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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

COURTNEY FINE, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

CONAGRA FOODS, INC.,

Defendant.

NO. CV 10-01848 SJO (CFOx)

**ORDER DENYING PLAINTIFF'S MOTION
FOR CLASS CERTIFICATION**

[Docket No. 34]

This matter is before the Court on Plaintiff Courtney Fine's ("Plaintiff") Motion for Class Certification, filed June 18, 2010. Defendant ConAgra Foods, Inc. ("Defendant") filed an Opposition, to which Plaintiff replied. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for July 26, 2010. See Fed. R. Civ. P. 78(b). For the following reasons, Plaintiff's Motion is DENIED.

I. BACKGROUND

Defendant ConAgra Foods ("Defendant") is a manufacturer and distributor of microwave popcorn, a billion-dollar industry. (First Am. Class Action Compl. ("FAC") ¶¶ 16, 34-35.) On September 6, 2007, Defendant issued a release to the public stating it was no longer adding the compound diacetyl, which has been shown to be hazardous to health when heated and inhaled,

1 to its butter-flavored microwave popcorn products. (FAC ¶¶ 36-43.) Since the announcement,
2 Defendant "reformulated" all butter-flavored varieties of Orville Redenbacher's and Act II
3 microwave popcorn in response to consumer uncertainty regarding the safety of Defendant's
4 microwave popcorn. (FAC ¶¶ 38-45.) Defendant also redesigned the packaging for these
5 products to display the words "No Added Diacetyl."¹ (FAC ¶¶ 44-45.)

6 Plaintiff is an individual residing in Los Angeles, California who purchased several of
7 Defendant's butter-flavored microwave popcorn products after Defendant's announcement in
8 September 2007. (FAC ¶ 15.) Plaintiff alleges that she relied on Defendant's claims that there
9 is "no added diacetyl" in the popcorn products when making the purchases. (FAC ¶ 15.) Plaintiff
10 asserts, however, that diacetyl is still present in the products.² (FAC ¶ 15.) Plaintiff further asserts
11 that had she known Defendant's representation regarding the diacetyl was false, she would not
12 have made the purchases. (FAC ¶¶ 15, 50.)

13 On March 15, 2010, Defendant removed the instant litigation from state court pursuant to
14 28 U.S.C. § 1441(a), 28 U.S.C. § 1446, and the Class Action Fairness Act. On March 23, 2010,
15 the Court granted the parties' stipulation, allowing Plaintiff to file a First Amended Complaint. On
16 April 12, 2010, Plaintiff filed the First Amended Complaint, on her own behalf and on behalf of all
17 other persons similarly situated pursuant to Rule 23(b)(2) and Rule 23(b)(3). (FAC ¶ 21.) Plaintiff
18 alleges causes of action for: (1) false and misleading representation of material facts, constituting
19 unfair competition within the meaning of California Business & Professions Code §§ 17200, *et seq.*
20 ("UCL"); and (2) false advertising in violation of Business & Professions Code §§ 17500, *et seq.*

21
22 ¹ Plaintiff alleges that the products on which Defendant places the misleading label include:
23 Orville Redenbacher's Movie Theater Butter, Pour Over Movie Theater Butter, Movie Theater
24 Butter Mini Bags, Butter, Ultimate Butter, Tender White, Old Fashioned Butter, Corn on the Cob,
25 Movie Theater Butter Light, Light Butter, and Organic Butter, as well as ACT II's Butter, Butter
26 Lover's, Light Butter, Xtreme Butter, Movie Theater Butter, 94% Fat Free Butter, Buttery Kettle
27 Corn, and Buttery Cinnamon. (FAC ¶ 10.)

28 ² While Plaintiff herself does not have direct knowledge of the presence of diacetyl in
Defendant's products, Plaintiff relies on the work and statements of several health experts and
alleges that "[k]nown 'substitutes' for diacetyl still contain molecules of diacetyl." (FAC ¶¶ 9, 48-
50.)

1 ("FAL"). (FAC ¶¶ 52-68.) Plaintiff further alleges that she has suffered a monetary loss as a result
2 of Defendant's actions, which were in violation of the Consumer Legal Remedies Act ("CLRA"),
3 Cal. Civ. Code §§ 1750, *et seq.* (FAC ¶¶ 69-79.)

4 Presently before the Court is Plaintiff's Motion for Class Certification. Plaintiff seeks to
5 certify the following statewide class pursuant to Rule 23(a), Rule 23(b)(2), and Rule 23(b)(3):

6 All persons residing in the State of California who purchased Orville
7 Redenbacher's brand Light Butter, Movie Theater Butter Light
8 microwave popcorn, and/or ACT II brand 94% Fat Free Butter, Light
9 Butter, and Butter Lover's microwave popcorn for personal use and
10 not for resale since September 1, 2007.

11 (Pl.'s Mot. 1:11-15.)

12 II. DISCUSSION

13 Whether Plaintiff's Motion for Class Certification is a hybrid motion pursuant to both Rule
14 23(b)(2) and Rule 23(b)(3) or a purely injunctive motion pursuant to Rule 23(b)(2), the analysis
15 remains the same.³ This is because "when a particular action qualifies under another portion of
16 Rule 23(b) as well as Rule 23(b)(3), it should be treated as if it had been brought exclusively under
17 the other provision." 7AA Charles Alan Wright, *et al.*, Fed. Practice & Procedure § 1784.1 (3d ed.
18 2010). Plaintiff argues that her "primary goal is to obtain injunctive relief by way of an order
19 enjoining [Defendant] from its continued practice of making misleading advertising and label claims
20 about its butter flavored microwave popcorn products." (Pl.'s Mot. 2:3-6.) Accordingly, Plaintiff
21 must meet the more demanding common-question and superiority standards of Rule 23(b)(2).

22 23 A. Legal Standard on a Motion for Class Certification

24
25 ³ Rule 23(b)(2) states in pertinent part: "the party opposing the class has acted or refused
26 to act on grounds that apply generally to the class, so that final injunctive relief or corresponding
27 declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Rule
28 23(b)(3) states in pertinent part: "the questions of law or fact common to class members
predominate over any questions affecting only individual members, and . . . a class action is
superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.
R. Civ. P. 23(b)(3).

1 A motion for class certification must fulfill the four prerequisites explicitly stated in Rule
2 23(a). Class certification is only appropriate when:

- 3 (1) [T]he class is so numerous that joinder of all members is
4 impracticable,
- 5 (2) there are questions of law or fact common to the class,
- 6 (3) the claims or defenses of the representative parties are typical of
7 the claims or defenses of the class; and
- 8 (4) the representative parties will fairly and adequately protect the interests
9 of the class.

10 Fed. R. Civ. P. 23(a).

11 1. Standing

12 The Ninth Circuit has held that standing may be addressed before the Rule 23(a) factors
13 as long as the court is not considering a global class settlement. See *Easter v. Am. W. Fin.*, 381
14 F.3d 948, 962 (9th Cir. 2004) ("The district court correctly addressed the issue of standing before
15 it addressed the issue of class certification."); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999)
16 ("Any . . . Article III court must be sure of its own jurisdiction before getting to the merits."). Here,
17 Defendant argues that Plaintiff "has not defined the proposed class such that anyone within it
18 would have standing." (Def.'s Opp'n 6:11-12.)

19 In the Court's Order Denying Defendant's Motion to Dismiss ("Order") dated June 29, 2010,
20 the Court ruled that Plaintiff established standing because she incurred injury as a result of
21 Defendant's allegedly improper conduct. (See Order 3:21-5:15.) Plaintiff's spending money on
22 Defendant's popcorn in reliance of Defendant's placing "No Added Diacetyl" on the packaging was
23 sufficient. (See Order 3:21-5:15.) In the instant Motion, Plaintiff seeks to certify a class that
24 includes "all persons residing in the State of California who purchased [Defendant's] popcorn for
25 personal use and not for resale since September 1, 2007." (Pl.'s Mot.1:11-15.) Plaintiff makes
26 no mention of the proposed class being comprised of members who made the purchase as a
27 *result of* Defendant's allegedly false statements, which is necessary in order to establish standing.
28 (See generally Pl.'s Mot.)

1 Moreover, other courts have held that class definitions "should be tailored to exclude
2 putative class members who lack standing . . . each class member need not submit evidence of
3 personal standing but, nonetheless, a class must be defined in such a way that anyone within it
4 would have standing." *Burdick v. Union Sec. Ins. Co.*, 2009 WL 4798873, at *4 (C.D. Cal. 2009).
5 Accordingly, class certification is improper, given that Plaintiff's proposed class includes many
6 people who may not have relied on Defendant's alleged misrepresentations when making their
7 purchasing decisions.

8 Even if the Court were to find that standing is not an issue in the instant matter, Plaintiff fails
9 to meet all four requirements of Rule 23(a). *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147,
10 160-61 (1982).

11 2. Numerosity

12 Numerosity is not disputed by Defendant in the instant matter, as Defendant agreed to
13 stipulate to the numerosity requirement during the meet and confer process. (Pl.'s Mot. 7:20-22.)

14 3. Commonality

15 Rule 23(a)(2) states that there must be "questions of law or fact common to the class."
16 Fed. R. Civ. P. 23(a)(2). The commonality requirement found in Rule 23(a)(2) is construed
17 permissively. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The existence
18 of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient
19 facts coupled with disparate legal remedies within the class. *Id.*

20 Here, Plaintiff alleges that the commonality requirement of Rule 23(a)(2) is met because
21 this case is "based on a uniform misleading statement made prominently on every box of and
22 package of the subject butter flavored microwave popcorn products sold to members of the class."
23 (Pl.'s Mot. 8:10-12.) Since Plaintiff's claims and the proposed class are based on the same
24 misleading label on the boxes of popcorn, the Court finds that Plaintiff has sufficiently
25 demonstrated commonality pursuant to Rule 23(a)(2).

26
27 4. Typicality
28

1 "The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co.*,
2 457 U.S. at 158 n. 13. "Both serve as guideposts for determining whether the named plaintiff's
3 claim and the class claims are so interrelated that the interests of the class members will be fairly
4 and adequately protected in their absence." *Id.*

5 Defendant, however, argues that Plaintiff is not typical because:

6 Plaintiff has failed to adduce facts suggesting that *other class*
7 *members* have been injured 'by the same course of conduct' that she
8 asserts injured her. There can be no serious question that the vast
9 majority of putative class members here never read (let alone
10 considered) the [Defendant's] statement at issue, do not know what
11 diacetyl is, and do not base their popcorn purchases on diacetyl-
12 related issues.

13 (Def.'s Opp'n 7:20-25, emphasis in original.)

14 The Court agrees. In *Sanchez v. Wal-Mart*, 2009 WL 1514435 (E.D. Cal. 2009), the plaintiff
15 bought a stroller from Wal-Mart, allegedly relying on the defendant's representations that the
16 stroller was "safe, easy to use, of merchantable quality, and fit for its intended and reasonably
17 foreseeable uses." *Sanchez v. Wal-Mart*, 2009 WL 1514435, at *1 (E.D. Cal. 2009). The plaintiff
18 claimed that "were it not for Defendants' false and misleading statements . . . she would not have
19 purchased the \$20 [s]troller. According to [the plaintiff], once she learned of the [s]troller's
20 potential for harm, she had to replace it, and therefore suffered harm." *Id.* The district court in
21 *Sanchez* held that the plaintiff had not met her burden in meeting the requirements of Rule 23
22 because "there are many individual factors that must be examined before determining whether a
23 particular individual's behavior with respect to the [s]troller would have been materially changed"
24 had the defendant's representations been different. *Id.* Here, the facts are very similar. Plaintiff
25 purchased popcorn because of Defendant's allegedly misleading statements regarding diacetyl.
26 (Pl.'s Mot. 5:4-5.) Plaintiff's injury was established due to her reliance on Defendant's statements.
27 (Order 3:21-5:15.) Since Plaintiff seeks to certify a class that would likely include people with
28 varying rationales behind their purchases – many who would, as Defendant points out, purchase

1 popcorn based on factors like flavor or brand – Plaintiff fails to establish that she is a typical
2 representative of the class. (Def.'s Opp'n 7:26.)

3 4. Adequacy of Representative

4 "The adequacy-of-representation requirement tend[s] to merge with the commonality and
5 typicality criteria of Rule 23(a)." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n. 20
6 (1997) (internal citations and quotations omitted). Because the Court finds that Plaintiff is not a
7 typical representative, the Court also finds that Plaintiff is not an adequate representative.

8 III. RULING

9 For the foregoing reasons, Plaintiff's Motion for Class Certification is **DENIED**. Plaintiff is
10 to proceed as an individual. All dates previously set remain.

11 IT IS SO ORDERED.

12 Dated: August 26, 2010.



S. JAMES OTERO
UNITED STATES DISTRICT JUDGE