award as long as it is supported by the evidence and is consistent with the purpose of restoring [to] the plaintiff the amount that the defendant wrongfully acquired." *Id.* The court agrees with the *Wiener* court that, at this stage, ConAgra has not shown that individualized inquiries will predominate over common

Because plaintiffs have proposed a viable damages model that can isolate a price premium attributable to consumers' understanding that "100% Natural" means that Wesson Oils do not contain GMOs, and that can manipulate historical pricing data to account for variations in retail price, the court concludes that they have shown that individual damages issues do not predominate over common questions.

(c) Conclusion Regarding Predominance

For the reasons stated, the court concludes that plaintiffs have shown that common questions predominate over individualized inquiries. It therefore finds that certification of the putative classes under Rule 23(b)(3) is appropriate.

(2) Superiority

The second requirement imposed by Rule 23(b)(3) is that a class action be superior to other methods of resolving class members' claims. "Under Rule 23(b)(3), the court must evaluate whether a class action is superior by examining four factors: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in a particular forum; and (4) the difficulties likely to be encountered in the

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questions. As noted, plaintiffs have proffered a damages methodology that can account for many of the variables ConAgra identifies; as a consequence, a "workable method of calculating damages for the proposed class [can] be achieved."

management of a class action." *Edward v. City of Long Beach*, 467 F.Supp.2d 986, 992 (C.D. Cal. 2006) (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004)).

"Where damages suffered by each putative class member are not large, th[e first] factor weighs in favor of certifying a class action." *Zinser*, 253 F.3d at 1190. Given the low average price of a bottle of Wesson Oil,[286] the price premium attributable to consumers' belief that "100% Natural" means the product contains no genetically modified organisms or GMO-ingredients will be quite small. Thus, even if an individual purchased Wesson Oils on a regular basis during the class period, the damages he or she could recover in an individual suit would not be sufficient to induce the class member to commence an action. The funds required to marshal the type of evidence, including expert testimony, that is necessary to pursue such a claim against a well-represented corporate defendant would discourage individual class members from filing suit when the expected return is so small. *See Amchem Products*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights").

The second factor likewise favors a finding that class certification is a superior means of litigating these claims. The only litigation raising the claims of which the court is aware are the cases presently pending before it. With respect to the third factor,

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[286] *See* Ugone Decl., ¶ 58.

these cases were either voluntarily transferred to this jurisdiction by the parties or transferred here by the Panel on Multidistrict Litigation. Given the small recovery that any individual plaintiff can expect, moreover, concentrating the litigation in a single forum is appropriate. Thus, the third factor also favors a finding of superiority.

In addressing the fourth factor, ConAgra raises concerns about the manageability of the action given that plaintiffs seek certification of eleven state classes. The claims, ConAgra asserts, "invok[e] a spectrum of common law and statutory principles, [and have] widely varying remedies." As a consequence, it contends, a class action is not "superior" and will fail to "simplify any questions regarding manageability."[287] Plaintiffs counter that a class action is superior because: (1) they propose that the court certify eleven separate classes, alleviating choice of law concerns; (2) while they require proof of different elements, the various state consumer protection laws all "fall into consistent patterns;" and (3) the warranty claims are all based on the same statutory text. The court agrees with plaintiffs.

The court considered the various state law claims in analyzing predominance, and found that several raise common questions. Under the various consumer protection statutes, plaintiffs must show, for example, that ConAgra's conduct is deceptive and misleads reasonable consumers and/or class members. *See, e.g.*, *Elias v. Hewlett-Packard Co.*, 903 F.Supp.2d 843, 854 (N.D. Cal. 2012) ("[T]he standard for [the CLRA, FAC, and UCL] is the 'reasonable consumer'

[287] Class Cert. Opp. at 58-60.

test, which requires a plaintiff to show that members of the public are likely to be deceived by the business practice or advertising at issue" (citations omitted)); *Ackerman v. Coca-Cola Co.*, No. CV 09-0395 (JG), 2010 WL 2925955, *15 (E.D.N.Y. July 21, 2010) (noting that the applicable standard under the GBL is whether a "reasonable consumer would have been misled by the defendant's conduct"); *Alpine Bank v. Hubbell*, 506 F.Supp.2d 388, 410 (D. Colo. 2007) (noting that the applicable standard under the CCPA is whether the conduct has a "capacity or tendency to deceive a reasonable consumer"); *Pearson v. Philip Morris, Inc.*, 257 Or.App. 106, 155-56 (2013) ("[W]hether plaintiffs in this action can prove reliance on a class-wide basis depends on whether it is likely that significant numbers of class members did not rely on defendant's representations"); *Shumaker v. Hamilton Chevrolet, Inc.*, 920 N.E.2d 1023, 1031 (Ohio App. 2009) ("[A] deceptive act 'has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts"); *Office of the Attorney General v. Wyndham International, Inc.*, 869 So.2d 592, 598 (Fla. App. 2004) ("When addressing a deceptive or unfair trade practice claim [under the FDUTPA], the issue is . . . whether the practice was likely to deceive a consumer acting reasonably in the same circumstances").

Although the court concluded that individualized inquiries would predominate over common issues with respect to plaintiffs' Colorado, Florida, New York, and Texas unjust enrichment claims, the claims as to which predominance was satisfied, i.e., the Illinois, Indiana, Nebraska, Oregon, and South Dakota unjust enrichment claims, require resolution

of substantially the same question – whether ConAgra received some benefit from plaintiffs that it would be inequitable to allow it to keep in light of its conduct. Finally, the breach of warranty claims that satisfy Rule 23(b)'s predominance requirement – i.e., the California, Colorado, and New York express warranty claims and the Colorado, Indiana, and Nebraska implied warranty claims – raise common questions regarding the warranty, i.e., ConAgra's "100% Natural" label, and whether it was breached because Wesson Oils contain GMO-ingredients.

As plaintiffs note, moreover, the MDL Panel consolidated the actions in this court for pretrial purposes, and the court could, in its discretion, sever the classes following certification for separate adjudication of the claims of the state classes. *Seiko Epson Corp. v. Abacus 24-7 LLC*, No. 09-CV-477-BR, 2009 WL 5064950, *1 (D. Or. Dec. 15, 2009) ("[W]here certain claims in an action are properly severed under Fed.R.Civ.P. 21, two separate actions result [and the] district court may transfer one action while retaining jurisdiction over the other,'" citing *Chrysler Cred. Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1519 (10th Cir. 1991) (citing *Wyndham Assoc. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968))). Thus, the court concludes that, at this stage, plaintiffs have carried their burden of showing that class treatment is superior to the maintenance of individual actions.

(3) Conclusion Regarding Rule 23(b)(3)

For the reasons stated, plaintiffs have established that common questions predominate over individualized inquiries with respect to certain of the class claims they seek to pursue, and that a class

action is a superior vehicle for adjudicating the claims. Accordingly, the court grants plaintiffs' motion to certify ten putative state classes to pursue enumerated claims under Rule 23(b)(3).

f. Rule 23(c)(4)

Plaintiffs argue alternatively that if the court determines that classes cannot be certified under Rule 23(b), it should certify relevant issue classes under Rule 23(c)(4). This rule provides: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed.R.Civ.Proc. 23(c)(4). The Ninth Circuit has endorsed the use of issue classes where individualized questions predominate and make certification under Rule 23(b)(3) inappropriate. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues"); *see also Dukes*, 603 F.3d at 620 n. 43 ("Relying on Rule 23(c)(4), our own precedent also generally allows class treatment of common issues even when not all issues may be treated on a class basis"). As Judge Stephen Wilson noted in *Amador v. Baca*, 299 F.R.D. 618, 636 (C.D. Cal. 2014), the Ninth Circuit "did not explain which cases might be 'appropriate cases' for severance of particular issues" because "[i]t was unnecessary to address th[at] question in view of the numerous 'deficiencies in th[e district court's] certification [order].'" *Id.* at 636.

Plaintiffs propose that the court certify an issue class to litigate the falsity of ConAgra's statement – i.e., "whether ConAgra's labeling of Wesson Oils as '100% Natural,' despite making them from GMO ingredients, is false, unfair, deceptive, and/or misleading to a reasonable consumer."[288] Because the court concludes that several of plaintiffs' class claims can be certified, and because plaintiffs request this relief only if the court refuses to certify classes under Rule 23(b)(2) or Rule 23(b)(3), the court denies plaintiffs' request to certify an issue class under Rule 23(c)(4).

III. CONCLUSION

For the reasons stated, the court grants in part and denies in part plaintiffs' amended motion for class certification. The court denies plaintiffs' motion to certify injunctive relief classes under Rule 23(b)(2) of the Federal Rules of Civil Procedure because the named plaintiffs have not shown that they have Article III standing to represent such classes.

As respects plaintiffs' motion to certify damages classes under Rule 23(b)(3), the court grants plaintiffs' motion in part, and certifies classes for California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, and Texas.

The certified classes may pursue the following claims:

- California: (1) violations of the UCL, CLRA, and FAL; and (2) breach of express warranty

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[288] Class Cert. Motion at 2, 73-74.

- Colorado: (1) violation of the CCPA; (2) breach of express warranty; and (3) breach of implied warranty
- Florida: (1) violation of the FDUTPA
- Illinois: (1) violation of the ICFA and (2) unjust enrichment
- Indiana: (1) unjust enrichment and (2) breach of implied warranty
- Nebraska: (1) unjust enrichment and (2) breach of implied warranty
- New York: (1) violation of the GBL; and (2) breach of express warranty
- Ohio: (1) violation of the OCSPA
- Oregon: (1) violation of the OUTPA; and (2) unjust enrichment
- South Dakota: (1) violation of the SDDTPL; and (2) unjust enrichment
- Texas: (1) violation of the TDTPA

DATED: February 23, 2015

s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

On June 28, 2011, Robert Briseno filed a complaint against ConAgra.[1] Between October and December 2011, the court consolidated several cases filed against ConAgra under the caption indicated above.[2]

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

[2]Minutes (In Chambers): Order Taking Off Calendar and Denying as Moot Motion of Plaintiffs Briseno and Toomer to Consolidate Related Actions and Designate Interim Class Counsel, Docket No. 33 (Oct. 6, 2011); Order Consolidating Cases, Docket No. 56 (Nov. 28, 2011); Order Re Stipulation to Consolidate Related Actions, Docket No. 59 (Dec. 9, 2011); Amended Order Granting Stipulation Re Amended Consolidated Complaint, Response to Amended Consolidated Complaint, and Consolidation of Additional Action, Docket No. 61 (Dec. 9, 2011). The consolidated cases are *Robert Briseno v. Conagra Foods, Inc.*, CV 11-05379 MMM(AGRx); *Christi Toomer v. Conagra Foods, Inc.*, CV 11-06127 MMM(AGRx); *Kelly McFadden v. Conagra Foods, Inc.,* CV 11-06402 *MMM(AGRx); Janeth Ruiz v.*

On January 12, 2012, plaintiffs filed a First Consolidated Amended Complaint.[3]

On February 24, 2012, ConAgra filed a motion to dismiss,[4] which the court granted in part and denied in part on November 15, 2012.[5] On December 19, 2012, plaintiffs filed a Second Consolidated Amended Complaint.[6] On February 20, 2014, they filed a motion seeking an order permitting the withdrawal of several named plaintiffs and the dismissal of their claims;[7] the court granted this motion on May 5, 2014.[8] That same day, plaintiffs filed a motion for

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Conagra Foods, Inc., CV 11-06480 *MMM(AGRx); Brenda Krein v. Conagra Foods, Inc.,* CV 11-07097 *MMM(AGRx); Phyllis Scarpelli, et al. v. Conagra Foods, Inc.*, Case No. CV 11-05813 *MMM (AGRx); Michele Andrade v. ConAgra Foods Inc.,* CV 11-09208 *MMM (AGRx); and Lil Marie Virr v. Conagra Foods, Inc.*, CV 11-08421 *MMM (AGRx).*

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

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

[5]Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Docket No. 138 (Nov. 15, 2012).

[6]Second Amended Class Action Complaint ("SAC"), Docket No. 143 (Dec. 19, 2012).

[7]Motion for Order for Allowing Withdrawal and Voluntary Dismissal, Docket No. 190 (Feb. 20, 2014). *See also* Corrected Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Order Allowing Withdrawal and Voluntary Dismissal ("Motion"), Docket No. 191 (Feb. 20, 2014) at 4, 5, 6.

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

class certification,[9] which ConAgra opposes.[10] On June 2, 2014, ConAgra filed a motion to strike the declarations of plaintiffs' experts, Colin B. Weir and Charles M. Benbrook.[11] Plaintiffs oppose ConAgra's motion.[12]

I. BACKGROUND

Plaintiffs are consumers residing in twelve different states who purchased Wesson Oils between January 2007 and their entry into this case.[13] They allege that from at least June 27, 2007 to the present, ConAgra Foods, Inc. ("ConAgra") deceptively and misleadingly marketed its Wesson brand cooking oils, made from genetically-modified organisms ("GMO"), as "100% Natural." Throughout the proposed class

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

[10] Opposition to Plaintiffs' Motion for Class Certification ("Opp. Cert."), Docket No. 265 (June 2, 2014).

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

[12]Opposition to Motion to Strike ("Opp. Motion to Strike"), Docket No. 280 (June 26, 2014).

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

period, every bottle of Wesson Oil carried a front label stating that the product was "100% Natural."[14]

Plaintiffs propose certification of twelve separate statewide classes as follows:

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

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

- California: (1) California Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750, *et seq.* and California Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200, *et seq.* and §§ 17500, *et seq.*; (2) CAL. COM. CODE § 2313; CAL. COM. CODE § 2314.
- Colorado: (1) Colorado Consumer Protection Act, COLO. REV. STAT. §§ 6-1-101, *et seq.*; (2) COLO. REV. STAT. § 4-2-313; (2) COLO. REV. STAT. § 4-2-314; (4) Unjust Enrichment.

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

[15]Cert. Motion at 11-12.

- Florida: (1) Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN. §§ 501.201, *et seq.*; (2) Unjust Enrichment.
- Illinois: (1) Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS §§ 505/1, *et seq.*; (2) Unjust Enrichment.
- Indiana: (1) IND. CODE § 26-1-2-313; (2) IND. CODE § 26-1-2-314; (3) Unjust Enrichment.
- Nebraska: (1) Nebraska Consumer Protection Act, NEB. REV. STAT. §§ 59-1601, *et seq.*; (2) NEB. REV. STAT. § 2-313; (3) NEB. REV. STAT. § 2-314; (4) Unjust Enrichment.
- New Jersey: (1) New Jersey Consumer Fraud Act, N.J. STAT. ANN. §§ 56:8-1, *et seq.*; (2) N.J. STAT. ANN. § 12A:2-313; (3) N.J. STAT. ANN. § 12A:2-314;
- New York: (1) New York Consumer Protection Act, N.Y. GEN. BUS. LAW §§ 349,
- *et seq.*; (2) N.Y. U.C.C. Law § 2-313; (3) Unjust Enrichment.
- Ohio: (1) Ohio Consumer Sales Practices Act, OHIO REV. CODE §§ 1345.01, *et seq.*; (2) Unjust Enrichment.
- Oregon: (1) Oregon Unfair Trade Practices Act, OR. REV. STAT. §§ 646.605, *et seq.*; (2) OR. REV. STAT. § 72-3130; (3) Unjust Enrichment.
- South Dakota: (1) South Dakota Deceptive Trade Practices and Consumer Protection Law, S.D. COD. LAWS §§ 37 24 1, *et seq.*; (2) S.D. COD. LAWS § 57A- 2-313; (3) S.D. COD. LAWS § 57A-2-314; (4) Unjust Enrichment.

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

II. DISCUSSION

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

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

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[16]SAC, ¶¶ 64-103.

[17]Citing *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), plaintiffs argue that the court need not conduct a full *Daubert* analysis at the class certification stage. (Opp. Motion to Strike at 4-5.) In *Tait*, the court reviewed Ninth Circuit cases concerning consideration of expert testimony at

Under Rule 702,

"[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

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the class certification stage, both prior to and following the Supreme Court's decision in *Dukes*. It held that "district courts must conduct an analysis tailored to whether an expert's opinion was sufficiently reliable to admit for the purpose of proving or disproving Rule 23 criteria, such as commonality and predominance." *Id.* at 495. *See id.* ("'At this early stage, robust gatekeeping of expert evidence is not required; rather, the court should ask only if expert evidence is 'useful in evaluating whether class certification requirements have been met.' This means that a district court need only conduct a 'tailored *Daubert* analysis' which 'scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence,'" quoting *Ellis*, 657 F.3d at 982, and *In re Zurn Pex Plumbing Products Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011)*; id.* at 496 ("Plaintiff responds that the Court's analysis of Expert Clark's opinion at the class certification stage must be limited to the purpose for which it is presented, namely, to establish the Rule 23(a) requirement of commonality by showing that the issue of whether the class members' Washers had a propensity to develop BMFO is susceptible to common proof. . . . [T]he Court agrees"). The court does not interpret the motions to strike the parties have filed as motions to exclude expert testimony at trial. Consequently, the court evaluates the admissibility of the expert testimony under *Daubert* in light of the purpose for which it is offered – i.e., to demonstrate that it is appropriate to certify a class under Rule 23. "Any determination the court makes regarding the admissibility of expert testimony (other than a finding that an expert is not qualified), is not a final conclusion that will control the admissibility of the expert's testimony at trial." *Cholakyan v. Mercedes-Benz, USA, LLC,* 281 F.R.D. 534, 542 n. 53 (C.D. Cal. 2012).

> education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED.R.EVID. 702.

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

Before admitting expert testimony, the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93; *see also Ellis*, 657 F.3d at 982 ("Under *Daubert*, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable"). In

conducting this preliminary assessment, the trial court is vested with broad discretion. *See, e.g.*, *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997); *United States v. Espinosa*, 827 F.2d 604, 611 (9th Cir. 1987) ("The decision to admit expert testimony is committed to the discretion of the district court and will not be disturbed unless manifestly erroneous").

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

"In determining whether expert testimony is admissible under Rule 702, the district court must keep in mind [the rule's] broad parameters of reliability, relevancy, and assistance to the trier of fact." *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1134 (9th Cir. 1998) (internal quotation marks omitted); *see also Jinro Am. Inc. v. Secure Invests., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001) ("Rule 702 is applied consistent with the 'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony"

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

(internal quotation marks omitted)). On a motion for class certification, it is not necessary that expert testimony resolve factual disputes going to the merits of plaintiff's claims; instead, the testimony must be relevant in assessing "whether there was a common pattern and practice that could affect the class as a whole." *Ellis*, 657 F.3d at 983.

1. Plaintiffs' Expert: Colin B. Weir

Colin Weir is plaintiffs' economic expert. Weir is Vice President of Economics and Technology, Inc. (ETI), a research and consulting firm specializing in economics, statistics, regulation, and public policy, where he has worked for eleven years.[19] Weir holds an MBA from the High Technology program at Northeastern University, and a BA in Business Economics from the College of Wooster.[20] Weir's academic studies included work on hedonic regression analysis and conjoint analysis.[21] His work at ETI involves econometric and statistical analysis, multiple linear regression, statistical sampling, micro and macroeconomic modeling and other economic analyses.[22] Weir has given expert testimony in federal and state courts, and before the Federal Communications Commission and state regulatory commissions.[23] He has also consulted on a variety of consumer and wholesale products cases, calculating

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[19]Expert Declaration of Colin B. Weir ("Weir Decl."), Docket No. 243 (July 14, 2014) at 3; Opp. Motion to Strike, Exh. C ("Weir Depo.") at 47:8-12.

[20]*Id.*

[21]*Id.* at 9:20-10:21; 13:13-14:7.

[22]*Id.*, Exh. 1 at 1. 23

[23]Weir Decl. at 3.

damages related to household appliances, herbal remedies, HBC products, food products, electronics, and computers.[24] Weir opines that it is possible to determine damages attributable to plaintiffs' claims on a classwide basis by determining whether class members paid a "price premium" – i.e., an additional amount paid for Wesson Oils as a result of the 100% Natural Claim – using ConAgra's available business records, market research data concerning retail prices for the products at issue and a series of benchmark products, and consumer survey data.[25] Weir discusses two techniques that purportedly allow for the comparison of prices across sales channels, retailers, geographies, time periods, and various other product attributes.[26] The first technique, hedonic regression, is used to isolate the effect of one or more product attributes on the price of a product.[27] Weir states that the data necessary for this analysis "should be easily obtained" from ConAgra's business records and market research data from companies like IRI and Nielsen, or independent market research.[28] The second technique, conjoint analysis, is used to assess the relative importance of product attributes, and their price components.[29] Unlike hedonic regression, conjoint analysis does not require use of existing data, but instead relies on data

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[24] *Id.*

[25] *Id.*, ¶ 9 & nn. 5-6.

[26] *Id.*, ¶ 11.

[27] *Id.*, ¶ 12.

[28] *Id.*, ¶ 33.

[29] *Id.*, ¶ 13.

generated through a survey process.[30] Weir states that the data necessary to select the survey sample and conduct the conjoint analysis are easily obtainable from one of several sources, including ConAgra's business records, market research data from companies such as IRI and Nielsen, and independent research.[31] Although he describes hedonic regression and conjoint analysis, Weir does not actually perform either analysis or describe in any detail their specific application to this case.

ConAgra first moves to exclude Weir's testimony on the basis that he lacks relevant training and experience, and is therefore not qualified to opine on methodologies of conducting a damages analysis.[32] It argues that Weir lacks the requisite experience to offer an expert opinion on hedonic regression or conjoint analysis because he has never previously calculated and testified to damages in a case employing these methodologies.[33] ConAgra asserts that Weir also lacks the requisite training because he does not have a Ph.D., and did not complete a particular concentration when obtaining an MBA that would prepare him to conduct such analyses.[34]

In the Ninth Circuit, an expert may be qualified to offer a particular opinion either as a result of practical training or academic experience. *Thomas v. Newton Int'l Enterprises*, 42 F.3d 1266, 1269 (9th Cir.

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[30]*Id.*, ¶ 46.

[31]*Id.*

[32]Motion to Strike at 3.

[33]*Id.*

[34]*Id.* at 4 n. 1.

1994) ("[T]he advisory committee notes emphasize that Rule 702 is broadly phrased and intended to embrace more than a narrow definition of qualified expert"); *Rogers v. Raymark Industries. Inc.*, 922 F.2d 1426, 1429 (9th Cir. 1991) ("A witness can qualify as an expert through practical experience in a particular field, not just through academic training"). *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience").

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

The court concludes that Weir's academic training and practical experience qualify him to testify to the calculation of damages using hedonic regression and conjoint analysis. First, Weir's academic training is directly relevant to his testimony. He holds an MBA; his undergraduate course work specifically included hedonic regression and conjoint analysis, the two models he wishes to utilize here. Weir also has many years of practical experience with economic modeling and regression analysis. In addition, he has served as an expert witness in numerous cases, including

Ebin v. Kangadis Foods, Inc., 297 F.R.D. 561, 571 (S.D.N.Y. 2014), a class action in which the court cited with approval his expert report that "detail[ed] several models for calculating damages for [defendant's] alleged misrepresentation." This combination of educational training and professional experience suffices to qualify him under Rule 702. *Kingsbury v. U.S. Greenfiber, LLC*, No. CV 08–00151 DSF (AGRx), 2013 WL 7018657 (C.D. Cal. Nov. 5, 2013), a case cited by ConAgra, is not to the contrary.[35] In *Kingsbury*, the court found that a real estate salesman who was designated an expert witness was not qualified to offer an opinion on a developer's duty to disclose to purchasers the use of a particular insulation product at the property because he "had never heard of" the product prior to the litigation, had never sold a home containing it, and had encountered a disclosure issue involving insulation less than six times in his career. Weir, by contrast, has prior knowledge of, and experience with, the subject of his testimony because he studied and worked with the analytical models forming the basis for his opinion prior to the commencement of this action.

ConAgra next argues that Weir's testimony lacks a reliable factual foundation because he provides an incomplete description of hedonic regression. [36] Specifically, it asserts that Weir's hedonic regression analysis is unreliable because he fails (1) to identify or define the variables – including the relevant

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

[36]Motion at Strike at 5.

attributes of Wesson products – that he plans to use in his econometric model, (2) to confirm that the data required to execute the planned regression analysis exist or are obtainable, (3) to identify the set of comparator products he would include in his analysis, and (4) to determine the portion of any calculated price premium attributable to interpreting the "100% Natural" label statement as "GMO-free" as opposed to other possible interpretations that are not challenged, e.g., "free of synthetic chemicals" or "free of preservatives."[37]

ConAgra contends that Weir's alternate model of calculating damages, conjoint analysis, is likewise unreliable because Weir has not determined the characteristics of the survey sample he would use in the analysis, the list of relevant product attributes, the sample size of the survey, or whether he would conduct separate surveys in each proposed class state or one large multi-state survey.[38] It asserts that Weir fails to provide a concrete methodology for converting output from a conjoint analysis to an actual price premium paid by putative class members, and likewise fails to provide an exhaustive list of product features that he would include in his proposed conjoint survey.[39] ConAgra also contends that Weir's methodology cannot reliably account for any changes in consumer perceptions of the "100% Natural" statement over the several years of the class period, and cannot demonstrate that consumer perceptions measured at the time the analysis is

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[37]*Id.* at 5, 7-8.

[38]*Id.* at 5-6.

[39]*Id.* at 8.

conducted will reliably reflect perceptions that existed at the beginning of the putative class period.[40]

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

The court finds plaintiffs' argument unavailing, and the authorities they cite distinguishable. In *Ralston v. Mortg. Investors Grp., Inc.*, No. 08–536–JF (PSG), 2011 WL 6002640, *9 (N.D. Cal. Nov. 30, 2011), defendant Countrywide moved to exclude testimony by Ralston's damages expert, Lyons, on the grounds that his report "offers nothing more than a simplistic spreadsheet amortization table that lacks justification for its assumptions, and furthermore offers only conclusory assurances that missing functionality can be added with ease." The court disagreed, noting that Lyons had provided "two tables showing hypothetical loan amortization

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[40]*Id.*

[41]Opp. Motion to Strike at 12.

[42]*Id.* at 13.

[43]*Id.* at 15.

schedules based on whether the additional payment amounts during years 2 through 5 of the loans (due to the annual payment increase included in the loan terms) are applied either to interest only or to principal only." *Id.* at *3, 9. It concluded that Lyons' report "present[ed] a structure or framework [that could be used] to analyze the actual loan data eventually provided to plaintiffs." *Id.* at *9.

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

inadmissible as irrelevant.'" *Id.* (quoting *Bazemore*, 478 U.S. at 400 n. 10).

Here, unlike the experts in *Ralston* or *Hemmings*, Weir does not provide a damages model that lacks certain variables or functionality. Rather, he provides no damages model at all. Although the methodologies he describes may very well be capable of calculating damages in this action, Weir has made no showing that this is the case. He does not identify any variables he intends to build into the models, nor does he identify any data presently in his possession to which the models can be applied. The court is thus left with only Weir's assurance that he can build a model to calculate damages. Stated differently, his declaration is "'so incomplete as to be inadmissible as irrelevant.'" *Hemmings*, 285 F.3d at 1188 (quoting *Bazemore*, 478 U.S. at 400 n. 10). *See Building Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1154 (9th Cir. 2012) (district court did not abuse its discretion in rejecting the declaration of an expert who "offered unsupported assertions" with "no data forming the basis for [the expert's] assumptions or conclusions"); *see id.* ("The party offering expert testimony has the burden of establishing its admissibility"). Accordingly, the court finds that Weir's declaration does not satisfy the requirements of Rule 702. The court therefore grants ConAgra's motion to strike Weir's declaration, and will not consider his testimony in deciding the certification motion.

2. Plaintiff's Expert: Charles M. Benbrook, Ph.D

ConAgra next moves to strike the declaration of Dr. Charles M. Benbrook.[44] Dr. Benbrook has more than thirty years of experience working on the impact of agricultural technology and regulations on pesticides, and the risks they pose to food quality and safety.[45] From 1981 to 1983, Dr. Benbrook served as the staff director for the House subcommittee with jurisdiction over the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[46] He served as chief scientist for the Organic Center from 2006-2012, and was responsible for tracing developments in the scientific literature, government agencies, food industry, and non-profit organizations with the potential to impact consumer understanding of, and confidence in, the official U.S. Department of Agriculture "certified organic" seal appearing on labels of certified organic food products.[47] He served on the USDA's AC-21 Agricultural Biotechnology Advisory Committee, which issued a report in 2013 on coexistence between farmers planting fields of organic, conventional non-GE (genetically engineered), and those planting GE crops.[48] Dr. Benbrook has also served on the technical standards committee of the Non-GMO Project, which manages a labeling program that verifies the absence of GE

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[44]Motion to Strike at 8.

[45] Declaration of Charles M. Benbrook, Ph.D. ("Benbrook Decl."), Docket No. 242 (May 5, 2014), ¶ 14.

[46]Benbrook Decl., ¶ 15.

[47]*Id.*, ¶ 17.

[48]*Id.*, ¶ 19.

content in food products.[49] Since 1990, he has served as president of Benbrook Consulting Services, a small consulting firm that conducts projects on agricultural technology, food safety and quality, and pesticide use and regulation. He has published a peer-reviewed paper on the impact of GE crops on pesticide use in the United States,[50] and has studied and written extensively on the impact of the commercialization of GE crops on pesticide use and efficacy, as well as their impact on human health and the environment.[51]

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

ConAgra argues that Dr. Benbrook's testimony is unreliable because it is not based on scientific methods or data, but is merely rhetorical, and therefore incapable of being tested.[54] It asserts that

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[49]*Id.*, ¶ 20.

[50]*Id.*, ¶ 27.

[51]*Id.*, ¶ 23.

[52]*Id.*, ¶¶ 1-2, 4.

[53]*Id.*, ¶ 5.

[54]Motion to Strike at 9.

Dr. Benbrook simply cites the opinions of various governmental agencies, and definitions of industry groups, to support his semantic conclusion that GMOs are not "natural."[55] This testimony, ConAgra contends, does not assist the trier of fact because it largely discusses and describes widely available facts, including basic genetic terminology and processes.[56]

The mere fact that Dr. Benbrook does not rely on a testable methodology does not render his testimony inadmissible under *Daubert*. The Supreme Court has repeatedly clarified that the "factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue. . . ." *Kumho Tire*, 526 U.S. at 150. The *Daubert* factors are not exhaustive, and the Court's task is not to apply *Daubert* as "a definitive checklist or test," but to "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field." *Id.* at 152. *See Boyd v. City and County of San Francisco*, 576 F.3d 938, 945 n. 4 (9th Cir. 2009) (noting that *Daubert*'s list of factors neither necessarily nor exclusively applies to all experts in every case); *Liberty Life Ins. Co. v. Myers*, No. CV 10–2024–PHX–JAT, 2013 WL 524587, *3 (D. Ariz. Feb. 11, 2013) ("It is also well-settled that the four Daubert factors – testing, peer review, error rates, and acceptability in the relevant scientific community – are merely illustrative, not exhaustive, and may be inapplicable in a given case"). While courts often focus on whether an expert's methodology can be

[55] *Id.* at 10.

[56] *Id.* at 11.

tested, *see, e.g.*, *Daubert*, 43 F.3d 1311, 1319 (9th Cir. 1995) (holding that expert testimony was inadmissible under Rule 702 where the expert offered "no tested or testable theory to explain how, from [ ] limited information, he was able to eliminate all other potential causes"); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, 978 F.Supp.2d 1053, 1077 (C.D. Cal. 2013) ("Muckenhirn may not testify regarding the existence or effect of the software bug identified as the FTB, nor may any other expert" because "although the FTB was testable, it had not been tested"), this is not an absolute. Rather, some expert testimony is properly based on relevant knowledge and experience of a type that cannot be tested. *See, e.g.*, *Speicher v. Union Pacific R.R.*, No. C07–05524 RBL, 2009 WL 250026, *3 (W.D. Wash. Feb. 2, 2009) ("General views about railroad operations and safety cannot be tested, are not appropriate subjects of peer review, and do not have a known potential rate of error. Further, no relevant scientific community exists to accept the views. . . . Due to the generic nature of Mr. Beall's testimony, an intense, methodical investigation of its merits is unnecessary. The Court is satisfied merely to evaluate whether Mr. Beall's testimony is properly grounded in relevant experience and knowledge").

Given the wide variety of expert testimony that is offered in cases pending in federal court, a district court has broad discretion in determining the relevant factors to employ in assessing the reliability of expert testimony. *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000) ("Indeed, not only must the trial court be given broad discretion to

decide whether to admit expert testimony, it 'must have the same kind of latitude in deciding how to test an expert's reliability'"). Here, the bulk of Dr. Benbrook's declaration focuses on the process of genetic engineering, the impacts of that process on GE crops and the products derived therefrom, and whether those impacts occur – or could occur – absent the application of GE techniques. These opinions are testable because they can be independently verified or objectively challenged. *See* FED.R.EVID. 702 Advisory Committee Notes (*Daubert*'s testability factor means capable of being "challenged in some objective sense"). Consequently, the court finds these opinions sufficiently reliable.

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

The same can be said of Dr. Benbrook's testimony regarding the increase in the production of GE crops.

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

relied in formulating his definition of the term "natural."

ConAgra moves specifically to strike Dr. Benbrook's opinions concerning consumers understanding of "natural" based on consumer surveys he has read.[57] In particular, it seeks to strike his opinion that "[t]here is considerable agreement across surveys on the core elements of what a 'natural' food product is, and the most frequently cited core attributes of a 'natural' food typically include minimally processed, no use of pesticides, no added synthetic or artificial ingredients, and 'not genetically engineered' (in the case of fresh, whole foods), or 'not derived from a genetically engineered crop' (in surveys encompassing processed foods)."[58] ConAgra argues that Dr. Benbrook is not qualified to testify regarding consumer surveys because he lacks any marketing experience or expertise.[59] It asserts his opinion that "[t]here is considerable agreement across surveys" that "natural food products" are not made of, or derived from, genetically engineered crops is based on two surveys only, neither of which supports his opinion.[60] Furthermore, it contends the opinion is not reliable because Dr. Benbrook has not read the surveys he purportedly interprets, as the exhibit to his declaration that identifies references cited in his report or on which he relied lists only partial

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[57]*Id.* at 14. *See* Benbrook Decl., ¶¶ 35-45.

[58]Motion to Strike at 14; Benbrook Decl., ¶ 36.

[59]Motion to Strike at 14.

[60]*Id.*; Benbrook Decl., ¶ 36.

summaries of the studies.[61] Because he has not reviewed the full surveys, ConAgra argues, Dr. Benbrook cannot evaluate the study methodology or determine the relevance of the studies' findings.[62] ConAgra asserts the opinions should be stricken for the additional reason that Benbrook merely repeats numbers from documents, which will not assist the trier of fact.[63]

So long as the surveys are relevant and reliable, Dr. Benbrook need not be an expert in survey methodology to incorporate the results of surveys into his work. *See Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1138 n. 72 (D. Colo. 2006) ("Defendants contend Mr. Hunsperger is not qualified to use the survey results in any fashion because he is not an expert in designing, administering or interpreting raw data from public opinion surveys. Mr. Hunsperger, however, need not be qualified as an expert in these matters in order to incorporate the Flynn/Slovic survey results in his own work, particularly when I have already found that the survey is relevant, reliable and admissible in its own right"). As the court has already concluded, however, the general meaning of "natural" is not a subject as to which jurors need assistance. Jurors might benefit from assistance as to whether consumers generally equate "natural" with an absence of genetically modified ingredients, however. Nonetheless, the court has no means of judging the reliability of the two surveys Dr. Benbrook cites, since neither is

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[61]Motion to Strike at 15.

[62]*Id.*

[63]*Id.* at 16.

before the court. *Compare id.* at 1124-29. Thus, the court cannot determine that it was appropriate for Dr. Benbrook to rely on the survey results. Moreover, Dr. Benbrook's rather sweeping conclusion that "[t]here is considerable agreement across surveys,"[64] when he relies on only two does not seem to be a reliable opinion.

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

[64]Benbrook Decl., ¶ 36.

opinions of others whether those opinions are in evidence or not").

By contrast, an expert can appropriately rely on the opinions of others if other evidence supports his opinion and the record demonstrates that the expert conducted an independent evaluation of that evidence. *See Jerpe v. Aerospatiale*, No. CIV. S–03–555 LKK/DAD, 2007 WL 1394969, *6 (E.D. Cal. May 10, 2007) (crediting an expert's declaration that he "independently arrived" at his opinions despite "deposition testimony [that] was somewhat ambiguous on the issue of whether [expert] was merely relying on the same underlying data set produced at the direction of [another expert]"); *Gray v. United States*, No. 05cv1893 J(BLM), 2007 WL 4644736, *8 (S.D. Cal. Mar. 17, 2007) ("Ms. Hyland[ ] . . . states that she considered all of the input and also considered information from the San Diego County Medical Society and from a compendium of physician compensation studies. In light of Ms. Hyland's indication that she has interviewed Dr. Gray, reviewed medical records, as well as consulted with search firms, the Court declines to, at this time, take the drastic measure of excluding her report and testimony").

As proof that Dr. Benbrook is merely "parroting" the opinions of other experts and presenting them as his own, ConAgra cites a sentence Benbrook copied verbatim from the Leatherhead article, *Do "natural" claims cut the mustard?* It states that "Leatherhead Food Research delivers integrated scientific expertise, international regulatory advice and independent market insights to the global food, drink and related

industries."[65] While Dr. Benbrook appears to have copied this statement from Leatherhead's materials, it is merely a description of Leatherhead's business, not an opinion relevant to the issues raised by this litigation. ConAgra cites no other portions of Benbrook's declaration that have been lifted from source materials. Nonetheless, as Dr. Benbrook has no expertise in marketing or consumer reactions, the fact that he offers opinions concerning consumers' interpretation of the word "natural" based on two market surveys indicates that he has merely reviewed the surveys prepared by marketing experts and is reporting what they found. There is no indication in his declaration that he has independently tested or evaluated the results of the surveys or otherwise personally researched what consumers believe "natural" in terms of the presence of absence of genetically modified organisms or GMO ingredients. Consequently, the court concludes that Dr. Benbrook cannot offer an expert opinion concerning whether or not consumers believe that a food labeled "natural" contains GMO ingredients.[66]

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[65]*Compare* Benbrook Decl., ¶ 39, *with* Declaration of Henry J. Kelston ("Kelston Decl."), Docket No. 244 (May 5, 2014), Exh. 23 at 3.

[66]ConAgra also contends that Dr. Benbrook did not review full versions of the studies he cites. Plaintiffs acknowledge that Dr. Benbrook did not have access to the full 2010 Hartman report, *Beyond Natural and Organic*, at the time he prepared his declaration, but state that he has access to it now, has reviewed it, and is prepared to testify regarding its contents. Plaintiffs proffer no declaration by Dr. Benbrook to this effect, however. Thus, this statement is merely attorney argument, and is not evidence the court can consider in determining the reliability of Dr. Benbrook's testimony. Plaintiffs further state,

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

1. "It is my opinion, based on my preliminary examination of the facts in this case, that, since 1997, an increasing share of Wesson Oils were extracted from GE corn, soybeans, or canola, thus rendering it impossible for ConAgra to honestly represent that the Wesson Oil products at issue in this litigation are 'natural[.]'"[68]
2. "[F]ood ingredients and products derived from such GE crops are not natural[.]";[69]

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however, that the data set forth in paragraphs 43 and 44 of Dr. Benbrook's declaration, which discusses the Hartman Report, are extracted from another study referenced in Appendix D, *Consumer confusion about the difference: "Natural" and "Organic" product claims*, a White Paper by the Canada Organic Trade Organization. Even had Dr. Benbrook reviewed full copies of both surveys, the court would exclude his opinion concerning consumer interpretation of the term "natural" for the reasons stated in text.

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

[67]Motion to Strike at 12.

[68]Benbrook Decl., ¶ 7.

[69]*Id*., ¶ 8(c).

3. "[T]he attributes in a food product that consumers seek when they choose a product, like Wesson Oil, that is labeled '100% Natural' are inherently inconsistent with that product's derivation from GE crops."[70]
4. "Regardless of the specific methods used to create a given GE event within an existing, commercial corn, soybean, or canola variety, the process relied upon is inherently artificial and unnatural."[71]
5. "Biotechnology industry leaders have issued formal statements and definitions discussing the nature of food produced from GE crops that confirm the unnatural nature thereof."[72]
6. "Accordingly, based on my expert understanding of the genetic engineering process and my experience in this field, it is my opinion that the evidence summarized above demonstrates that the Wesson Oils that ConAgra, during the Class Period, represented and sold as being '100% Natural' were falsely and deceptively labeled, in that they unquestionably contained oils derived from unnatural GE corn, soybeans, and canola."[73]

While an expert witness may not testify to a legal conclusion, he may testify to an ultimate issue of fact.

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[70] *Id.*, ¶ 8(e).

[71] *Id.*, ¶ 141.

[72] *Id.*, ¶ 196.

[73] *Id.*, ¶ 320.

Mukhtar, 299 F.3d at 1066 n. 10 ("[A]n expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law"); *Wiles v. Dep't of Educ.*, Nos. 04–00442 ACK–BMK, 05–00247 ACK–BMK, 2008 WL 4225846, *1 (D. Haw. Sept. 11, 2008) ("[W]hile an expert witness generally may give opinion testimony that embraces an ultimate issue to be decided by the trier of fact, that expert may not express a legal opinion as to the ultimate legal issue"); *see* FED.R.EVID.. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue"); *see also id.*, 1972 Advisory Committee Notes ("The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called 'ultimate issue' rule is specifically abolished by the instant rule").

"Courts have held that expert witnesses' use of 'judicially defined terms,' 'terms that derived their definitions from judicial interpretations,' and 'legally specialized terms' . . . constitute[s] [an] expression of opinion as to the ultimate legal conclusion." *Wiles*, 2008 WL 4225846 at *1. Dr. Benbrook's opinions that Wesson Oil products are not natural go only to the ultimate issue of fact, and are therefore admissible. The same can not be said, however, regarding his opinion that ConAgra "falsely and deceptively labeled" its products. "False" and "deceptive" are judicially defined terms. Accordingly, his use of these terms constitutes the offering of an improper legal opinion that usurps the role of the court. *See S.E.C. v. Leslie*, No. C 07–3444, 2010 WL 2991038, *9 (N.D. Cal. July 29, 2010) (excluding

expert's opinion because "it is for the jury to determine whether Defendants' statements in fact were misleading"); *F.T.C. v. Stefanchik*, No. C04-1852RSM, 2007 WL 4570879, *1 (W.D. Wash. Feb. 15, 2007) (expert's opinion that defendant's materials are not unfair, false, misleading or deceptive was an impermissible legal conclusion).[74]

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

In determining whether to find that a party is judicially estopped, courts consider (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading the court to accept the earlier position, such that judicial acceptance of a later inconsistent position would create "the perception that either the first or second [time the] court was misled"; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 782-83 (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001)). *See also Ceja-Corona v. CVS Pharm., Inc.*, No. 1:12–cv–01703–AWI–SAB, 2014 WL 1679410, *9 (E.D.Cal. Apr. 28, 2014) (listing factors).

In opposing ConAgra's motion to dismiss, plaintiffs argued that the action should not be stayed or dismissed under the

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

3. ConAgra's Expert Dominique M. Hanssens, Ph.D

Dr. Dominique M. Hanssens is a professor of marketing at the UCLA Anderson School of Management, where he has served on the faculty

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"primary jurisdiction" doctrine because FDA agency expertise was not required to determine whether the "100% Natural" claim is misleading. Here, plaintiffs proffer Dr. Benbrook's testimony under Rule 702, which requires only that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." FED.R.EVID. 702. The two positions are not "clearly inconsistent"; rather, they are compatible. Accordingly, the court concludes that judicial estoppel does not apply to bar Dr. Benbrook's testimony.

since 1977.[75] He has taught course on Elements of Marketing, Marketing Strategy & Planning, and Customer Information Strategy.[76] His research focuses on strategic marketing problems involving data-analytic methods such as econometrics and time-series analysis.[77] From July 2005 to June 2007 he served as the Executive Director of the Marketing Science Institute in Cambridge, Massachusetts.[78] He is also a founding partner of MarketShare, a global marketing analytics firm.[79]

Dr. Hanssens opines that there is a high degree of heterogeneity in the consumer purchase process, and that consumer purchase decisions are influenced by a variety of factors upon which consumers place different weights.[80] Dr. Hanssens opines that the term "100% Natural" has no fixed or universal meaning, and that the sources on which Dr. Benbrook relied in forming his opinion are not to the contrary.[81] Dr. Hanssens conducted a survey in which participants were divided between a "Test Group" and a "Control Group." The former were shown an actual Wesson Vegetable Oil label, while the latter were shown the same label but with all references to "100% Natural" removed.[82]

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[75]Hanssens Decl., ¶ 1.

[76]*Id.*, ¶ 1.

[77]*Id.*, ¶ 2.

[78]*Id.*, ¶ 3.

[79]*Id.*, ¶ 4.

[80]*Id.*, ¶ 12.

[81]*Id.*, ¶¶ 15-16.

[82]*Id.*, ¶ 42.

Participants were asked: "Assuming you were intending to buy vegetable oil today, how likely would you be to buy this product based on the information you've been provided?" The two groups' responses differed by just 1.1%, an amount that is not statistically significant.[83] When asked whether they believed the product was free of GMO ingredients, 40.3% and 35.7% of respondents in each group respectively answered "yes," a difference of 4.6%, which likewise is not statistically significant.[84] Dr. Hanssens opines that the survey's results show that the "100% Natural" label on Wesson cooking oils does not have a material effect on consumer purchasing intent, or on consumer beliefs as to whether Wesson cooking oils are free of GMO ingredients.[85]

Plaintiffs argue that Dr. Hanssens failed to use an acceptable survey design, and that his findings are rebutted by surveys conducted by other organizations as well as by ConAgra's own market research.[86] They proffer the declaration of Dr. Elizabeth Howlett, who opines that Dr. Hanssens' survey suffers from "a number of shortcomings and fatal methodological flaws that render the survey results meaningless."[87]

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[83] *Id.*, ¶¶ 51-52.

[84] *Id.*, ¶ 58.

[85] *Id.*, ¶¶ 13-14.

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

[87] Declaration of Dr. Elizabeth Howlett ("Howlett Decl."), Docket No. 288 (June 30, 2014), ¶ 17. Dr. Howlett also opines on the level of importance consumers attach to "natural" claims on food products in general and to the "100% Natural" label on Wesson Oils in particular. She also discusses a survey

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

On July 11, 2014 – the Friday before the Monday hearing on plaintiffs' motion – plaintiffs filed a response to ConAgra's

The methodological flaws she identified include (1) a failure to adduce any evidence Test Group participants actually perceived the "100% Natural" label, (2) a failure to control for participants' prior knowledge and pre-existing beliefs, (3) a failure to control for participants' confusion regarding the meaning of "GMO," (4) a failure to include measures to ensure participants are paying attention to the survey, (5) a failure to screen for contradictory or meaningless responses, (6) a failure accurately to interpret open-ended answers, (7) a failure to utilize a representative sample, (8) a failure to analyze non-

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evidentiary objections to Howlett's declaration and the Kozup survey, as well as to a rebuttal declaration filed by Weir (*See infra* n. 133). (Plaintiffs' Response to Defendant ConAgra Foods, Inc.'s Evidentiary Objections to New Evidence Submitted for the First Time on Reply in Support of Plaintiffs' Motion for Class Certification ("Reply Evidence Response"), Docket No. 299 (July 11, 2014).) Plaintiffs argued that Kozup's survey was rebuttal evidence because it was proffered in response to Hanssens' survey. (*Id.* at 10.) For the reasons already stated, the court does not agree with this characterization of plaintiffs' evidence. Citing *Smith v. Microsoft Corp.*, No. 11-CV-1958 JLS (BGS), 2013 WL 6497073 (S.D. Cal. Dec. 10, 2013) and *All Star Seed v. Nationwide Agribusiness Ins. Co.*, No. 12cv146 L(BLM), 2014 WL 1286561 (S.D. Cal. Mar. 31, 2014), plaintiffs contended that even if the filings do not qualify as rebuttal evidence, the court should still consider them, afford ConAgra an opportunity "orally [to] rebut the new evidence during [the] hearing," or construe ConAgra's objections as a legally sufficient response. (*Id.* at 8.) The court finds the cases cited distinguishable, as the *Smith* and *All Star* courts each determined that evidence or argument submitted for the first time in reply was not "new." Moreover, given the technical nature of the new evidence plaintiffs have adduced, affording ConAgra an opportunity to rebut it orally or considering ConAgra's evidentiary objections a sufficient response would prejudice ConAgra.

response and dropout rates, and (9) a failure to control for bias.[88]

While plaintiffs are correct that *Daubert* governs the admissibility of survey data, the Ninth Circuit has held that "[c]hallenges to survey methodology go to the weight given the survey, not its admissibility." *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143 n. 8 (9th Cir. 1997) ("However, 'as long as they are conducted according to accepted principles,' survey evidence should ordinarily be found sufficiently reliable under *Daubert*. Unlike novel scientific theories, a jury should be able to determine whether asserted technical deficiencies undermine a survey's probative value," quoting *Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (9th Cir. 1992)); *id.* at 1143 (the fact that a survey that was conducted only in the southern portion of the state and asked leading questions went to the weight of the evidence, not the admissibility of the survey); *see also Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir. 2001) ("Treatment of surveys is a two-step process. First, is the survey admissible? That is, is there a proper foundation for admissibility, and is it relevant and conducted according to accepted principles? This threshold question may be determined by the judge. Once the survey is admitted, however, follow-on issues of methodology, survey design, reliability, the experience and reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather than its admissibility. These are

[88]Howlett Decl., ¶¶ 48-63.

issues for a jury or, in a bench trial, the judge"); *Alcantar v. Hobart Serv.*, No. ED CV 11–1600 PSG (SPx), 2013 WL 156530, *4 (C.D. Cal. Jan. 15, 2013) ("[A]ny problems with the response rate affect the weight, and not the admissibility of the study"); *Microsoft Corp. v. Motorola Inc.*, 904 F.Supp.2d 1109, 1120 (W.D. Wash. 2012) (criticisms of a conjoint analysis concerned "issues of methodology, survey design, reliability, and critique of conclusions, and therefore [went] to the weight of the survey rather than admissibility"); *Harris v. Vector Marketing Corp.*, 753 F.Supp.2d 996, 1001-02 (N.D. Cal. 2010) ("[Plaintiff] criticizes the content of the survey conducted and prepared by [defendant's expert] as well as the response rate to the survey. The problem for [Plaintiff] is that, as she herself admits in her brief, even challenges to defects in methodology normally affect the weight to be accorded the survey and not its admissibility"); *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F.Supp. 1283, 1296 (N.D. Cal.1991) (holding that the alleged under-inclusiveness of a survey in a copyright infringement action affected "the weight of the survey, not its admissibility"), aff'd, 964 F.2d 965 (9th Cir. 1992), cert. denied, 507 U.S. 985 (1993).

Plaintiffs do not challenge Dr. Hanssens' expertise, nor does it appear they could, given his extensive experience. As for the relevance of the survey results, Dr. Hanssens' findings regarding the impact the "100% Natural" label has on consumer purchasing decisions, and whether consumers associate "100% Natural" with products free of GMO ingredients, are probative as to whether the label misleads consumers and causes them to believe Wesson Oil products do not

contain GMO ingredients. The court has some concerns regarding the survey design, particularly Dr. Hanssens' decision to utilize a sample consisting of unequal proportions of females in the Test Group and Control Group – 62.9% and 52.9% respectively. Both of these percentages fall below the 80% ConAgra requires in the marketing studies it commissions, suggesting that it believes women make up approximately 80% of its consumers.[89] The court concludes, however, that such concerns go to the weight of Dr. Hanssens' survey, and do not render it inadmissible under Rule 702.[90]

Plaintiffs also urge the court to exclude the survey as unduly prejudicial under Rule 403 of the Federal Rules of Evidence. Rule 403 requires the court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting

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

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

time, or needlessly presenting cumulative evidence." FED.R.EVID. 403. Although the survey is prejudicial to plaintiffs' position, the prejudice is not "unfair." *See Hankey*, 203 F.3d at 1172 (evidence is unfairly prejudicial only if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one," citing FED. R. EVID. 403 , Advisory Committee Notes); *see also Old Chief v. United States*, 519 U.S. 172, 179 (1997) ("The term 'unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged" (citation omitted)). Nor does any prejudice substantially outweigh the probative value of the evidence. The court therefore declines to strike Dr. Hanssens' testimony.

B. Legal Standard Governing Class Certification

A district court may certify a class only if:

> "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED.R.CIV.PROC. 23(a).

In addition, a district court must also find either that at least one of the several conditions set forth in Rule 23(b) is met. "Rule 23(b)(1) allows a class to be maintained where 'prosecuting separate actions by or against individual class members would create a risk

of' either '(A) inconsistent or varying adjudications,' or '(B) adjudications . . . that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede[ ] their ability to protect their interests.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2549 n. 2 (2011).

Rule 23(b)(2) allows class treatment when "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.PROC. 23(b)(2). The Supreme Court has not yet decided whether this rule "applies only to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all." *Dukes*, 131 S. Ct. at 2557. It has concluded, however, "that, at a minimum, claims for individualized relief . . . do not satisfy the Rule." *Id.* Thus, "it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.*

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

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties,

common questions of law or fact, etc." *Id.* at 2551. Thus, "[t]he party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir.), amended, 273 F.3d 1266 (9th Cir. 2001)); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). A class can be certified only if the court "is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982). As the Supreme Court has noted, "[f]requently . . . 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. at 2551.

Plaintiffs seeks to certify the following twelve separate statewide classes:

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

C. Whether the Proposed Class Should Be Certified

1. Standing

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[91]Motion at 11-12.

As a threshold matter, ConAgra contends that the named plaintiffs lack standing because they have suffered no injury.[92] Specifically, ConAgra argues that after filing the lawsuit, plaintiffs continued to purchase cooking oils and other products that were labeled "natural" but contained non-organic GMO ingredients.[93] It asserts plaintiffs cannot prove measurable damages because although they allege they paid a premium for Wesson Oils because it was labeled "100% Natural," they are unable determine the price they paid for Wesson products and have no means of acquiring this information.[94]

The court finds these arguments unavailing. First, each plaintiff testified that he or she purchased Wesson Oil during the class period.[95] Plaintiffs

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[92]Opp. Cert. at 15.

[93]*Id.*

[94]*Id.*

[95]ConAgra argues that plaintiff Pauline Michael testified she did not purchase Wesson Oil products during the three-year limitations period for consumer protection claims in Illinois, 815 ILCS §§ 505/1 *et seq.*, and that she accordingly lacks standing to represent an Illinois class on this claim. ("Q. Have you bought any Wesson Oil since June 27, 2007? A. No, I don't believe so." (Declaration of Robert B. Hawk ("Hawk Decl."), Docket No. 269 (June 2, 2014), Exh. D at 80:1-4.)) With their reply, plaintiffs submitted Michael's declaration, in which she states that she incorrectly recalled the date of her last purchase of Wesson Oil during her deposition, and that she in fact has in fact purchased the product since June 27, 2007. (Reply Declaration of Plaintiff Pauline Michael ("Michael Decl."), Docket No. 286 (June 30, 2014), ¶¶ 6-8.) Although submitted in reply, this evidence responds directly to the deposition testimony ConAgra adduced in support of its opposition. Accordingly, Michael's reply declaration is not "new" and the court will not decline to consider it on this basis. Ordinarily, however, when a

declaration directly contradicts prior deposition testimony, the deposition testimony controls and the declaration must be disregarded. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony"). To determine whether such a declaration can be considered, the court must make a factual determination as to whether the declaration is a "sham." *Id.* at 266-67 (limiting the rule first articulated in *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975)). An affidavit is not a sham if: (1) it "merely elaborat[es] upon, explain[s] or clarif[ies] prior testimony," *Messnick v. Horizon Industries , Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995); (2) if "the witness was confused at that time of the earlier testimony and provides an explanation for the confusion," *Pacific Ins. Co. v. Kent*, 120 F.Supp.2d 1205, 1213 (C.D. Cal. 2000) (citing *Kennedy*, 952 F.2d at 266); or (3) if the declaration concerns newly discovered evidence, *id. See also Van Asdale v. Int'l Game Tech .*, 577 F.3d 989, 998-99 (9th Cir. 2009) ("the inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit"); *id.* at 999 ("minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit"); *Kennedy*, 952 F.2d at 267 (before testimony is designated "sham," it must "flatly contradict[ ] earlier testimony"). Michaels states that she was asked repeatedly during her deposition when she last purchased Wesson, and had trouble recalling the date. (Michael Decl., ¶ 5.) She states that she stopped purchasing Wesson Oils after making changes to her diet, and that she estimated the year of her last purchase by estimating the year when she altered her diet; she based her estimate on her probable age at the time of the dietary changes. (*Id.*, ¶¶6-7.) She explains she later realized that because the dietary changes were prompted by a car accident that occurred in September 2008, her last purchase of Wesson Oils must have occurred after June 27, 2007. (*Id.*, ¶ 8.) The court is satisfied by Michaels' explanation and concludes that the contradictory testimony was the result of an honest discrepancy or mistake. *See Van Asdale*, 577 F.3d at 999; *Calloway v. Contra Costa County Jail Correctional Officers*, No.

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

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C 01-2689 SBA, 2007 WL 134581, *17 (N.D. Cal. Jan. 16, 2007) ("Defendants offer many instances from Plaintiff's deposition testimony where he was unable to remember dates, but the *Kennedy* court was clear that discrepancies due to honest mistake do not constitute 'sham' testimony. The Court declines to exclude the declaration as a sham"). Accordingly, the court declines to strike the declaration, and finds that Michaels has standing to represent the Illinois class on the consumer protection claim.

[96] Reply in Support of Motion to Certify Class ("Reply"), Docket No. 284 (June 30, 2014) at 12-13.

[97] The court is cognizant that due to market factors, prices for the same product may vary widely. *See, e.g.*, *Werdebaugh v. Blue Diamond Growers*, Case No.: 12–CV–2724–LHK, 2014 WL 2191901, *23 (N.D. Cal. May 23, 2014) ("Werdebaugh testified that consumers typically pay a premium simply by purchasing

evidence concerning the portion of that price that constituted a "premium" for the product's "100% Natural" ingredients would suffice to send the question of damages to the jury. *See Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10–4387 PJH, 2014 WL 60097, *12 (N.D. Cal. Jan. 7, 2014) ("One method of quantifying the amount of restitution to be awarded is computing the effect of unlawful conduct on the market price of a product purchased by the class. This measure of restitution contemplates the production of evidence that attaches a dollar value to the 'consumer impact or advantage' caused by the unlawful business practices. Restitution can then be calculated by taking the difference between the market price actually paid by consumers and the true

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from Whole Foods, a distinction for which Dr. Capps does not account in his Price Premium Model"); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2011 WL 196930, *3 (S.D.N.Y. Jan. 21, 2011) ("[P]laintiffs have offered no evidence of the prices of competing or comparable beverages that did not contain the alleged mislabeling, much less the prices of such beverages at locations and periods of time that approximate those at which the two plaintiffs purchased Snapple. Again, this would be a difficult task since it is undisputed that the prices of beverages in the retail market vary widely and are affected by the nature and location of the outlet in which they are sold, and the availability of discounts, among many other factors"). ConAgra asserts that the price of Wesson Oil and its competitors' products is set by retailers and varied widely during the class period. It proffers the declaration of its expert, Keith Ugone, as evidence of this. (*See* Declaration of Keith R. Ugone, Docket No. 268 (June 2, 2014), ¶ 50 and App. E.) Without further information concerning the nature of the data available through Information Resources, Inc. or from other sources, however, the court is unwilling at this point to conclude that no plaintiff could show that he or she suffered in injury in fact for Article III purposes.

market price that reflects the impact of the unlawful, unfair, or fraudulent business practices. Expert testimony may be necessary to determine the amount of price inflation attributable to the challenged practice" (internal citations omitted)). *Compare Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal.App.4th 663, 700 (2006) ("There was expert testimony that 'Made in U.S.A.' claims have a significant positive impact on consumers and that Leatherman realized a 'substantial advantage' by using a 'Made in U.S.A.' representation; however, the expert did not attempt to quantify either the dollar value of the consumer impact or the advantage realized by Leatherman. The record therefore contains no evidence concerning the amount of restitution necessary to restore purchasers to the status quo ante"). At least on the basis of the present record, the court is unwilling to conclude that lack standing to sue because they cannot prove they suffered a concrete injury. Whether plaintiffs' failure to present evidence that Weir has constructed a model that adequately accounts for all variables, and that isolates the effect of the "100% Natural" label on the price of Wesson Oils undercuts their ability to show that damages are susceptible of measurement across the class such that common questions of fact predominate under Rule 23(b)(3) is another question altogether.

2. Rule 23(a) Requirements

a. Whether Plaintiffs Have Identified an Ascertainable Class

Although not specifically mentioned in Rule 23, plaintiffs must, in addition to showing numerosity, commonality, typicality and adequacy, demonstrate

that the members of the class are ascertainable. *See, e.g.*, *Lukovsky v. San Francisco*, No. C 05-00389 WHA, 2006 WL 140574, *2 (N.D. Cal. Jan. 17, 2006) ("'Although there is no explicit requirement concerning the class definition in FRCP 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed,'" quoting *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-80 (S.D. Cal. 1999)); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 163 (C.D. Cal. 2002) ("Prior to class certification, plaintiffs must first define an ascertainable and identifiable class. Once an ascertainable and identifiable class has been defined, plaintiffs must show that they meet the four requirements of Rule 23(a), and the two requirements of Rule 23(b)(3)" (citation and footnote omitted)); *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (holding that a class definition must be "precise, objective and presently ascertainable"); *Bishop v. Saab Automobile A.B.*, No. CV 95-0721 JGD (JRx), 1996 WL 33150020, *4 (C.D. Cal. Feb. 16, 1996) ("To file an action on behalf of a class, the named plaintiffs must be members of the class that they purport to represent at the time the class action is certified. The named plaintiffs must also demonstrate that the class is ascertainable" (citation omitted)).

A class is sufficiently defined and ascertainable if it is "administratively feasible for the court to determine whether a particular individual is a member." *O'Connor*, 184 F.R.D. at 319; *accord Davoll v. Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995); *see also Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 347 (S.D.

Ga. 1996) ("[T]he 'description of the class must be sufficiently definite to enable the court to determine if a particular individual is a member of the proposed class,'" quoting *Pottinger v. Miami*, 720 F.Supp. 955, 957 (S.D. Fla. 1989)).

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

District courts in this circuit are split as to whether the inability to identify the specific members of a putative class of consumers of low priced products makes the class unascertainable. Some courts have concluded that it does. *See Sethavanish v. ZonePerfect Nutrition Co.*, No. 12–2907–SC, 2014 WL 580696, *5-6 (N.D. Cal. Feb. 13, 2014) ("Plaintiff has yet to present any method for determining class membership, let alone an administratively feasible method. It is unclear how Plaintiff intends to determine who purchased ZonePerfect bars during

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[98]Cert. Motion at 19.

[99]Opp. Cert. at 12.

[100]*Id.* at 12-13.

the proposed class period, or how many ZonePerfect bars each of these putative class members purchased. It is also unclear how Plaintiff intends to weed out inaccurate or fraudulent claims. Without more, the Court cannot find that the proposed class is ascertainable"); *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 308-11 (3d Cir. 2013) (holding a putative class of consumers who purchased a diet supplement was not ascertainable because (1) there was insufficient evidence to show that retailer records could be used to identify class members, (2) the use of affidavits to identify class members would deprive defendant of the opportunity to challenge class membership, (3) a proposed screening model to ensure the affidavits are reliable was not shown to be reliable for certification purposes, and (4) the inclusion of fraudulent or inaccurate claims could dilute the recovery of absent class members, who could then argue they were not adequately represented and thus not bound by the judgment); *In re POM Wonderful LLC*, No. ML 10–02199 DDP (RZx), 2014 WL 1225184, *6 (C.D. Cal. Mar. 25, 2014) (observing that "[i]n situations where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipts or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible," and holding that a class of consumers of a juice product was not ascertainable, particularly where "[n]o bottle, label, or package included any of the alleged misrepresentations").

Other courts have rejected the reasoning underlying such decisions as effectively foreclosing

class actions involving low priced consumer goods. *See Forcellati v. Hyland's, Inc.*, No. CV 12–1983–GHK (MRWx), 2014 WL 1410264, *5 (C.D. Cal. Apr. 9, 2014) (rejecting an argument that a putative class of consumers of children's cold/flu products was not ascertainable, and stating that "[g]iven that facilitating small claims is '[t]he policy at the very core of the class action mechanism,' we decline to follow *Carrera*," quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)); *McCrary v. Elations Co., LLC*, No. EDCV 13–00242 JGB (OPx), 2014 WL 1779243, *8 (C.D. Cal. Jan. 13, 2014) ("*Carrera* eviscerates low purchase price consumer class actions in the Third Circuit. It appears that pursuant to *Carrera* in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carrera* prohibits certification of the class. While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit. In this Circuit, it is enough that the class definition describes 'a set of common characteristics sufficient to allow' a prospective plaintiff to 'identify himself or herself as having a right to recover based on the description. As discussed above, the class definition clearly defines the characteristics of a class member by providing a description of the allegedly offending product and the eligible dates of purchase. A prospective plaintiff would have sufficient information to determine whether he or she was an Elations customer who viewed the specified label during the stated time period,'" quoting *Moreno v. AutoZone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008) (citations omitted)); *Ries v.*

Arizona Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012) ("Defendants' real concern with the proposed class definition appears to be that members of the class do not have actual proof that they are in the class. Defendants suggest that simply because most members of the proposed class will not have retained all of their receipts for AriZona Iced Tea over the past few years, the administration of this class will require 'fact-intensive mini trials' to establish whether each purported class member had in fact made a purchase entitling them to class membership. This is simply not the case. If it were, there would be no such thing as a consumer class action. There is no requirement that 'the identity of the class members . . . be known at the time of certification'").

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

Here, the class definition identifies putative class members by objective characteristics; this is the mark of an ascertainable class. *See Forcellati*, 2014 WL 1410264 at *5 ("'The requirement of an ascertainable class is met as long as the class can be defined through objective criteria,'" quoting *Guido v. L'Oreal, USA, Inc.*, Nos. CV CV 11–1067 CAS (JCx), CV 11–5465 CAS (JCx), 2013 WL 335385, *18 (C.D. Cal. July 1, 2013)); *id.* ("A class is sufficiently ascertainable if 'the proposed class definition allows prospective plaintiffs to determine whether they are class members with a potential right to recover,'" quoting *Parkinson v. Hyundai Motor America*, 258 F.R.D. 580, 593–94 (C.D. Cal. 2008)). While it is true that identifying class members may well require the creation of a claim form or declaration that those asserting membership in the class must submit (likely under penalty of perjury), courts have concluded that such a procedure makes the class ascertainable, at least where the alleged mislabeling occurred throughout the class period, and on a single product or narrow group of products. *See, e.g.*, *Werdebaugh*, 2014 WL 2191901 at *11; *Brazil v. Dole Packaged Foods, LLC*, Case No.: 12–CV–01831–LHK, 2014 WL 2466559, *4-6 (N.D. Cal. May 30, 2014) (certifying a class of consumers who purchased Dole fruit products allegedly mislabeled "All Natural" during the class period and finding that the submission of consumer affidavits as a means of identifying class members was likely to produce reliable affidavits because all products included in the class definition contained the alleged mislabeling consistently throughout the class period). ConAgra may also be able to test an individual's claim that he

or she is a class member by comparing information about the individual's purchase with information it maintains concerning the retailers that sold its products during the class period or other similar information. *See Galvan v. KDI Distribuation Inc.*, SACV 08–0999–JVS (ANx), 2011 WL 5116585, *4 (C.D. Cal. Oct.25, 2011)

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

Plaintiffs counter that the inclusion of uninjured class members does not necessarily render a class unascertainable, citing *Rodman v. Safeway, Inc.*, No.

[101]Opp. Cert. at 13-14.

11–cv–03003–JST, 2014 WL 988992, (N.D. Cal. Mar. 10, 2014). There, plaintiff moved to certify a nationwide class of all persons who registered to purchase groceries through Safeway.com, and who purchased groceries that were subject to a price markup. *Id.* at *15. Safeway argued that the class was not ascertainable because it included individuals who, for various reasons, did not have viable claims or who could not prove damages. *Id.* The court rejected this argument, noting that such a rule would effectively require a plaintiff to plead a "fail-safe" class. *Id.* *See* 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE CIVIL § 1760 (3d ed.) ("Some courts also have considered whether the class definition must exclude anyone who does not have a viable claim. In effect, this interpretation means that plaintiffs must plead what effectively is a 'fail-safe' class").[102]

Other courts in this circuit have reached similar conclusions, *see Rodman*, 2014 WL 988992 at *15

[102]"Fail-safe classes are defined by the merits of their legal claims, and are therefore unascertainable prior to a finding of liability in the plaintiffs' favor." *Velasquez v. HSBC Finance Corp.*, No. 08-4592 SC, 2009 WL 112919, *4 (N.D. Cal. Jan. 16, 2009); *see also Boucher v. First American Title Ins. Co.*, No. C10–199RAJ, 2011 WL 1655598, *5 (W.D. Wash. May 2, 2011) ("Second, the definition conditions a customer's class membership on a finding that First American is liable to him or her. . . . So, for example, if the court certified the class and later determined on summary judgment that First American correctly discounted all class members' premiums, then the class would have no members. A 'fail-safe class' like this ensures that a defendant cannot prevail against the class, because if the defendant prevails, the class will not exist"); *Lewis v. First American Title Ins. Co.*, 265 F.R.D. 536, 551 (D. Idaho 2010) (defining a fail-safe class as one that "impermissibly determines membership based upon a determination of liability").

(collecting cases), and the Seventh and Tenth Circuits are in accord. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (the fact that a proposed class "will often include persons who have not been injured by the defendant's conduct . . . does not preclude class certification," but it is also the case that "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant"); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) ("That a class possibly or even likely includes persons unharmed by a defendant's conduct should not preclude certification"). The *Rodman* court concluded that while "[t]here is a place in the Rule 23 analysis for considering whether a class definition is sufficiently 'overbroad' as to preclude certification," the issue was better analyzed as part of the commonality inquiry. 2014 WL 988992 at *16.[103]

Moreover, "[c]onsumer action classes that have been found to be overbroad generally include members who were never exposed to the alleged misrepresentations at all." *Algrain v. Maybelline LLC*, __ F.R.D. __, 2014 WL 1883772, *7 (S.D. Cal. May 12, 2014). *See id.* ("In the instant case,

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

Plaintiffs have alleged a widespread advertising campaign promoting the alleged misrepresentations as well as uniform labeling for each of the Class Products. That the proposed class may include purchasers who did not rely on the misrepresentations and/or were satisfied with the products does not render the class 'overbroad' where Maybelline has failed to demonstrate a lack of exposure as to some class members"); *compare Red v. Kraft Foods, Inc.*, No. CV 10–1028–GW (AGRx), 2012 WL 8019257, * 5 (C.D. Cal. Apr.12, 2012) (finding a class that included consumers who were not exposed to the misleading statements overbroad); *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 926-28 (2010) (finding a class overbroad where a majority of class members were never exposed to the alleged misrepresentations and there was absolutely no likelihood they were deceived by the allegedly false advertising).

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

b. Numerosity

Before a class can be certified under the Federal Rules of Civil Procedure, the court must determine that it is "so numerous that joinder of all members

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

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

c. Commonality

Commonality requires "questions of law or fact common to the class." *See* FED.R.CIV.PROC. 23(a)(2). The commonality requirement is construed liberally, and the existence of some common legal and factual issues is sufficient. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982); *accord Hanlon v.*

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[105]Answer to Amended Complaint, ¶ 57.

[106]ConAgra does not dispute plaintiffs' showing as to this requirement.

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

That said, the putative class's "claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. Although for purposes of Rule 23(a)(2) even a single common question will do, *id.* at 2556, "'[w]hat matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the

litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" *Id.* at 2551 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.REV. 97, 132 (2009)). As the Ninth Circuit recently articulated by way of example, "it is insufficient to merely allege any common question, for example, 'Were Plaintiffs passed over for promotion?' Instead, they must pose a question that 'will produce a common answer to the crucial question why was I disfavored.'" *Ellis*, 657 F.3d at 981 (quoting *Dukes*, 131 S. Ct. at 2552).

Plaintiffs argue the commonality element is satisfied for all classes because their claims pose a common question – whether ConAgra's "100% Natural" marketing and labeling of Wesson Oil products was false, unfair, deceptive, and/or misleading.[107] Because all class members were exposed to the statement and purchased Wesson Oil products, there is "a common core of salient facts." *Hanlon*, 150 F.3d at 1019. Indeed, courts routinely find commonality satisfied in false advertising cases such as the case at bar. *See, e.g.*, *Ries*, 287 F.R.D. at 537 ("[H]ere, variation 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"); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010) (holding that the commonality requirement was satisfied by allegations that the defendant beverage supplier's "packaging and

[107]Cert. Motion at 15.

marketing materials are unlawful, unfair, deceptive or misleading to a reasonable consumer"). Accordingly, the court finds the commonality requirement satisfied.[108]

d. Typicality

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

"The test of typicality is whether other members have the same or similar injury, whether the action is

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

based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508 (citation and internal quotations omitted). Typicality, like commonality, is a "permissive standard[ ]." *Hanlon*, 150 F.3d at 1020. Indeed, in practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 157-58 n. 13. *See also Dukes*, 131 S. Ct. at 2551 n. 5 ("We have previously stated in this context that '[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest,'" citing *Falcon*, 457 U.S. at 158 n. 13).

Typicality may be lacking "if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Hanon*, 976 F.2d at 508 (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)); *see also J.H. Cohn & Co. v. Am. Appraisal Assoc., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) ("[E]ven an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required

typicality of the class as well as bring into question the adequacy of the named plaintiff's representation"). To be typical, a class representative need not prove that she is immune from any possible defense, or that her claim will fail only if every other class member's claim also fails. Instead, she must establish that she is not subject to a defense that is not "typical of the defenses which may be raised against other members of the proposed class." *Id.*; *see also Ellis*, 657 F.3d at 984.

The named plaintiffs argue that the typicality requirement is satisfied because they allege a common pattern of wrongdoing – i.e., ConAgra's labeling of all Wesson Oils as "100% Natural." As a consequence, they contend, each class member was exposed to the same allegedly false advertising on the Wesson Oils labels. Plaintiffs also assert that they have alleged the "100% Natural" label was a factor in their decision to purchase the products, and that the same evidence supports their claims as supports other class members' claims.[109] ConAgra counters that plaintiffs' claims are not typical because the record evidence demonstrates that the "100% Natural" label was not a significant factor driving purchases of Wesson Oil.[110] It cites Dr. Hanssens' finding that there is no statistically significant difference between the purchasing decisions of survey respondents shown a "100% Natural" label and those who saw a label without the phrase. It also cites Dr. Hanssens' finding that only 5-6% of respondents who saw the "100% Natural" label mentioned "natural"

[109]Cert. Motion at 16.

[110]Opp. Cert. at 16.

ingredients when describing why they would or would not buy a Wesson Oil product, and what factors were important to them when purchasing cooking oil.[111]

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

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

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

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

While the evidence concerning the materiality of the "100% Natural" label is in dispute, the question is whether under the applicable law, the fact that the "100% Natural" label may not have been a significant factor in the purchasing decision of all class members makes plaintiffs' claims atypical. Plaintiffs argue that the court need not address materiality in determining whether to certify the proposed classes, because materiality is determined according to a "reasonable consumer" standard and should be resolved at the merits stage. It is true that for claims brought under California's CLRA and UCL, causation can be proved on a classwide basis by showing that the manufacturer's representation was material. This is true because the CLRA employs a "reasonable consumer" standard to determine materiality. *See, e.g.*, *Falk v. Gen. Motors Corp.*, 496 F.Supp.2d 1088, 1095 (N.D. Cal. 2007) ("Materiality, for CLRA claims, is judged by the effect on a 'reasonable consumer,'" citing *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal.App.4th 1351, 1360 (2003)). Under the UCL, the court asks whether "'members of the public are likely to [have] be[en] deceived.'" *Shein v. Canon U.S.A., Inc.*, No. CV 08-7323 CAS (Ex), 2010 WL 3170788, *7 (C.D. Cal. Aug. 10, 2010) (quoting *In re Tobacco II*, 46 Cal.4th 298, 312 (2009)). Thus, plaintiffs are entitled to a classwide inference of reliance if they can show (1) that uniform misrepresentations were made to the class, and (2) that those misrepresentations were material. *Id.* (stating that "relief under [the] UCL is available without individualized proof" if plaintiff can show

that defendant employed "'uniform conduct to mislead the entire class'" and "the alleged misrepresentation was material," citing *Kaldenback v. Mut. of Omaha Life Ins. Co.*, 178 Cal.App.4th 830, 850 (2009), and *Kingsbury v. U.S. Greenfiber, LLC*, No. CV 08-00151 AHM (JTLx), 2009 WL 2997389, *10 (C.D. Cal. Sept.14, 2009)). *See also Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 669 (C.D. Cal. 2009) ("Courts have found that an inference of reliance may be appropriate for claims for violations of the UCL and the CLRA. . . . For a class action, an inference of reliance arises as to the entire class only if the material misrepresentations were made to all class members," citing *Vasquez v. Superior Court*, 4 Cal.3d 800, 805 (1971) ("It is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class")). There is no suggestion here that the "100% Natural" claim was not uniformly made to members of the class. Thus, as respects plaintiffs' CLRA and UCL claims, the fact that the "100% Natural" label may not have been a significant factor in the purchasing decision of all class members, as it purportedly was in plaintiffs' purchasing decision, does not make plaintiffs' claims atypical of the class.

Plaintiffs, however, fail to address whether individualized reliance and an individualized showing of causation are elements of the balance of their claims. They do not demonstrate, for example, that the reasonable consumer standard applies to their California express warranty claim.[114] Nor do

[114]In this regard, there is some authority for the proposition that a breach of express warranty claim under the California

they adequately address the claims they assert under Colorado, Florida, Illinois, Indiana, Nebraska, New Jersey, New York, Ohio, Oregon, South Dakota, and Texas law; as discussed *infra*, plaintiffs' appendix of legal authority does not demonstrate that no individualized showing of reliance and/or causation is required to prove the common law and statutory claims the proposed state classes plead.

Because the typicality requirement focuses on whether the named plaintiffs' claims arise from the same course of conduct as the class members' claims, and whether *the named plaintiffs* are subject to unique defenses, however, and because it is not an onerous requirement, the court concludes that the fact that some *class members* may not have relied on the "100% Natural" label in purchasing Wesson Oils does not render the named plaintiffs' claims atypical. Stated differently, if the named plaintiffs' claims were subject to the unique defense that they did *not* rely on the "100% Natural" label in purchasing

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

Wesson Oils, then as to any claims that require proof of individualized reliance, there might be a concern about typicality. The situation posited by ConAgra is the converse of that, however. The concerns it raises concerning the need for individualized proof of reliance or causation, moreover, are better addressed in assessing whether Rule 23(b)(3)'s predominance requirement is met. Consequently, the court finds the typicality requirement satisfied.

e. Adequacy

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

ConAgra also asserts that class counsel cannot adequately represent the interests of the class. The

adequacy of representation turns on the competence of class counsel and the absence of conflicts of interest. *Falcon*, 457 U.S. at 157. ConAgra argues that counsel "have proven unequal to the task of representing a class."[115] It notes that counsel will be unable to attempt to certify four state classes that were originally identified in their complaint because the named plaintiffs representing those classes withdrew "with no real explanation" as to why withdrawal was necessary and "with no timely move by counsel to replace the withdrawing . . . [plaintiffs]" demonstrates that counsel are inadequate. [116] ConAgra also cites the court's observation in a recent order that "plaintiffs ha[d] done little to prepare for class certification proceedings or move the case forward." [117] It notes the court's comment that plaintiffs' "approach to discovery in this case has been dilatory. . . ,"[118] its statement that "[t]o the extent [counsel permitted] the withdrawing plaintiffs [not to comply with a discovery order issued by Judge Rosenberg], they ha[d] violated [Judge Rosenberg's] order, subjecting [their clients] to sanctions."[119] While courts have held that counsel who have delayed in seeking class certification or have not diligently sought discovery are not adequate to represent the interests of the class, *see, e.g.*, *Colby v. J.C. Penney Co.*, 128 F.R.D. 247, 250 (N.D. Ill. 1989) (decertifying a class based, *inter alia*, on counsel's lack of diligence

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[115]Opp. Cert. at 17.

[116]*Id.*

[117]*Id.* at 18.

[118]*Id.*

[119]*Id.* at 9.

in conducting discovery), aff'd on other grounds, 926 F.2d 645 (7th Cir. 1991); *Lau v. Standard Oil Co. of California*, 70 F.R.D. 526, 527-28 (N.D. Cal. 1975) (three year delay in seeking class certification), the court cannot say that class counsel's problems in this case rise to the level that would support such a finding here, particularly given their background in class action litigation. Nor does the court discern any conflict of interest affecting the representation. Consequently, the court finds that the named plaintiffs and class counsel satisfy the adequacy requirement.

3. Rule 23(b) Requirements

Having concluded that the Rule 23(a) requirements are met, the court turns to Rule 23(b). Plaintiffs seek to certify the proposed classes separately for purposes of injunctive relief and damages under Rule 23(b)(2) and 23(b)(3). In its decision in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), rev'd, 131 S. Ct. 2541 (2011) (en banc), the Ninth Circuit noted that the district court had the option of certifying a Rule 23(b)(2) equitable relief class and a separate Rule 23(b)(3) class for damages if it concluded that it could not certify a single Rule 23(b)(2) class because monetary relief predominated over the equitable relief sought. *Id.* at 620. The Supreme Court later "rejected the 'predominance' test for determining whether monetary damages may be included in a 23(b)(2) certification." *Ellis*, 657 F.3d at 986. Subsequent to the Supreme Court's decision in *Dukes*, however, the Ninth Circuit has suggested on multiple occasions that district courts consider certifying separate Rule 23(b)(2) and 23(b)(3) classes. *See id.* at 988 ("[T]he district court must consider how best to

define the class(es) to ensure that all class members have standing to seek the requested relief. *See, e.g.*, *Dukes*, 603 F.2d at 620 (suggesting the court certify a 'Rule 23(b)(2) class for equitable relief and a separate Rule 23(b)(3) class for damages')"); *see also Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) ("Plaintiffs concede that class certification for their monetary claims under Rule 23(b)(2) cannot stand in light of *Wal–Mart*. However, the possibility of a Rule 23(b)(2) class seeking injunctive relief remains. Rule 23(b)(2) applies 'when a single injunction or declaratory judgment would provide relief to each member of the class.' . . . *[S]ee* . . . *Ellis*, 657 F.3d at 987 (indicating that the court could certify a Rule 23(b)(2) class for injunctive relief and a separate Rule 23(b)(3) class for damages)"). Consequently, and contrary to ConAgra's argument,[120] it does not appear to be the case that the court can certify a Rule 23(b)(2) class only if the monetary relief sought is purely incidental to the injunctive relief. Rather, Ninth Circuit precedent indicates that the court can separately certify an injunctive relief class and if appropriate, also certify a Rule 23(b)(3) damages class. Consequently, the court turns to consideration of the requirements for certification under Rule 23(b)(2).

a. Rule 23(b)(2)

An injunctive relief class can be certified under Rule 23(b)(2) when "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

[120]Opp. Cert. at 38.

respecting the class as a whole." FED.R.CIV.PROC. 23(b)(2). As a threshold matter, the court must determine whether the named plaintiffs have standing to seek an injunction requiring ConAgra to cease marketing Wesson Oils as "100% Natural." ConAgra asserts there is no evidence that any named plaintiff would purchase Wesson Oils in the future, and that this is fatal to their ability to secure injunctive relief. Several courts have reached this conclusion. *See, e.g.*, *Werdebaugh*, 2014 WL 2191901 at *9 ("[B]ecause 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"); *Forcellati*, 2014 WL 1410264 at *13 ("Plaintiffs do not suggest that they are likely to purchase Defendants' products in the future. Instead, they contend that the Article III standing requirement for injunctive relief does not apply in the consumer protection context. Some district courts in this Circuit have taken this approach, holding that a plaintiff in a false advertising case retains standing to pursue injunctive relief so long as the products continue to be deceptively marketed and sold by the defendant. These courts have reasoned that to hold otherwise would severely undermine the efficacy of California's consumer protection laws. We decline to adopt this approach. We find more persuasive the courts that have insisted that it is improper to carve out an exception to Article III's standing requirements to further the purpose of California consumer protection laws" (internal quotation marks

and citation omitted); *Rahman v. Mott's LLP*, No. 13–3482, 2014 WL 325241, *10 (N.D. Cal. Jan. 29, 2014) ("to establish standing, [a plaintiff] must allege that he intends to purchase the products at issue in the future"); *Jou v. Kimberly–Clark Corp.*, No. 13–3075, 2013 WL 6491158, *13 (N.D. Cal. Dec. 10, 2013) (rejecting "[p]laintiffs' contention that it is unnecessary for them to maintain any interest in purchasing the products in the future" in order to establish standing to sue for injunctive relief); *Ries*, 287 F.R.D. at 533–34 (finding that plaintiffs had standing to pursue injunctive relief where they alleged an intention to purchase the products at issue in the future); *Delarosa v. Boiron, Inc.*, No. 10–1569, 2012 WL 8716658, *3–6 (N.D. Cal. Dec. 28, 2012) (finding that plaintiff lacked standing to sue for injunctive relief where she did not dispute she had no intention to purchase product in the future); *Wang v. OCZ Tech. Group, 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, *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"); *Moheb v. Nutramax Labs., Inc.*, No. 12–3633, 2012 WL 6951904, *6 (C.D. Cal. Sept. 4, 2012) ("Plaintiff and other members of the Class no longer buy

Cosamin and, thus, will obtain no benefit from an injunction concerning Defendant's advertising because they cannot demonstrate a probability of future injury").

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

suggestion that plaintiffs' mere recognition of the alleged deception operates to defeat standing for an injunction, then injunctive relief would never be available in false advertising cases, a wholly unrealistic result").

The court agrees with Judge Moskowitz that Article III's standing requirements take precedence over enforcement of state consumer protection laws. *See Mason*, 2013 WL 1969957 at *4 ("Guided 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. . . . If an ADA plaintiff must demonstrate likely injury in the future, consumer plaintiffs such as the one in this case must as well. There is no likelihood of injury in the future if a plaintiff has no interest in purchasing the product at issue again because it does not work or does not perform as advertised"); *see also Garrison v. Whole Foods Mkt. Grp., Inc.*, No. 13–5222, 2014 WL 2451290, *5 (N.D. Cal. June 2, 2014) ("It may very well be that the legislative intent behind California's consumer protection statutes would be best served by enjoining deceptive labeling.... But the power of federal courts is limited, and that power does not expand to accommodate the policy objectives underlying state law"). It does not agree, moreover, with those courts that have concluded that applying Article III's standing requirements will preclude all

enforcement of state consumer protection laws. First, plaintiffs can sue in state court for injunctive relief. Second, as this very case demonstrates, it is not impossible that a plaintiff or plaintiffs will express a desire to purchase the product at issue in the future. *See Werdebaugh*, 2014 WL 2191901 at *9.

Applying Article III's requirements, the court agrees with Judge Breyer that a plaintiff does not lack standing simply because "he has learned that a label is misleading and therefore will not be fooled by it again." Rather, a plaintiff lacks standing if he has not "express[ed] an intent to purchase the products in the future." *Jones v. ConAgra Foods, Inc.*, No. C 12–01633 CRB, 2014 WL 2702726, *12 (N.D. Cal. June 13, 2014). Plaintiffs argue that two of the named plaintiffs – Pauline Michael and Maureen Towey – have expressed an intent to purchase Wesson Oils in the future.[121] Although they cite page 128 of Michael's deposition, that page does not contain any testimony concerning Michael's desire to purchase Wesson Oils in the future.[122] ConAgra, moreover, has proffered portions of Michael's deposition testimony in which she stated that she stopped purchasing Wesson Oils approximately five or six years ago because her eating habits changed.[123] Although Michael has submitted a declaration stating that she testified erroneously that she had not purchased Wesson Oils since June 27, 2007, and

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[121]Reply at 38.

[122]Levitt Decl., Exh. P at 2.

[123]Declaration of Robert B. Hawk in Opposition to Motion for Class Certification ("Hawk Decl."), Docket No. 269 (June 2, 2014), Exh. D at 36-37.

that she continued to purchase Wesson Oils until she was in a car accident in September 2008, which prompted the dietary changes about which she earlier testified, she nowhere states that she wishes to purchase Wesson Oils in the future. Indeed, both her deposition testimony and her declaration indicates that due to dietary changes, she no longer buys the product.

With respect to plaintiff Maureen Towey, plaintiffs cite page 132 of her deposition. That page, however, does not contain a statement by Towey that she wishes to purchase Wesson Oils in the future.[124] ConAgra, moreover, has submitted excerpts of Towey's deposition in which she states that the only purchase of a Wesson Oil she can recall making was in 2010.[125] Consequently, the court cannot conclude that either Michael or Towey has expressed a desire to purchase Wesson Oils in the future. As a result, the court concludes that none of the named plaintiffs has standing to sue for injunctive relief. It declines to certify classes under Rule 23(b)(2) as a result.

b. Rule 23(b)(3)

i. Whether Common Issues Predominate

(a) Reliance and Causation

Certifying a class under Rule 23(b)(3) requires "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."

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[124]Levitt Decl., Exh. P at 3.

[125]Hawk Decl., Exh. F at 41, 45.

FED.R.CIV.PROC. 23(b)(3); *see Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004). The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a). *Amchem Products*, 521 U.S. at 623-24. If common questions "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then "there is clear justification for handling the dispute on a representative rather than on an individual basis," and the predominance test is satisfied. *Hanlon*, 150 F.3d at 1022. "'[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, [however,] a Rule 23(b)(3) action would be inappropriate.'" *Zinser*, 253 F.3d at 1190 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778, at 535-39 (1986)). This is because, *inter alia*, "the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Id.*

Plaintiffs' motion asserts that predominance is easily satisfied because there is a single common question that will have a single answer – whether labeling Wesson Oils – which are made from or contain genetically modified organisms – is false, unfair, deceptive and/or misleading.[126] In this regard, they contend that they will be able to show that the "100% Natural" claim was material to a reasonable consumer and thus that they will be entitled to a

[126]Cert. Motion at 21.

classwide inference of reliance and causation.[127] ConAgra counters that individual issues predominate because reliance and causation cannot be determined on a classwide basis.[128]

Although plaintiff submitted a document they denominate Appendix 1, which purports to address the laws of the various states for which they seek to certify classes,[129] the document does not demonstrate that reliance and causation can be proved on a classwide basis with respect to each of the claims plaintiffs assert, and each of the classes they propose. Appendix 1, for example, does not address in any way the putative California class' breach of express warranty claim. For the most part, moreover, the citations provided with respect to classes to be certified under other states' laws do not – at least as represented by plaintiffs – address, on a cause of action by cause of action basis, whether the laws of those states require individualized proof of reliance and/or causation. ConAgra, for its part, cites several cases suggesting that such proof is required in at least certain of the states at issue. Based on plaintiffs's submission, the court simply cannot find that they have met their burden of showing that common issues predominate over individual questions because they have not demonstrated that with respect to all claims and all classes, they are

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[127]*Id.* at 22.

[128]Opp. Cert. at 19.

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

entitled to a classwide inference of reliance and causation upon adducing appropriate proof.

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

[130]Although plaintiffs submitted the survey conducted by Dr. Kozup in reply, the court has declined to consider it for the reasons stated in note 88 *supra*.

appears that at the time Dr. Benbrook prepared his declaration, he had not read a complete version of at least one of the reports he cites. The surveys themselves, moreover, have not been submitted.[131] Consequently, the court has difficulty according them great weight.[132]

(b) Damages

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

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

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

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[133]Weir Decl., ¶ 9; Hawk Decl., Exh. G at 113-14. Weir submitted a rebuttal declaration with plaintiffs' reply, which states that he conducted a preliminary hedonic regression analysis. (Rebuttal Declaration of Colin B. Weir, Docket No. 285 (June 30, 2014), ¶¶ 10, 87-93.) Because Weir's preliminary analysis is new evidence submitted for the first time in reply, the court declines to consider it. *Provenz*, 102 F.3d at 1483. Plaintiffs contend that Weir was unable to complete his preliminary analysis by the class certification deadline because ConAgra did not produce Nielsen data until April 28, 2014, four weeks after the March 31, 2014 deadline for production set by Judge Rosenberg, and one week prior to the class certification deadline. (Reply Evidence Response at 14.) Plaintiffs assert they should not be held responsible for failing to request a continuance because they had previously filed an *ex parte* application seeking an extension of the class certification deadline, which ConAgra opposed. (*Id.* at 15.) The application to which plaintiffs refer was filed on March 16, 2014. (*Ex Parte* Application to Modify Scheduling Order or, in the Alternative, for Expedited Scheduling Conference, Docket No. 220 (Mar. 16, 2014).) The court issued an order on March 28, 2014, *inter alia*, continuing the class certification deadline to May 5, 2014. (Order Granting Plaintiffs' *Ex Parte* Application to Modify Scheduling Order, Docket No. 230 (Mar. 28, 2014) at 7.) Thus, plaintiffs' application, and the court's order, predate the events

suffices to support a finding that plaintiffs have not shown that damages can be calculated on a classwide basis.[134] *See, e.g.*, *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 25 (2012) ("Defendant also argues that the methodology offered by [plaintiff's expert] Capps is too vague for the Court to even evaluate. The Court concurs. Capps says he plans to run a regression analysis to determine which products increased in price and by how much as a result of the merger. Yet, admittedly, he cannot simply compare before-and-after prices; instead, he has to account for other non-merger factors that may have affected price. Capps's expert report mentions some 'possible explanatory factors' that he might use in his

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about which plaintiffs complain. Accordingly, they should have brought ConAgra's failure to comply with the March 31 production deadline to the court's attention and requested appropriate relief.

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

regression . . . but his proposal is tentative at best. He notes that '[t]he result of merits discovery may further refine this assessment and provide the basis for including additional explanatory factors to be considered as part of any regression model.' In other words, not only had Capps not yet performed a single regression, but also he could not even tell the Court the precise analyses he intended to undertake"); *Weiner*, 2010 WL 3119452 at *8 (concluding that plaintiffs had not demonstrated that damages could be proved on a classwide basis because their expert, "Goedde[,] himself concedes that he has done nothing to confirm that his proposed approaches would be workable in this case. For instance, Goedde admits that if he is unable to identify comparable products for Snapple's 'All Natural' beverages, then his 'yardstick' approach will not work. And yet, Goedde has not even attempted to identify any comparable products to be used in his analysis. Nor has Goedde attempted to use his two approaches to actually build an empirical algorithm to determine whether a price premium was paid for Snapple's beverages as a result of the 'All Natural' labeling. He has stated that he will not do so until after a decision on class certification"),

More fundamentally, *Comcast* stands for the proposition that plaintiffs' method of proving damages must be tied to their theory of liability. *Comcast*, 133 S. Ct. at 1433 ("If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to

serve as evidence of damages in this class action must measure only those damages attributable to that theory. 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)"). Weir proposes to calculate the price premium attributable to ConAgra's use of the term "100% Natural."[135] He concedes, however, that "100% Natural" and "non-GMO" are not equivalent. Specifically, he testified at his deposition that he did not believe the terms were equivalent "because non-GMO is extremely specific about one thing and I – my understanding of the general claim of "All Natural" is that it has many implications."[136] This is confirmed by the studies Benbrook cites, which list multiple possible characteristics that consumers associate with a "natural" label.[137] Plaintiffs' specific theory of liability in this case is that the "100% Natural" label misled consumers and caused them to believe that Wesson Oils contained no genetically modified organisms or GMO ingredients. Under *Comcast*, therefore, Weir must be able to isolate the price premium associated with misleading consumers in that particular fashion. It does not appear from his declaration and deposition testimony that he intends to do so. Rather, it appears he intends merely to calculate the price premium attributable to use of the term "100% Natural" and all of the meanings consumers ascribe to it. This does not suffice under

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[135]Weir Decl., ¶¶ 4, 9.

[136]Hawk Decl., Exh. G at 66.

[137] Benbrook Decl., ¶ 41.

Comcast. *See Vaccarino v. Midland Nat. Life Ins. Co.*, No. 2:11–cv–05858–CAS(MANx), 2014 WL 572365, *7 (C.D. Cal. Feb. 3, 2014 ("In *Comcast*, the plaintiffs advanced four separate theories of antitrust violation, which collectively resulted in subscribers overpaying for cable TV service. The district court only accepted one of these four theories as susceptible of classwide proof. The plaintiffs' method of computing damages, however, did not segregate out the harm caused by each of the four theories of antitrust violation proffered by the plaintiffs. The Supreme Court found that this damages model did not satisfy the requirements of Rule 23(b)(3) because it conflated all four theories of antitrust violation without differentiating between the harms caused by each theory" (citations omitted)).

(c) Conclusion Regarding Predominance

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

ii. Superiority

The second requirement imposed by Rule 23(b)(3) is that a class action be superior to other methods of resolving class members' claims. "Under Rule 23(b)(3), the court must evaluate whether a class action is superior by examining four factors: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in a particular forum; and (4) the difficulties likely to be encountered in the

management of a class action." *Edwards v. City of Long Beach*, 467 F.Supp.2d 986, 992 (C.D. Cal. 2006) (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004)).

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

The second factor likewise favors a finding that a class action is a superior means of litigating these claims. The only litigation of which the court is aware raising the claims asserted here are the cases

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

that are presently pending before the court. These cases were either voluntarily transferred to this jurisdiction by the parties or transferred here by the Panel on Multidistrict Litigation. Given the small recovery that any individual plaintiff can expect, moreover, concentrating the litigation in a single forum is appropriate. Thus, the third factor too favors a finding of superiority.

ConAgra does not address the first three factors. Rather, it focuses on the fourth – the difficulties likely to be encountered in the management of a class action. ConAgra asserts that the case will be unmanageable if the court certifies twelve different state classes, each of which alleges multiple claims.[139] It contends that variations in state law would make a single trial unworkable, as there would have to be different jury instructions and verdict forms for the claims of each state class.[140] Plaintiffs counter that "courts frequently certify classes under the laws of multiple jurisdictions." *In re Static Random Access memory (SRAM) Antitrust Litigation*, 264 F.R.D. 603, 615 (N.D. Cal. 2009).[141] Although ConAgra complains that plaintiffs have not submitted a workable trial plan,[142] the Ninth Circuit has held that "[n]othing in the Advisory Committee Notes [to Rule 23] suggests grafting a requirement for a trial plan onto the rule." *Chamberlain v. Ford Motor Co.*, 402 F.3d 952, 961 n. 4 (9th Cir. 2005). The court notes, however, that it has concerns about

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[139]Opp. Cert. at 36.

[140]*Id.* at 37.

[141]Reply at 28.

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

the manageability of any trial proceeding. Thus, if at some point it determines that some or all of plaintiffs' classes can be certified, it will direct plaintiffs to submit a trial plan for its consideration.[143] *See Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 441 (C.D. Cal. 2007) ("Neither Plaintiff nor her counsel has provided any suggestions – much less a plan – to this Court regarding managing the proposed class action"); *see also Zinser*, 253 F.3d at 1189 ("[The] court cannot rely merely on assurances of counsel that any problems with predominance or superiority can be overcome"). Because the court is not in a position to certify classes now, it need not address the question of a trial plan in any greater detail at this time. It notes simply that absent the additional information concerning the variations in state law discussed elsewhere in this order, it is not in a position to assess how manageable or unmanageable a trial of plaintiffs' claims would be.

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

Because plaintiffs have not demonstrated that common questions predominate over individual

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

issues, and because they have proffered insufficient information concerning variations in the law of the twelve states in which they seek to certify classes to permit the court to determine finally whether a class action is superior, they have not satisfied Rule 23(b)(3).

4. Rule 23(c)(4)

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

'deficiencies in th[e district court's] certification [order].'" *Id.* at *17.

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

III. CONCLUSION

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

DATED: August 1, 2014

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[144]Cert. Motion at 33.

s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 14 2017
MOLLY C. DWYER,
CLERK
U.S. COURT OF APPEALS

ROBERT BRISENO, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. CONAGRA FOODS, INC., Defendant-Appellant.	No. 15-55727 D.C. No. 2:11-cv-05379-MMM-AGR Central District of California, Los Angeles ORDER

Before: W. FLETCHER, CHRISTEN, and FRIEDLAND, Circuit Judges.

The panel has unanimously voted to deny Appellant's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on

whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED.**

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 2 2017
MOLLY C. DWYER,
CLERK
U.S. COURT OF APPEALS

ROBERT BRISENO, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. CONAGRA FOODS, INC., Defendant-Appellant.	No. 15-55727 D.C. No. 2:11-cv-05379-MMM-AGR Central District of California, Los Angeles ORDER

Before: W. FLETCHER, CHRISTEN, and FRIEDLAND, Circuit Judges.

Appellant ConAgra Foods, Inc.'s motion to stay issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41(d)(2)(A). The mandate is stayed for a period not to exceed 90

days pending the filing of the petition for a writ of certiorari in the Supreme Court. If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, the stay shall continue until final disposition of the matter by the Supreme Court.

APPENDIX G

Fed. R. Civ. P. 23 provides in relevant part:

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

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(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

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(2) *Notice*.

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(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

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(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

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