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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SKYE ASTIANA,

Plaintiff,

v.

BEN & JERRY'S HOMEMADE, INC.,

Defendant.

No. C 10-4387 PJH

**ORDER DENYING MOTION FOR
CLASS CERTIFICATION**

Plaintiff's motion for class certification came on for hearing before this court on November 20, 2013. Plaintiff appeared by her counsel Joseph Kravec and Michael Braun, and defendant appeared by its counsel William Stern. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby DENIES the motion as follows.

BACKGROUND

This is a case filed as a proposed class action on behalf of individuals who purchased ice cream products produced by defendant Ben & Jerry's Homemade, Inc. ("Ben & Jerry's"), including ice cream, frozen yogurt, and popsicles, which contained alkalized cocoa and were labeled "all natural." Plaintiff Skye Astiana claims that both the packaging and the advertising for the Ben & Jerry's ice cream products were deceptive and misleading to the extent that the cocoa was alkalized with a "synthetic" agent.

1 Plaintiff filed the complaint in this action on September 29, 2010, against Ben &
2 Jerry's. On December 8, 2010, plaintiff filed a first amended complaint ("FAC"), alleging six
3 causes of action – "unlawful business practices" in violation of Business & Professions
4 Code § 17200; "unfair business practices" in violation of § 17200; "fraudulent business
5 practices" in violation of § 17200; false advertising, in violation of Business & Professions
6 Code § 17500; restitution based on quasi-contract/unjust enrichment; and common law
7 fraud.

8 On March 28, 2012, the court granted plaintiff's motion for preliminary approval of
9 class action settlement, and also ordered dissemination of notice to the class. The court
10 set the matter for a hearing on final approval on September 12, 2012. On September 4,
11 2012, the Ninth Circuit issued its decision in Dennis v. Kellogg, 697 F.3d 858 (9th Cir.
12 2012), in which it vacated an order granting preliminary approval of settlement, based on its
13 finding that the provision regarding distribution of the unclaimed portion of the settlement
14 fund to a cy pres fund was improper because the cy pres fund was not oriented towards
15 providing the type of consumer remedies sought in the complaint.

16 At the September 12, 2012 hearing in this case, the court denied the motion for final
17 approval, based on, among other things, numerous problems with the claim procedure and
18 the amount requested for fees and costs, and also based on issues related to the Ninth
19 Circuit's ruling in Kellogg.

20 The parties subsequently advised that they were unable to resolve the court's
21 concerns, and the court issued an order on November 21, 2012 denying the motion for final
22 approval and the accompanying motion for fees and costs. At a case management
23 conference on January 31, 2013, the court set deadlines for the class certification motion
24 and for dispositive motions.

25 DISCUSSION

26 A. Legal Standard

27 "Before certifying a class, the trial court must conduct a 'rigorous analysis' to
28 determine whether the party seeking certification has met the prerequisites of [Federal Rule

1 of Civil Procedure] 23." Mazza v. American Honda Motor Co., Inc., 666 F.3d 581, 588 (9th
2 Cir. 2012) (citation and quotation omitted). The party seeking class certification must
3 affirmatively demonstrate that the class meets the requirements of Rule 23. Wal-Mart
4 Stores, Inc. v. Dukes, ___ U.S. ___, 131 S.Ct. 2541, 2551 (2011); see also Gen'l Tel. Co. of
5 Southwest v. Falcon, 457 U.S. 147, 156 (1982). Thus, in order for a plaintiff class to be
6 certified, the plaintiff must prove that he/she meets the requirements of Federal Rule of
7 Civil Procedure 23(a) and (b). As a threshold matter, and apart from the explicit
8 requirements of Rule 23, the party seeking class certification must also demonstrate that
9 an identifiable and ascertainable class exists. Mazur v. eBay Inc., 257 F.R.D. 563, 567
10 (N.D. Cal. 2009).

11 Rule 23(a) requires that plaintiffs demonstrate numerosity, commonality, typicality
12 and adequacy of representation in order to maintain a class. Mazza, 666 F.3d at 588.
13 That is, the class must be so numerous that joinder of all members individually is
14 "impracticable;" there must be questions of law or fact common to the class; the claims or
15 defenses of the class representative must be typical of the claims or defenses of the class;
16 and the class representative must be able to protect fairly and adequately the interests of
17 all members of the class. See Fed. R. Civ. P. 23(a)(1)-(4).

18 If the class is ascertainable and all four prerequisites of Rule 23(a) are satisfied, the
19 court must also find that the plaintiff has "satisf[ied] through evidentiary proof" at least one
20 of the three subsections of Rule 23(b). Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1432
21 (2013). A class may be certified under Rule 23(b)(1) upon a showing that there is a risk of
22 substantial prejudice or inconsistent adjudications from separate actions. Fed. R. Civ. P.
23 23(b)(1). A class may be certified under Rule 23(b)(2) if "the party opposing the class has
24 acted or refused to act on grounds that apply generally to the class, so that final injunctive
25 relief or corresponding declaratory relief is appropriate respecting the class as a whole."
26 Fed. R. Civ. P. 23(b)(2). Finally, a class may be certified under Rule 23(b)(3) if a court
27 finds that "questions of law or fact common to class members predominate over any
28 questions affecting only individual members, and that a class action is superior to other

1 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.
2 23(b)(3).

3 “[A] court’s class-certification analysis . . . may ‘entail some overlap with the merits of
4 the plaintiff’s underlying claim.” Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133
5 S.Ct. 1184, 1194 (2013) (quoting Dukes, 131 S.Ct. at 2551). Nevertheless, “Rule 23 grants
6 courts no license to engage in free-ranging merits inquiries at the certification stage.” Id. at
7 1194-95. “Merits questions may be considered to the extent – but only to the extent – that
8 they are relevant to determining whether the Rule 23 prerequisites for class certification are
9 satisfied.” Id. at 1195. If a court concludes that the moving party has met its burden of
10 proof, then the court has broad discretion to certify the class. Zinzer v. Accuflix Res. Inst.,
11 Inc., 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001).

12 B. Plaintiff’s Motion

13 Through this motion, plaintiff seeks certification of a class pursuant to Rule 23(a) and
14 Rule 23(b)(3).¹ The proposed class is defined as a class of “[a]ll persons who, on or after
15 September 29, 2006, purchased in the State of California Ben & Jerry’s ice cream products
16 that were labeled ‘All Natural’ but contained alkalized cocoa processed with a synthetic
17 ingredient.”

18 Plaintiff argues that all requirements of Rule 23(a) and Rule 23(b)(3) are satisfied.
19 She contends that the class is sufficiently “numerous,” that her claims are “typical” of the
20 claims of the class, that she and her counsel are “adequate,” and that “common questions”
21 exist because she and the class members have all suffered the same injury. She asserts
22 further that common questions predominate as to the UCL claims, and as to the common
23 law fraud and quasi-contract claims, and that individual issues of damages do not
24 predominate. Finally, she argues that a class action is superior to other methods for the
25 adjudication of this controversy.

26 _____
27 ¹ The FAC alleges a nationwide class and a California sub-class, plus two injunctive
28 relief classes, but the present motion seeks a California-only Rule 23(b)(3) damages class.
The court concludes that plaintiff has abandoned the “national class” allegations and the “(b)(2)
class” claims.

1 In opposition, defendant contends that the motion should be denied, because
2 plaintiff has not shown that the class is "ascertainable" or "numerous;" because plaintiff has
3 not shown that she has Article III standing or injury-in-fact; because commonality and
4 predominance are lacking; because plaintiff cannot show that she or her attorneys are
5 "adequate" representatives; and because plaintiff cannot show that a class action is
6 "superior."

7 The court finds that the motion must be denied, for two primary reasons – plaintiff
8 has not established that the class is ascertainable, and she has not established that
9 common issues predominate over individual issues.

10 1. Ascertainability

11 While there is no explicit requirement concerning the class definition in Rule 23,
12 courts have held that the class must be adequately defined and clearly ascertainable
13 before a class action may proceed. See Xavier v. Philip Morris USA Inc., 787 F.Supp. 2d
14 1075, 1089 (N.D. Cal. 2011); Schwartz v. Upper Deck Co., 183 F.R.D. 672, 679-80 (S.D.
15 Cal. 1999); see also DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (identity of
16 class members need not be known at time of certification, but class membership must be
17 clearly ascertainable).

18 "A class definition should be 'precise, objective and presently ascertainable.'"
19 Rodriguez v. Gates, 2002 WL 1162675 at *8 (C.D. Cal. May 30, 2002) (quoting O'Connor v.
20 Boeing North American, Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998)); see also Manual for
21 Complex Litigation, Fourth § 21.222 at 270-71 (2004). That is, the class definition must be
22 sufficiently definite so that it is administratively feasible to determine whether a particular
23 person is a class member. See Xavier, 787 F.Supp. 2d at 1089.

24 Plaintiff does not directly address ascertainability in her moving papers. In the
25 opposition, defendant argues that the proposed class definition does not describe a group
26 of people whose membership in the class can be ascertained in a reliable manner.
27 Defendant contends that because cocoa can be alkalized using one of several alkalis –
28 some of which are "natural" and some of which are "non-natural" (i.e., "synthetic") – it will

1 be necessary to determine which class members bought an ice cream containing alkalized
2 cocoa processed with a synthetic ingredient. Defendant asserts, however, that there is no
3 way to identify which class members bought which type of ice cream, particularly given that
4 Ben & Jerry's is a wholesale manufacturer that does not maintain records identifying the
5 ultimate customers or their purchases.

6 The court agrees with defendant that the class is not sufficiently ascertainable.
7 The class is defined as persons who bought Ben & Jerry's labeled "all natural" which
8 contained alkalized cocoa processed with a synthetic ingredient. However, plaintiff has
9 provided no evidence as to which ice cream contained the allegedly "synthetic ingredient"
10 (assuming that alkali can be considered an "ingredient"). More importantly, plaintiff has not
11 shown that a means exists for identifying the alkali in every class member's ice cream
12 purchases. The packaging labels say only "processed with alkali," because that is all the
13 FDA requires.

14 Defendant uses cocoa that is sourced from as many as 15 different suppliers.
15 Plaintiff contends that one supplier, Barry Callebaut, was the only supplier that provided
16 Ben & Jerry's with alkalized cocoa for use in products where the cocoa powder provided
17 the chocolate base of the ice cream. However, while Barry Callebaut's corporate designee
18 testified that the alkalized cocoa the company provided to Ben & Jerry's was alkalized with
19 synthetic substances, he also testified that he did not know which alkalizing agent was
20 used in every instance. Moreover, other sources provided Ben & Jerry's with "mix-in"
21 ingredients made from alkalized cocoa, which sources did not identify the specific alkalizing
22 agent used in processing the alkalized cocoa. Because plaintiff has not shown that a
23 method exists for determining who, among the many California purchasers of Ben &
24 Jerry's, fits within the proposed class, the class is not ascertainable.

25 2. Standing

26 A second threshold issue for any class action is that the named plaintiff must show
27 that she has been personally injured and has Article III standing. See Lierboe v. State
28 Farm Mut. Auto Ins. Co., 350 F.3d 1018, 1022 (9th Cir. 2003). If the plaintiff lacks a claim

1 in her own right, she cannot represent a class. Schlesinger v. Reservists Comm. To Stop
2 the War, 418 U.S. 208, 216 (1974).

3 Plaintiff does not directly address standing in her moving papers. In its opposition,
4 defendant contends that plaintiff cannot show Article III standing or injury-in-fact.
5 Defendant cites plaintiff's deposition testimony, where she asserted that she consumed all
6 the ice cream she bought, that the products were not tainted, that she did not become ill,
7 and that until she met her attorneys she was not unhappy. Defendant contends that
8 plaintiff's only claim to non-economic injury is that she decided Ben & Jerry's "disrupted my
9 vibe," but argues that "hurt feelings" is not an injury-in-fact, and that it is not susceptible to
10 classwide proof. Defendant also argues that plaintiff's injury is contingent on whether she
11 bought ice cream with "bad alkali," and is thus not certain.

12 Defendant asserts further that plaintiff's only allegation of injury is the payment of a
13 premium for Ben & Jerry's ice cream, see FAC ¶¶ 5, 6, 23, 41, but notes that she testified
14 in her deposition that the price had no bearing on her purchase decisions. Defendant
15 contends that to someone who did not care about the price, paying a premium cannot be
16 an "injury." Moreover, plaintiff testified that she had no idea how much of a premium she
17 paid for Ben & Jerry's as opposed to other ice creams.

18 In response, plaintiff argues that she has standing and injury-in-fact. She cites to
19 her deposition testimony, where she was asked if the allegation in the FAC that she "is
20 willing to and has paid a premium for foods that are all natural and has refrained from
21 buying their counterparts that were not all natural" was a true statement, and she
22 responded, "Yes;" and where she was asked if the statement in the FAC that she paid
23 more for Ben & Jerry's ice cream than she "would have had to pay for other similar ice
24 cream . . . products that were not all natural," and she responded, "Yes." She also points to
25 her response to Interrogatory No. 1, where she stated that she "lost money because she
26 paid more to buy [d]efendant's "All Natural" ice cream . . . than she would have paid for
27 similar ice cream . . . that was not touted as "All Natural."

28 Plaintiff notes that the court previously (in its May 26, 2011 order denying the motion

1 to dismiss) rejected defendant's standing/injury-in-fact argument, stating that if plaintiff did
2 in fact purchase the ice cream based on the representation that it was all-natural, and if that
3 representation proves to be false, then plaintiff will arguably have suffered an injury in fact.
4 Plaintiff claims that the above-cited deposition testimony and interrogatory response show
5 that she did purchase the Ben & Jerry's ice cream products based on the representation
6 that they were all-natural.

7 The court finds that plaintiff has alleged facts sufficient to establish standing, at least
8 for purposes of the present motion. The arguments raised by defendant – particularly
9 regarding whether plaintiff paid a "premium" and regarding what in fact constitutes
10 "premium" ice cream – would more properly be addressed in the context of a dispositive
11 motion, rather than in a motion to dismiss or a motion for class certification.

12 3. Rule 23(a)

13 "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the
14 class whose claims they wish to litigate." Dukes, 131 S.Ct. at 2550. When considering a
15 class certification motion, the trial court must perform a "rigorous analysis" to ensure that
16 "the prerequisites of Rule 23(a) have been satisfied." Id. at 2551. In doing so, and as
17 Dukes clarifies, a district court must examine evidence going to the merits, to the extent
18 examination of that evidence necessarily overlaps with the analysis required to determine
19 whether Rule 23(a) factors have been met. See id. at 2552.

20 a. Numerosity

21 Rule 23(a)(1) requires that a class be so numerous that joinder of all members is
22 impracticable. In order to satisfy this requirement, the plaintiff need not state the exact
23 number of potential class members, nor is there a specific number that is required. See In
24 re Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 350-51 (N.D. Cal. 2005). Rather, the
25 specific facts of each case must be examined. General Tel. Co. v. EEOC, 446 U.S. 318,
26 330 (1980).

27 While the ultimate issue in evaluating this factor is whether the class is too large to
28 make joinder practicable, courts generally find that the numerosity factor is satisfied if the

1 class comprises 40 or more members, and will find that it has not been satisfied when the
2 class comprises 21 or fewer. See, e.g., Celano v. Marriott Int'l, Inc., 242 F.R.D. 544, 549
3 (N.D. Cal. 2007).

4 Here, plaintiff argues that the proposed class is sufficiently numerous because, at a
5 minimum, it includes thousands of members. Defendant argues, however, that plaintiff has
6 not shown numerosity, because merely "buying" ice cream is not enough – plaintiff must
7 show that the consumer bought a flavor that used a "bad" alkali. Defendant asserts that
8 when a putative class is a subset of some larger pool, the trial court may not infer
9 numerosity from the number in the larger pool alone.

10 The court finds it more likely than not that the class is sufficiently numerous. The
11 real problem, however, is ascertainability, because (as explained above) it is impossible to
12 tell who does or does not fit within the class definition.

13 b. Commonality

14 Commonality requires that there be "questions of law or fact common to the class."
15 Fed. R. Civ. P. 23(a)(2). The plaintiff must show that the class members have suffered "the
16 same injury" – which means that the class members' claims must "depend upon a common
17 contention" which is of such a nature that "determination of its truth or falsity will resolve an
18 issue that is central to the validity of each [claim] in one stroke." Dukes, 131 S.Ct. at 2551
19 (quotation and citation omitted). The plaintiff must demonstrate not merely the existence of
20 common questions, but rather "the capacity of a classwide proceeding to generate common
21 answers apt to drive the resolution of the litigation." Id. (quotation omitted) (emphasis in
22 original). Nevertheless, for purposes of Rule 23(a)(2), "[e]ven a single [common] question'
23 will do." Id. at 2556.

24 Plaintiff argues that this case involves questions of law and fact common to the
25 class. She combines her arguments regarding Rule 23(a)(2) commonality with her
26 arguments regarding Rule 23(b)(3) predominance, but the substance of her assertion
27 regarding commonality is that the claims in the case "depend on common factual and legal
28 contentions the determination of which will resolve issues that are central to the validity of

1 [the] claims in a single stroke." She contends that all claims arise from defendant's
2 identical misrepresentations that the Ben & Jerry's ice cream products at issue were "all
3 natural," when in fact those products used alkalized cocoa powder processed with a
4 substance the FDA recognizes as "synthetic."

5 Plaintiff asserts that the common questions include (a) whether defendant labeled its
6 Ben & Jerry's ice cream "all natural;" (b) whether the Ben & Jerry's ice cream products
7 labeled "all natural" used alkalized cocoa that was alkalized with a non-natural alkalizing
8 agent; (c) whether Ben & Jerry's ice cream products that contained cocoa alkalized with a
9 non-natural alkalizing agent are in fact "all natural;" (d) whether Ben & Jerry's "all natural"
10 labeling and failure to comply with 21 C.F.R. § 135.110(f)(2) (by labeling its products
11 "artificially flavored") was likely to deceive class members or the general public;² and (e) the
12 appropriate measure of restitution and/or restitutionary disgorgement.

13 In opposition, defendant makes three main arguments. First, defendant contends
14 that "all natural" has no common meaning – given that food producers, consumers, and the
15 FDA have all failed to define "all natural" in any consistent manner (and in the case of the
16 FDA, declined to attempt to define it) – and in any event cannot result in certification if the
17 ingredient (such as alkalized cocoa) would qualify as "organic." Defendant also notes that
18 in the original complaint, plaintiff attacked all alkalized cocoa, but now alleges that only
19 synthetic alkalis are "non-natural," and also suggests again that all alkalis are "bad."
20 Defendant asserts that if even plaintiff can't decide what is or is not "all natural," the term is
21 evidently not susceptible to common definition or proof.

22 Second, defendant argues that plaintiff has no evidence, let alone common
23 evidence, of deception. Defendant asserts that at trial, plaintiff must show that the term "all
24 natural" is "likely to deceive," which must be shown by common evidence, such as a
25 consumer survey. Defendant notes that plaintiff has provided no expert declarations, and
26 no other evidence supporting her theory that the words "all natural" would cause a

27
28 ² As defendant notes in its opposition, the FAC does not allege violation of 21 C.F.R.
§ 135.110(f).

1 reasonable consumer to anticipate a non-synthetic alkali; and that in lieu of evidence, all
2 she has provided is a selection of articles discussing consumer preferences for products in
3 general, not ice cream, and which in any event are hearsay.

4 Third, defendant asserts that its evidence refutes any common understanding of "all
5 natural." Defendant's expert Dr. Kent Van Liere conducted a consumer survey in which he
6 showed 400 consumers a "Cherry Garcia®" cartoon with either the words "all natural" (test
7 group) or "Vermont's Finest" (control group) on the label. More than half the respondents
8 had no expectation that the ice cream contained alkalized cocoa (although both packages
9 included "cocoa (processed with alkali)" as an ingredient; only 13% shown the "all natural"
10 label expected that the alkali would be "natural," and of that group, only 3% said that would
11 make them more likely to buy. Defendant contends that this is consistent with the findings
12 of its expert Dr. Carol Scott, who found no evidence that consumers who purchased the
13 Ben & Jerry's ice cream products at issue gave significant consideration to whether the ice
14 cream was labeled "all natural," and that in fact, numerous other factors were more likely to
15 motivate their purchases.

16 As noted above, commonality can be established by the presence of a single
17 significant common issue, which in this case, includes the ultimate question whether
18 consumers were likely to be deceived by defendant's labeling and advertising of the Ben &
19 Jerry's ice cream products as "all natural." It is undisputed that defendant labeled some
20 Ben & Jerry's ice cream products as "all natural." It also appears to be undisputed that at
21 least some of the Ben & Jerry's products labeled "all natural" contained cocoa that had
22 been alkalized with a "synthetic" alkalizing agent, and that some contained cocoa that had
23 been alkalized with a "natural" alkalizing agent – although plaintiff has provided no reliable
24 method to determine whether the alkalized cocoa in a given container of ice cream was
25 processed using a "synthetic" or a "natural" alkalizing agent.

26 Defendant has provided evidence suggesting that consumers are not likely to be
27 deceived by the "all natural" label, while plaintiff has presented no evidence in opposition.
28 Thus, plaintiff has not established that this is a common legal or factual question that is

1 susceptible to classwide determination. The related question whether there is a common
2 or accepted meaning of "all natural," while essential to any ultimate resolution of the claims
3 raised in this case, has also not been resolved in this motion. Nevertheless, the court finds
4 that the existence of this question is arguably sufficient to establish Rule 23(a)(2)
5 commonality, as class treatment is likely to generate common answers likely to drive the
6 resolution of the litigation.

7 c. Typicality

8 The third requirement under Rule 23(a) is that the claims or defenses of the class
9 representatives must be typical of the claims or defenses of the class. Fed. R. Civ. P.
10 23(a)(3). The purpose of the typicality requirement is to assure that the interest of the
11 named representative aligns with the interests of the class. See Ellis v. Costco Wholesale
12 Corp., 657 F.3d 970, 984-85 (9th Cir. 2011); Hanon v. Dataproducts Corp., 976 F.2d 497,
13 508 (9th Cir. 1992). "Typicality refers to the nature of the claim or defense of the class
14 representative, and not to the specific facts from which it arose or the relief sought." Id.
15 (quotation omitted).

16 Under the "permissive standards" of Rule 23(a), "representative claims are 'typical if
17 they are reasonably co-extensive with those of absent class members; they need not be
18 substantially identical." Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003). To be
19 considered typical for purposes of class certification, the named plaintiff need not have
20 suffered an identical wrong. Id. Rather, the class representative must be part of the class
21 and possess the same interest and suffer the same injury as the class members. See
22 Falcon, 457 U.S. at 156.

23 Plaintiff argues that her claims are typical of the claims of the class, because all the
24 claims arise from the same course of events – the sale of "all natural" labeled Ben &
25 Jerry's ice cream products which contain alkalized cocoa processed with a synthetic
26 substance. Plaintiff also contends that she and the members of the class were each
27 exposed to identical misrepresentations on the ice cream packages, and thus share the
28 same interests in determining whether the Ben & Jerry ice cream products were

1 deceptively labeled. She asserts that a plaintiff who purchases products within the same
2 product line with the same labeling omissions or claims is "sufficiently similar to" and thus
3 can represent all other class members within that product line.

4 In opposition, defendant argues that the contrast between what plaintiff testified to
5 in her deposition, and what Dr. Van Liere's consumer survey showed, is "glaring." Plaintiff
6 testified that nothing mattered except the words "all natural" on the label, whereas 97% of
7 consumers in Dr. Van Liere's survey responded that it did not matter if the product
8 contained cocoa processed with a synthetic alkali. Defendant also notes that plaintiff
9 complains about her "vibe" being "disrupted" upon learning from class counsel that Ben &
10 Jerry's might have used a "synthetic" alkali, but that she provides no evidence that other
11 consumers shared this view. Moreover, they note that she is suing over many ice cream
12 products, including 27 that she never purchased, and argue that her claim cannot be
13 typical of those of consumers who purchased products she did not purchase.

14 The court finds that plaintiff has not established that her claims are typical of those
15 of the class, in part because she has not identified an ascertainable class. It is true that all
16 purchasers of Ben & Jerry's ice cream were exposed to the same package labeling, but
17 that alone is not sufficient to establish that plaintiff's claims of having been deceived are
18 typical of the claims of the class, given that the class is not sufficiently ascertainable.

19 d. Adequacy

20 The fourth requirement under Rule 23(a) is adequacy of representation. The court
21 must find that named plaintiff's counsel is adequate, and that the named plaintiff(s) can
22 fairly and adequately protect the interests of the class. To satisfy constitutional due
23 process concerns, unnamed class members must be afforded adequate representation
24 before entry of a judgment which binds them. See Hanlon v. Chrysler Corp., 150 F.3d
25 1011, 1020 (9th Cir. 1998).

26 Legal adequacy is determined by resolution of the question whether the named
27 plaintiffs and their counsel have any conflicts with class members; and the question
28 whether the named plaintiffs and their counsel will prosecute the action vigorously on

1 behalf of the class. Id. Generally, representation will be found to be adequate when the
2 attorneys representing the class are qualified and competent, and the class
3 representatives are not disqualified by interests antagonistic to the remainder of the class.
4 Lerwill v. Inflight Motion Pictures, 582 F.2d 507, 512 (9th Cir. 1978).

5 Plaintiff argues that she is an adequate representative because she is a member of
6 the class she seeks to represent, shares the same claims and interest in obtaining relief as
7 the other class members, and has no conflicts of interest with other class members. She
8 asserts that she has also demonstrated her adequacy through her participation thus far in
9 this litigation, and was found to be an adequate representative in another food labeling
10 case (represented by the same counsel). Plaintiff contends that proposed class counsel
11 are also adequate, as they are qualified, experienced, and generally able to conduct the
12 proposed litigation as required by Rule 23(g).

13 The plaintiff's burden of showing adequacy is fairly minimal, and she has arguably
14 met it here. Defendant essentially makes only one argument in opposition – that plaintiff's
15 refusal to disclose the details of her settlement with the defendant in another proposed
16 class action (where certification was denied) makes her an inadequate representative.

17 4. Rule 23(b)

18 Under Rule 23(b)(3), a plaintiff must show that "the questions of law or fact common
19 to class members predominate over any questions affecting only individual members," and
20 that "a class action is superior to other available methods for fairly and efficiently
21 adjudicating the controversy. Fed. R. Civ. Pro. 23(b)(3). Matters pertinent to the Rule
22 23(b)(3) inquiry include the class members' interests in individually controlling the
23 prosecution or defense of separate actions, the extent and nature of any litigation
24 concerning the controversy already begun by or against class members, the desirability or
25 undesirability of concentrating the litigation of the claims in the particular forum, and the
26 likely difficulties in managing a class action. Id.

27 a. Predominance of common questions

28 The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are

1 sufficiently cohesive to warrant adjudication by representation." AmChem Prods., Inc., v.
2 Windsor, 521 U.S. 591, 623 (1997). This inquiry requires the weighing of the common
3 questions in the case against the individualized questions, which differs from the Rule
4 23(a)(2) inquiry as to whether the plaintiff can show the existence of a common question of
5 law or fact. See Dukes, 131 S.Ct. at 2556.

6 In addition, however, the predominance analysis under Rule 23(b)(3) is more
7 stringent than the commonality requirement of Rule 23(a)(2). Thus, to satisfy the
8 predominance inquiry, it is not enough to establish that common questions of law or fact
9 exist, as it is under Rule 23(a)(2)'s commonality requirement. Indeed, the analysis under
10 Rule 23(b)(3) "presumes that the existence of common issues of fact or law have been
11 established pursuant to Rule 23(a)(2)." Hanlon, 150 F.3d at 1022.

12 Rule 23(b)(3) focuses on "the relationship between the common and individual
13 issues." Id. The inquiry is more rigorous as it "tests whether proposed classes are
14 sufficiently cohesive to warrant adjudication by representation." AmChem Prods., 521
15 U.S. at 623-24. Under the predominance inquiry, "there is clear justification for handling
16 the dispute on a representative rather than an individual basis" if "common questions
17 present a significant aspect of the case and they can be resolved for all members of the
18 class in a single adjudication" Hanlon, 150 F.3d at 1022, quoted in Mazza, 666 F.3d
19 at 589.

20 Considering whether questions of law or fact common to class members
21 predominate begins with the elements of the underlying causes of action. See Stearns v.
22 Ticketmaster Corp., 655 F.3d 1013, 1020 (9th Cir. 2011). Here, plaintiffs allege six causes
23 of action – three claims under § 17200, one claim under § 17500, a claim for common law
24 fraud, and a claim for restitution/quasi-contract.

25 Plaintiff contends that common questions predominate as to all six claims, and that
26 individual issues of damages do not predominate. First, with regard to the claims under
27 § 17200 and § 17500, plaintiff argues (a) that common issues predominate as to the
28 "unlawful" business practices claim because she will be able to establish through common

1 evidence that the "all natural" claims are false and misleading to consumers; (b) that
2 common issues predominate as to the "unfair" business practices claim because the court
3 must weight the utility of defendant's conduct against the gravity of the harm to the alleged
4 victim, an inquiry plaintiff asserts is common to all members of the class; and (c) that
5 common issues predominate as to the "fraudulent" business practices claim and false
6 advertising claim because plaintiff's own reliance on defendant's representation caused
7 her injury, and because she can show that members of public are "likely to be deceived,"
8 but (under Stearns) need not show individualized reliance as to the other class members.

9 With regard to the common law fraud claim, plaintiff asserts that common issues
10 predominate because the elements of the fraud claim (misrepresentation of a material fact,
11 knowledge of falsity, intent to deceive and to induce reliance, justifiable reliance, and
12 resulting damage) can all be proved from common evidence that defendant
13 misrepresented that the Ben & Jerry's ice cream products were "all natural;" that the "all
14 natural" statement is material to the average consumer; that defendant knew the ice cream
15 was not "all natural;" that defendant intended to deceive consumers about the nature of its
16 ingredients; that plaintiff justifiably relied on defendant's "all natural" misrepresentation;
17 and that plaintiff and the class members were damaged by buying a product that was not
18 "all natural."

19 With regard to the claim for restitution based on quasi-contract, plaintiff contends
20 that this claim can be proved by evidence of receipt and unjust retention of a benefit at the
21 expense of another, which she asserts is the same common evidence referenced above.
22 Finally, plaintiff argues that individual issues of damages do not predominate, because
23 damages can be measured from defendant's record of sales, profits, and prices for Ben &
24 Jerry's ice cream. Plaintiff contends that an opinion from a damages expert is not required
25 at the class certification stage, particularly where losses can be determined by a "purely
26 mechanical process" or a "mathematical calculation."

27 Plaintiff asserts that restitutionary disgorgement of defendant's profits can be
28 calculated using "simple math" based on the financial records of Ben & Jerry's showing

1 what its sales, profits, and costs were on the products at issue. For example, she claims
2 she can get sales information in California "through subpoenas of retailers or from retail
3 tracking servicers . . . who gather and sell point-of-sales data, including products sold, the
4 stores sold at, and the prices paid."

5 In its opposition, defendant argues that common issues do not predominate
6 because reliance, materiality, and causation are all inherently individual; because
7 entitlement to monetary relief raises inherently individual issues; and because proving a
8 violation of FDA "policy" or FDA regulations raises individual issues.

9 First, defendant asserts that reliance, materiality, and causation are all inherently
10 individual, and plaintiff has no evidence of any of these being common factors, let alone
11 that they predominate. For example, defendant contends, its experts have established
12 that consumer choice is affected by many different factors, and plaintiff has no evidence
13 to show that "all natural" has any uniform meaning or that it would have any major impact
14 on a consumer's decision to purchase (or not to purchase) a particular brand of ice cream.
15 Defendant also contends that likelihood of confusion must be "probable," not just
16 "possible," and that while plaintiff provides no evidence of likelihood of confusion, the
17 study conducted by defendant's expert shows that only 3% of consumers who saw "all
18 natural" on the packaging expected that the alkali used to process the cocoa was
19 "natural."

20 Defendant argues that the only way to test materiality and reliance would be to
21 determine how much each consumer would have de-valued the ice cream products given
22 the alleged presence of potassium carbonate – the "synthetic" alkalizing agent. However,
23 defendant asserts, this cannot be done on a classwide basis, because consumer choice is
24 affected by myriad factors, as reflected in the report of its expert Dr. Scott.

25 In its second main argument, defendant asserts that entitlement to monetary relief
26 raises inherently individual issues. As an initial matter, defendant notes that while plaintiff
27 claims that restitution and damages can be proven on a price-premium theory from data of
28 "average retail prices," she has provided no evidence supporting this assertion – in

1 particular, no expert testimony in support. Defendant contends that under Comcast,
2 where a plaintiff fails to submit expert testimony, he/she cannot demonstrate that common
3 questions predominate.

4 As for plaintiff's claim that it is a matter of "simple math" to calculate damages
5 based on Ben & Jerry's sales figures, defendant responds that at most, Ben & Jerry's
6 sales figures show only aggregate dollar amounts and numbers of units sold at wholesale
7 – not who bought them, how many units each class member bought, or which alkali a
8 particular flavor used. Defendant also asserts that the class is overbroad, because at
9 most only 13% of consumers surveyed expected that the "all natural" label meant that the
10 alkali was "natural" and only 3% said it would affect their purchasing decision. Finally,
11 defendant contends that a remedy based on "average" prices, which is what plaintiff
12 seems to be suggesting, would alter defendant's substantive right to pay damages that are
13 reflective of its actual liability.

14 More importantly, defendant argues, the evidence shows that no one paid a
15 premium for the "all natural" Ben & Jerry's ice cream, as Ben & Jerry's charges wholesale
16 customers the same price regardless of flavor and regardless of the contents of the label.
17 Defendant cites to the report of its marketing expert Dr. Scott, who found that Ben &
18 Jerry's did not charge more for ice cream labeled "all natural" than it did for ice cream
19 without that label; that there was no difference at the retail level between the two; that
20 when Ben & Jerry's removed the "all natural" label from the ice cream packages, the
21 prices did not decrease (neither the wholesale nor the retail prices) as one would have
22 anticipated; and there is no support for plaintiff's speculation that "all natural" ice creams
23 command a premium of \$0.50 to \$0.75 per container.

24 In its third main argument, defendant contends that proving a violation of FDA
25 "policy" raises inherently individualized issues. Defendant argues that the FDA's "policy"
26 has two components – (a) nothing artificial or synthetic (including color additives) and (b)
27 the thing added would not be expected to be in food. Defendant contends that plaintiff
28 cannot show either element, as alkali is merely a processing aid, used to raise the pH –

1 not an ingredient or flavoring agent – and plaintiff has submitted no evidence showing that
2 a synthetic alkali is "not normally to be expected."³

3 Section 17200 prohibits “any unlawful, unfair or fraudulent business act or practice
4 and unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code § 17200.
5 The statute is phrased in the “disjunctive,” and, as a result, is violated where a defendant's
6 act or practice is unlawful, unfair, or fraudulent. Prata v. Super. Ct., 91 Cal. App. 4th 1128,
7 1137 (2001). Likewise, § 17500 broadly prohibits the dissemination of advertising that is
8 deceptive, untrue, or misleading. Cal. Bus. & Prof. Code § 17500; Jolley v. Chase Home
9 Finance, LLC, 213 Cal. App. 4th 872, 906-907 (2013).

10 Relief under § 17200 and § 17500 is available “without individualized proof of
11 deception, reliance and injury,” so long as the named plaintiffs demonstrate injury and
12 causation. Mass. Mut. Life Ins. Co. v. Sup. Ct., 97 Cal. App. 4th 1282, 1289 (2002); see
13 also In re Tobacco II Cases, 46 Cal. 4th 298, 326-27 (2009). Moreover, under these
14 statutes, only the named plaintiffs are required to establish reliance and causation, not
15 each class member. See Astiana v. Kashi Co., 291 F.R.D. 493, 504 (S.D. Cal. 2013);
16 Thurston v. Bear Naked, Inc., 2013 WL 5664985 at * 7 (S.D. Cal. July 30, 2013).

17 In this case, however, the court need not consider all the elements of each of these
18 claims, as all claims asserted in the FAC have "damages" as an element, and plaintiff has
19 not established that common issues predominate such that there is a classwide method of
20 granting relief.

21 Under the UCL, a court may grant a class restitution as a form of relief. Colgan v.
22 Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 694 (2006); Cal. Bus. & Prof. Code
23 §§ 17203, 17535. Restitutionary relief is an equitable remedy, and its purpose is “to
24 restore the status quo by returning to the plaintiff funds in which he or she has an

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26 ³ In addition, with regard to the new "flavoring" claim, defendant asserts (i) that it was
27 not pled, (ii) that plaintiff previously disclaimed it as inapplicable, (iii) that if a "bad alkali" is a
28 "flavor" then so too is a "good alkali," and (iv) that it is wrong, as even plaintiff admits in the ¶
14 of the FAC that the function of the alkali is not to impart flavor but to neutralize the acids
and alter the pH level of the beans. These arguments, while legitimate, do not have any
bearing on the court's decision regarding class certification.

1 ownership interest.” Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149
2 (2003); see also Cortez v. Purolator Air Filtration Products Co., 23 Cal. 4th 163, 177
3 (2000). The form of restitutionary relief authorized by California law has two purposes:
4 returning money unjustly taken from the class, and deterring the defendant from engaging
5 in future violations of the law. Colgan, 135 Cal. App. 4th at 695.

6 While a court of equity "may exercise its full range of powers in order to accomplish
7 complete justice between the parties" when awarding restitution, the restitution awarded
8 must be a "quantifiable sum," and the award must be supported by substantial evidence.
9 Colgan, 135 Cal. App. 4th at 698, 700; Cortez, 23 Cal. 4th at 178. Thus, the restitution
10 awarded to class members must correspond to a measurable amount representing the
11 money that the defendant has acquired from each class member by virtue of its unlawful
12 conduct. Colgan, 135 Cal. App. 4th at 697-98. Unlawful profits unfairly obtained can
13 provide a measure for recovery, but only "to the extent that these profits represent monies
14 given to the defendant or benefits in which the plaintiff has an ownership interest." Korea
15 Supply, 29 Cal. 4th at 1148.

16 In Leyva v. Medline Indus., Inc., 716 F.3d 510 (9th Cir. 2013), one of the cases on
17 which plaintiff relies, the Ninth Circuit acknowledged that under the Supreme Court's
18 recent decision in Comcast, the plaintiffs must be able to show that their damages
19 stemmed from the defendant's actions that created the legal liability. Id. at 514. However,
20 the Ninth Circuit noted that in the case before it, if the class members proved the
21 defendant's liability, damages would be "calculated based on the wages each class
22 member lost due to" the defendant's unlawful practices. In other words, the damages in
23 that case were ascertainable and quantifiable.

24 One method of quantifying the amount of restitution to be awarded is computing the
25 effect of unlawful conduct on the market price of a product purchased by the class.
26 Colgan, 135 Cal. App. 4th at 698-99. This measure of restitution contemplates the
27 production of evidence that attaches a dollar value to the "consumer impact or advantage"
28 caused by the unlawful business practices. Id. at 700. Restitution can then be calculated

1 by taking the difference between the market price actually paid by consumers and the true
2 market price that reflects the impact of the unlawful, unfair, or fraudulent business
3 practices. Expert testimony may be necessary to determine the amount of price inflation
4 attributable to the challenged practice. Id.

5 Further, the first step in any damages study is "the translation of the legal theory of
6 the harmful event into an analysis of the economic impact of that event." Comcast, 133
7 S.Ct. at 1435. "[A]t the class certification stage (as at trial), any model supporting a
8 plaintiff's damages case must be consistent with its liability case." Id. at 1433. Thus,
9 under Comcast, a court can certify a Rule 23(b)(3) class only if there is evidence
10 demonstrating the existence of a classwide method of awarding relief that is consistent
11 with the plaintiffs' theory of liability. Forrand v. Federal Exp. Corp., 2013 WL 1793951, at
12 *3 (C.D. Cal. Apr. 25, 2013); see also Roach v. T.L. Cannon Corp., 2013 WL 1316452 at
13 *3 (N.D.N.Y. March 29, 2013).

14 Whichever way one approaches it, plaintiff has not met her burden of showing that
15 there is a classwide method of awarding relief that is consistent with her theory of
16 deceptive and fraudulent business practices, false advertising, or common law fraud (or
17 the alternative theory of restitution based on quasi-contract).

18 Plaintiff has not offered any expert testimony demonstrating that the market price of
19 Ben & Jerry's ice cream with the "all natural" designation was higher than the market price
20 of Ben & Jerry's without the "all natural" designation. Thus, by definition, there is no
21 evidence showing how much higher the price of one was than the other. More
22 importantly, plaintiff has not offered any expert testimony demonstrating a gap between
23 the market price of Ben & Jerry's "all natural" ice cream and the price it purportedly
24 should have sold for if it had not been labeled "all natural" – or any evidence
25 demonstrating that consumers would be willing to pay a premium for "all natural" ice cream
26 that was made with cocoa alkalized with a "natural" alkali, and did in fact pay such a
27 premium.

28 Ben & Jerry's does not sell retail, and does not set retail prices. Establishing a

1 higher price for a comparable product would be difficult because prices in the retail market
2 differ and are affected by the nature and location of the outlet in which they are sold. See
3 Red v. Kraft Foods, Inc., 2012 WL 8019257 at *11 (C.D. Cal. Apr. 12, 2012). Moreover,
4 individualized awards of monetary restitution would require individualized assessments of
5 damages based on how many packages of ice cream each class member purchased.
6 See Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 541 (N.D. Cal. 2012); see also
7 Red, 2012 WL 8019257 at *11 (common questions did not predominate due to the
8 individualized nature of the damages calculations).

9 As noted above, under Comcast, the plaintiff is required to provide "evidentiary
10 proof" showing a classwide method of awarding relief that is consistent with plaintiff's
11 theory of liability. See 133 S.Ct. at 1432. Here, however, plaintiff has provided no
12 damages evidence. More importantly, her failure to offer a damages model that is capable
13 of measurement across the entire class for purposes of Rule 23(b)(3) bars her effort to
14 obtain certification of the class. The fact that plaintiff may have established that common
15 questions predominate with regard to some elements of some of the claims, is not
16 sufficient to support certification.

17 b. Superiority

18 Rule 23(b)(3) also requires the court to determine whether "a class action is
19 superior to other available methods for the fair and efficient adjudication of the
20 controversy, based on the following nonexclusive factors:

21 (A) the interest of members of the class in individually controlling the
22 prosecution. . . of separate actions; (B) the extent and nature of any litigation
23 concerning the controversy already commenced by. . . members of the class;
24 (C) the desirability. . . of concentrating the litigation of the claims in the
25 particular forum; (D) the difficulties likely to be encountered in the
26 management of a class action.

27 Fed. R. Civ. P. 23(b)(3). Plaintiff argues that these factors support class certification here.

28 In light of the finding that plaintiff has not identified an ascertainable class, and that
common issues do not predominate, a class action is plainly not a superior method of
adjudication of the controversy.

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CONCLUSION

In accordance with the foregoing, the court finds that plaintiff's motion for class certification must be DENIED.

IT IS SO ORDERED.

Dated: January 7, 2014



PHYLLIS J. HAMILTON
United States District Judge