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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

YANIRA ALGARIN, on Behalf of
Herself and All Others Similarly
Situating,

Plaintiff,

v.

MAYBELLINE, LLC, A New York
Limited Liability Company, dba
MAYBELLINE NEW YORK,

Defendants.

Civil No.12cv3000 AJB (DHB)

ORDER DENYING MOTION FOR
CLASS CERTIFICATION

[Doc. Nos. 63, 67]

This action arises out of the allegedly deceptive nature Defendant Maybelline, LLC’s (“Maybelline”) labels and advertises its Superstay 24HR product line. Plaintiffs, Yanira Algarin (“Algarin”) and Patsy Murdock (“Murdock”) (collectively “Plaintiffs”), bring this putative class action pursuant to California’s Unfair Competition Law (“UCL”) and California’s Legal Remedies Act “CLRA”) seeking both monetary and injunctive relief. (Doc. No. 47.) Presently before the Court is Plaintiffs’ motion for class certification. (Doc.

1 Nos. 63, 67).¹ The Court heard oral arguments on April 23, 2014 and took the matter under
2 submission. For the following reasons, Plaintiffs' motion is DENIED.

3 **I. BACKGROUND**

4 **A. Factual Background**

5 Maybelline manufactures, markets, sells and distributes SuperStay 24HR Lipcolor,
6 a line of lipcolors, and SuperStay 24HR Makeup, a line of skin foundations (collectively the
7 "Class Products"). (Doc. No. 47 at 1.) The Lipcolor features the label "SuperStay 24,"
8 "Micro-Flex Formula," "No Transfer," and "Up to 24HR Wear." (Doc. No. 63, Ex. 10.)
9 The Makeup features the Label "SuperStay Makeup 24HR," "Micro-Flex Formula," "Zero-
10 Transfer," and "24HR Wear." (*Id.*) Though the class products are also advertised as
11 makeup that provides "flexible, breathable, all day comfort," that withstands "heat, sweat
12 and humidity," Plaintiffs take the most issue with the 24 hour/no transfer claim.

13
14 Plaintiff Algarin purchased the SuperStay Lipcolor for \$10.00 in reliance on the
15 claimed 24 hour staying power. Plaintiff Murdock purchased the SuperStay Makeup for
16 \$12.00 also in reliance on the claimed 24 hour coverage. (Doc. No. 47 at 5.) Both Plaintiffs
17 gave full credence to the claimed 24 hour duration and were thus willing to pay a premium
18 for that purported benefit. (*Id.* at 9.) Both Plaintiffs used the products as directed and
19 needless to say, were decidedly unimpressed. Plaintiffs were exasperated that the products
20 failed to live up to the representations as "neither the lipcolor nor the foundation lasted 24
21 hours, or anywhere near 24 hours" Had the two Plaintiffs known the "truth" about the
22 "premium priced" Class Products, they would have purchased less expensive options. (*Id.*)
23 Plaintiffs allege that Maybelline continues to deceptively convey through its advertising and
24 labeling that: "SuperStay 24HR Products, with their 'micro-flex formula,' will not 'transfer'
25 and will 'stay' on for '24 hours.'" (*Id.* at 8-9) Plaintiffs were compelled to act on behalf of
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27
28 ¹ Document 63 is the sealed version of Plaintiffs' motion and document 67 is the public redacted version. Future citations in this order in this Order will refer only to document 63.

1 themselves and the class to prevent Maybelline from profiting further off of this allegedly
2 deceptive practice.

3 Maybelline allows dissatisfied consumers to make their complaints known to the
4 company, and in some circumstances will issue a refund, through its Refund Program. (Doc.
5 No. 69 at 21.) According to counsel, a consumer may obtain more information on the
6 Program by visiting Maybelline’s online website. From there, she may write to Maybelline
7 and if she expresses dissatisfaction (performance or otherwise) she may receive compensa-
8 tion from Maybelline. Between the Products’ launch dates and mid-2013, approximately
9 2,700 consumers contacted Maybelline regarding the lipcolor and 700 regarding the
10 makeup. (Decl. of Patricia Erin DeVincenzo (“DeVincenzo Decl.”), Doc. No. 69, Ex. A.)
11 Of these communications, 604 were performance complaints about the lipcolor and 97 about
12 the makeup. The median compensation for the lipcolor is \$10.00 and for the makeup is
13 \$11.00. (*Id.* at ¶ 7, 8, 10, 11(e)-(h).)

14 **B. Procedural Background**

15 Plaintiff Algarin filed the instant action with this Court on December 18, 2012, suing
16 only over the lipcolor line. Plaintiff Murdock filed her action in the Northern District of
17 California, suing for the makeup line. Attorneys for both Plaintiffs sought leave to file a
18 Second Amended Complaint (“SAC”) to consolidate the two cases in this district. The
19 Court granted that motion and Plaintiffs filed their SAC on September 19, 2013. (Doc. No.
20 47.)
21

22 Plaintiffs claim the labels are deceptive, false, and/or misleading. According to
23 named Plaintiffs, the labels and representations featured on the Class Products leads the
24 reasonable average consumer to believe that the product she is purchasing will *actually*
25 remain on her face for 24 hours.² (Doc. No. 63 at 4-7.) These representations are further
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27
28 ² Though this Order will may use gender-specific pronouns when referring to the
average consumer of the Class Products, the Court is not commenting upon who may or
may not be the actual purchasers.

1 reinforced by Maybelline’s extensive advertising campaign featuring the “long-wearing”
2 benefits of the Class Products. (*Id.* at 6.) Plaintiffs claim these representations are false, as
3 the Class Products do not actually last for 24 hours. Maybelline, as the manufacturer,
4 seller/distributor, knew or should have known the products do not last 24 hours and should
5 have disclosed that information. (Doc. No. 47 at 9.) According to Plaintiffs, they, along
6 with the purported class members were deceived and will continue to be deceived, by the
7 alleged misrepresentations unless the Court certifies the class and allow the class to seek
8 injunctive relief. Moreover, Plaintiffs and class members suffered harm, entitling them to
9 damages. (Doc. No. 63 at 3.)

10
11 Because of the Class Product’s deceptive labels and advertisements, Maybelline is
12 able to charge a “hefty price premium.” (*Id.* at 6.) The Lipcolor retails for approximately
13 \$10.00-\$12.00, which is \$1.00-\$1.50 higher than other Maybelline products. The Makeup
14 retails for approximately \$11.00-\$12.00, which is \$1.00-\$3.00 higher than other Maybelline
15 foundations. (*Id.* at 6-7.) Plaintiffs attribute this price premium solely to the alleged
16 misrepresentations.

17 Plaintiffs claim “[t]his is a textbook case for class certification” and seek certification
18 under both Rule 23(b)(2) and Rule 23(b)(3). (Doc. Nos. 63) A hearing was held on this
19 matter on April 24, 2014, where the Parties addressed a number of concerns and discussion
20 points the Court had set prior. (*See* Doc. No. 74.) The Court took the matter under
21 submission and this Order follows.

22 **II. LEGAL STANDARD**

23 **A. Class Certification**

24 Federal Rule of Civil Procedure governs class actions. The party seeking certification
25 must provide facts sufficient to satisfy the requirements of Rule 23(a) and (b). “Before
26 certifying a class, the trial court must conduct a ‘rigorous analysis’ to determine whether the
27 party seeking certification has met the prerequisites of [Rule] 23.” *Mazza v. American*
28 *Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks and

1 citation omitted). Rule 23(a) requires that plaintiffs demonstrate numerosity, commonality,
2 typicality and adequacy of representation in order to maintain a class. *Id.* If the court finds
3 the action meets the requirements of Rule 23(a), the court then considers whether the class
4 is maintainable under Rule 23(b). In the instant matter, Plaintiffs seek certification under
5 both 23(b)(2) and 23(b)(3).

6 Rule 23(b)(2) applies when “the party opposing the class has acted or refused to act
7 on grounds that apply generally to the class, so that final injunctive relief or corresponding
8 declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).
9 Claims for monetary relief may not be certified under Rule 23(b)(2), at least where the
10 monetary relief is not incidental to the requested injunctive or declaratory relief. Instead,
11 individualized monetary claims belong in Rule 23(b)(3), “with its procedural protections of
12 predominance, superiority, mandatory notice, and the right to opt out.” *Wal-Mart Stores*
13 *Inc. v. Dukes*, - U.S. -, 131 S. Ct. 2541, 2545 (2011). Rule 23(b)(3) requires the court to find
14 that questions of law or fact common to class members predominate over any questions
15 affecting only individual members, and that a class action is superior to other available
16 methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).
17

18 The merits of class members’ substantive claims are highly relevant when determining
19 whether to certify a class. It is not correct to say a district court may consider the merits to
20 the extent that they overlap with certification issues; rather, “a district court *must* consider
21 the merits if they overlap with the Rule 23(a) requirements.” *Ellis v. Costco Wholesale*
22 *Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citing *Dukes*, 131 S. Ct. at 2553.) Nevertheless,
23 the district court does not conduct a mini-trial to determine if the class “could actually
24 prevail on their claims.” *Id.*

25 **B. UCL and CLRA**

26 “The primary purpose of the unfair competition law . . . is to protect the public from
27 unscrupulous business practices.” *Consumers Union of U.S., Inc. v. Alto-Dena Certified*
28 *Dairy*, 4 Cal. App. 4th 964, 975 (Cal. Ct. App. 1992). A business practice need only meet

1 one of the three criteria (unlawful, unfair, or fraudulent) to violate the UCL. *McKell v.*
2 *Wash. Mut. Inc.*, 142 Cal. App. 4th 1457, 1471 (Cal. Ct. App. 2006). The UCL prohibits
3 similarly “unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code §
4 17200. Advertising is broadly defined to include virtually any statements made in
5 connection with the sale of goods or services, including statements and pictures of labels.
6 *See e.g., Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008). Advertising
7 that is likely to deceive the reasonable consumer violates the false advertising law. *Id.* at
8 938. “A UCL action is equitable in nature, damages cannot be recovered.” *In re Tobacco*
9 *II Cases*, 46 Cal. 4th 298 (2009). Recovery is thus limited to injunctive relief and
10 restitution. *Id.*

11
12 Likewise, a defendant is liable under the CLRA if it misrepresents that its goods
13 possess certain characteristics, uses, or benefits that they do not have or advertises goods
14 with the intent not to sell them as advertised. Cal. Civ. Code § 1770(a)(5), (7), (9) and (16).

15 **III. DISCUSSION**

16 Plaintiffs must provide sufficient facts to show the requirements of Rule 23(a) are
17 satisfied and that class treatment is appropriate under Rule 23(b). Maybelline makes several
18 objections to class certification and has provided expert testimony and unrebutted evidence
19 in support. The Court had a number of initial reservations regarding class certification and
20 after further consideration of the briefs filed in support and opposition, as well as oral
21 arguments from both parties, the Court’s reservations were confirmed. The Court is
22 persuaded by Maybelline’s contentions and the objective evidence before it. The Court
23 finds certification improper given the numerous deficiencies present in this case.

24 **A. The Proposed Class**

25 Plaintiffs define the class as: “[a]ll California consumers who purchased SuperStay
26 24HR Lipcolor and/or SuperStay 24HR Makeup for personal use until the date notice is
27 disseminated.”
28

1 As an initial matter the Court expressed concern over this inclusive definition. Given
2 the number of differences between the two products, including but not limited to, pricing
3 differences, claims differences³, labeling differences, and ultimately merits differences, the
4 Court questioned whether creating subclasses would be appropriate. After addressing this
5 matter during the hearing, counsel for Plaintiffs claimed that one comprehensive class is
6 viable though they would not object to creating subclasses. Ultimately however, the Court
7 finds that even parsing out the two subclasses would still not address all of the deficiencies
8 precluding class certification.

9
10 **B. The UCL’s Reasonable Consumer and CLRA’s Reliance and Materiality**
11 **Standards**

12 In 2004, California voters passed Proposition 64 which amended the UCL to allow
13 private suits only by a plaintiff “who has suffered injury in fact and has lost money or
14 property *as a result* of . . . unfair competition.” Cal. Bus. & Prof. Code § 17204 (emphasis
15 added); *In re Tobacco II*, 46 Cal. 4th 298, 314 (Cal. 2009). While claims that sound in fraud
16 would generally require Plaintiffs to prove reliance, plaintiffs pursuing a UCL claim need not
17 prove that each member of the class relied on the allegedly fraudulent misrepresentation.
18 Instead, California law only requires plaintiffs “show that members of the public are likely
19 to be deceived.” *Tobacco II*, 46 Cal. 4th at 312. As such, Plaintiff need only show that the
20 “reasonable consumer” is likely to have been deceived by the challenged business practices
21 or advertising. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). The focus of the
22 inquiry is on the “reasonable consumer who is a member of the target population. *Lavie v.*
23 *Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (Cal. Ct. App. 2003).

24 Similarly, though individualized reliance (causation) is an element of a CLRA claim,
25 if a material misrepresentation is made to the entire class, then the Court infers a
26 presumption of reliance as to the class, and individualized causation need not be shown. In
27

28 ³ The Lipcolor is labeled as lasting “up to” 24 hours, where as the Makeup is
labeled as “24HR”.

1 other words, “Plaintiffs may satisfy their burden of showing causation as to each by showing
2 materiality as to all.” *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (Cal. Ct. App.
3 2009) (internal quotation marks and citation omitted). A representation is considered
4 material if it induced the consumer to alter his position to his detriment. *Id.* However, “if
5 the issue of materiality or reliance is a matter that would vary from consumer to consumer,
6 the issue is not subject to common proof, and the action is properly not certified as a class
7 action.” *Id.*

8
9 Of great importance to the matters in this class certification is the fact Maybelline has
10 introduced unrefuted evidence of who the reasonable consumer in the target audience is and
11 what drives her in making purchasing decisions. As Maybelline contends, the Court does
12 not need to look to the hypothetical reasonable consumer. Similarly, the Court does not
13 need to infer reliance given the evidence presented.

14 **C. Maybelline’s Expert Report**

15 Maybelline’s expert, Dr. Eli Seggev, is an expert in the field of marketing.⁴ After a
16 thorough review of the Seggev report, the Court finds him qualified, and his opinion to be
17 based on reliable methodologies, relevant to the issues at hand, and useful to the trier of fact.
18 (Expert Report of Eli Seggev (“Seggev Rep.”), Doc. No. 69-5, Ex. B.) Plaintiffs’ only
19 complaint with Dr. Seggev’s survey was that he removed repeat purchasers and those who
20 could not remember how many times they purchased the Class Products. The Court has
21 reviewed Dr. Seggev’s reasoning for this, and finds that the decision was purposeful and
22 reasoned. (Seggev Rep. ¶ 49.)

23 Dr. Seggev reports that repeat purchasing is a behavioral indicator of customer
24 satisfaction and it follows that repeat purchasers are fully informed as to the duration claims
25 and realities when they decided to purchase the Class Products again. (Seggev Rep. ¶ 49
26 (citing Szymanski, D.M. & Henard, D.H., *Customer Satisfaction: A Meta-Analysis of the*
27

28 ⁴ Plaintiffs do not challenge Dr. Seggev’s expert report under Rule 702 and/or *Daubert*.

1 *Empirical Evidence*, 29 J. Acad. Mktg. Sci. 16, 24-25, 28-29 (2001)). Indeed, with
2 cosmetics such as the ones at issue here, customers can readily discern how well they work
3 and whether they lived up to the claimed representations. Accordingly, repeat purchasers
4 can not be considered injured in the manner proposed by Plaintiffs. (Seggev Rep. ¶49.) As
5 to the SuperStay lipcolor, Dr. Seggev's Report indicates that: (1) 45% of purchasers were
6 satisfied with the product based on repeat purchases; (2) duration was not the only
7 motivating factor in making the purchases; (3) over half of purchasers could not recall
8 duration expectations or were satisfied with the duration of the product; (4) 4% of the total
9 sample expected the specific 24 hour duration showing duration expectations varied among
10 purchasers; and (5) only 9% of the total sample were one-time purchasers who expected the
11 product to last 24 hours and thus are "injured" in the manner alleged by Plaintiffs. (*Id.* ¶¶
12 76-82).

13
14 As to the SuperStay Makeup, Dr. Seggev's survey indicates that: (1) 32% of
15 purchasers were satisfied with the product and not misled by the duration and/or could not
16 have suffered the injury as alleged by Plaintiffs; (2) purchasers indicated a variety of reasons
17 in selecting the product for purchase; (3) 4% of the total sample mentioned the 24 hour
18 duration as a reason for purchase showing that the 24 hour duration expectation was not the
19 primary purchaser driver; (4) over half of purchasers were satisfied with the duration or had
20 no duration expectation showing that duration expectations were either met or not material;
21 and (5) only 14% of the total sample are one-time purchasers who expected the product to
22 last 24 hours or more and thus are "injured" in the manner alleged by Plaintiffs. (*Id.* at ¶¶
23 96-102.)

24 Plaintiffs cite this Court to deposition testimony by Dr. Seggev to stand for the
25 proposition customers may purchase a product several times and not have their expectations
26 met. (Doc. No. 70 at 1.) However, further review of the entirety of Dr. Seggev's testimony
27 reveals that Plaintiffs take his testimony out of context. (Doc. No. 76.) Dr. Seggev
28 steadfastly defends his position that 54% of repeat purchasers, through the behavior of

1 purchasing again, are not injured in the manner Plaintiffs allege. Indeed, it sounds in
2 common sense that making repeat purchases indicates that the customer's expectations have
3 been met and she was satisfied with the product. *See Chow v. Neutrogena Corp.*, 2013 WL
4 5629777, at *2 (C.D. Cal. Jan 22, 2013) (finding plaintiff's CLRA claim problematic where
5 evidence demonstrates a significant portion of consumers were repeat purchasers and thus
6 inferring class-wide reliance was inappropriate).

7 Dr. Seggev's findings inform a number of the Rule 23 factor analysis. The Court will
8 address them in turn.

9 **D. Ascertainable Class**

10 Though not explicitly stated in Rule 23, courts have held that the class must be
11 adequately defined and clearly ascertainable before a class action may proceed. *See Chavez*
12 *v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 376 (N.D. Cal. 2010) (quoting *Schwartz*
13 *v. Upper Deck Co.*, 183 F.R.D. 672, 679-80 (S.D. Cal. 1999)); *Bishop v. Saab Auto. A.B.*,
14 1996 WL 33150020, at *4 (C.D. Cal. Feb. 16, 1996) (citing *DeBremaecker v. Short*, 433
15 F.2d 744 (5th Cir. 1970)). A class is sufficiently defined and ascertainable if it is
16 "administratively feasible for the court to determine whether a particular individual is a
17 member." *O'Connor v. Boeing N. American, Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998);
18 *accord Davoll v. Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995); *see also Buford v. H&R*
19 *Block, Inc.*, 168 F.R.D. 340, 347 (S.D. Ga. 1996) ("[T]he 'description of the class must be
20 sufficiently definite to enable the court to determine if a particular individual is a member
21 of the proposed class,'" quoting *Pottinger v. Miami*, 720 F. Supp. 955, 957 (S.D. Fla.
22 1989)). It must be administratively feasible to determine whether a particular person is a
23 class member as "an identifiable class exists if its members can be ascertained by reference
24 to objective criteria, but not if membership is contingent on a prospective member's state
25 of mind." *Schwartz*, 183 F.R.D. at 679-80.

1 Maybelline argues the proposed class fails to meet the ascertainability requirement
2 based on two grounds. First, the proposed class is overly broad as it includes uninjured
3 purchasers. Second, membership of the class cannot be readily determined.

4 Maybelline's first argument is essentially a challenge on the proposed class members'
5 standing. Maybelline presents evidence, in the form of Dr. Seggev's survey and report as
6 well as Maybelline's Early Trier Study, to show the proposed class includes: (1) a large
7 percentage of the potential class of SuperStay purchasers are repeat purchasers who cannot
8 be considered to be misled by the duration representation identified by Plaintiffs and (2)
9 one-time purchases of the Class Products who had no duration expectations and whose
10 purchasing decisions were made without regard to product duration. (Seggev Rep. ¶¶ 63-
11 102.) Because the proposed class includes these "uninjured" purchasers, the class is
12 impermissibly overbroad and thus unascertainable.

13 As to these arguments regarding the inability of proposed members to show injury,
14 the Court finds them more suitable for analysis under the Rule 23 rubric given the facts of
15 this case.⁵ Though it may be true that many purchasers of the Class Products did not rely
16 on the duration claims or were satisfied with the products, and thus "uninjured," these issues
17 would not affect the Court's analysis of *ascertainability* based on the facts in the instant
18 case.

19 Consumer action classes that have been found to be overbroad generally include
20 members who were never exposed to the alleged misrepresentations at all. *See e.g., Red v.*
21 *Kraft Foods, Inc.*, 2012 WL 8019257, at * 5 (C.D. Cal. Apr. 12, 2012) (finding a class
22 which includes consumers that were not exposed to the misleading statements to be
23 overbroad); *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 926-28 (Cal. Ct. App. 2010)
24 (finding the class overbroad where a majority of class members were never exposed to the
25 alleged misrepresentations and thus there was absolutely no likelihood they were deceived
26

27
28 ⁵ These issues pervade into a number of the Rule 23 factors and this Order addresses them in a way most conducive to the facts of this case.

1 by the alleged false advertising). In the instant case, Plaintiffs have alleged a widespread
2 advertising campaign promoting the alleged misrepresentations as well as uniform labeling
3 for each of the Class Products. That the proposed class may include purchasers who did not
4 rely on the misrepresentations and/or were satisfied with the products does not render the
5 class “overbroad” where Maybelline has failed to demonstrate a lack of exposure as to some
6 class members.

7
8 Maybelline further argues that because the class does not exclude purchasers who
9 have already received refunds through Maybelline’s Refund program, it is overbroad and
10 not ascertainable. The Court agrees. As the UCL only permits recovery or restitu-
11 tion/disgorgement, for purchasers who have already received refunds, they have already
12 been compensated well over any potential disgorgement. These purchasers have no claims.
13 *See Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1151 (2010) (finding a
14 class not ascertainable where the definition includes persons who have received refunds,
15 replacements, or who have not suffered any damages at all). However, exclusion of these
16 purchasers from the class definition would still not render certification appropriate.

17 The Court is satisfied that Plaintiffs’ class definition is ascertainable in the sense that
18 class membership can be determined based on an objective criterion. *Schwartz*, 183 F.R.D.
19 at 279-80. In the instant matter, that criterion will be whether members purchased either the
20 SuperStay lipcolor or the SuperStay makeup. However, the Court is concerned that
21 Plaintiffs have failed to provide a reliable method of determining who the actual members
22 of the class are, indeed as Maybelline contends, such a task may be impossible.

23 Though the class may be ascertainable in the sense that there are objective criteria for
24 determining who its members are, it is not in the sense that members could actually ever be
25 determined. Plaintiffs have failed to show how it is “*administratively feasible* to determine
26 whether a particular person is a class member.” *See Chavez*, 268 F.R.D. at 376 (emphasis
27 added). This inquiry overlaps with the “manageability” prong of Rule 23(b)(3)(D), in which
28 a court assesses whether a class action is superior to other available methods of fairly and

1 efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *see also Red*, 2012 WL
2 8019257, at * 4.

3 Maybelline argues purchasers are unlikely to have documentary proof of purchase and
4 Maybelline does not maintain a purchaser list or other identifying method. In such a
5 situation, the Court and the parties would necessarily rely on class members to self-identify.
6 (Doc. No. 69 at 6.) The Court shares Maybelline’s concerns. Indeed there are a number of
7 cases that stand for the proposition that where a court has no way to verify if a purchaser is
8 actually a class member, class certification may be improper. *See e.g., Red*, 2012 WL
9 8019257, at *4 (“Whether analyzed under the implied ascertainability requirement, or, the
10 superiority requirement of 23(b)(3) as informed by the manageability component imparted
11 in 23(b)(3)(D), the issue of whether class members will be able to identify themselves to the
12 Court in any even remotely verifiable way remains a significant legal and practical hurdle
13 for Plaintiff’s certification under 23(b)(3)”)”; *Hodes v. Int’l Foods*, 2009 WL 2424214, at
14 *4 (C.D. Cal. July 23, 2009) (stating class does not meet the requirements of 23(b)(3) where
15 court finds proposed class unmanageable given “the sheer number of members” causing
16 concern about “how Plaintiffs will identify each member The likelihood that tens of
17 thousands of class members saved their receipts as proof of their purchase of [the class
18 product] is very low.”).

19 Cases where self-identification alone has been deemed sufficient generally involve
20 situations where consumers are likely to retain receipts, where the relevant purchase was a
21 memorable “big ticket” item; or where defendant would have access to a master list of
22 consumers or retailers. *See Red*, 2012 WL 8019257, at *5 (explaining the three types of
23 situations in which self-identification is deemed sufficient to render the class ascertainable
24 and citing cases in support). None of these factors exist in the instant case. The Class
25 Products are small-ticket items that cost between \$10.00 to \$13.00, it is extremely unlikely
26 the average purchaser would retain receipts and perhaps even remember she purchased the
27 specific SuperStay products versus other similar Maybelline or competitor products.
28

1 According to deposition testimony taken from named Plaintiffs, even they themselves did
2 not retain receipts and had difficulty recalling many details about their purchases. (Doc. No.
3 69, Ex. 3, Algarin Dep. 49:20-51:5; Doc. No. 69, Ex. 4 Murdock Dep. 50:7-51:7.)
4 Moreover, given that the class period extends three years for the lipcolor and five years for
5 the makeup, it is doubtful that class members will precisely recall the items purchased, the
6 quantity purchased, and the amount paid.⁶

7
8 However, a lack of ascertainability alone will not defeat class certification. *Red*, 2012
9 WL 8019257, at *6. As long as the class definition is sufficiently definite to identify
10 putative class members, “the challenges entailed in the administration of this class are not
11 so burdensome as to defeat certification.” *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D.
12 Cal. 2013) (quoting *Ries*, 287 F.R.D. at 536). Thus, the Court continues to analyze whether
13 the requirements of Rule 23(a) and 23(b) are met.

14 **E. Rule 23(a)**

15 Rule 23(a) provides a class action may proceed only where: (1) the class members are
16 so numerous that joinder is impracticable; (2) common questions of law or fact exist; (3) the
17 claims or defenses of the representative parties are typical of the class; and (4) the
18 representative parties will fairly and adequately protect the interests of the class. Fed. R.
19 Civ. P. 23(a).

20 1. Numerosity and Adequacy

21 Maybelline does not dispute that the proposed class meets the numerosity requirement
22 nor do they dispute whether named Plaintiffs and counsel meet the adequacy requirement.
23 Accordingly, the Court is finds these two requirements satisfied.

24
25 ⁶ Maybelline cites to *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), in
26 support of its argument that the lack of documentary proof of purchase should preclude
27 certification. (Doc. No. 69 at 6-7). As Plaintiff notes, *Carrera* is not the law of this
28 circuit. See *Forcellati v. Hyland’s Inc.*, 2014 WL1410264, at *5 (C.D. Cal. Apr. 9, 2014)
 (“Given that facilitating small claims is ‘the 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)). However, this Court does not rely on *Carrera* to
 reach its conclusion.

1 2. Commonality

2 The commonality factor “requires the plaintiff to demonstrate that the class members
3 have suffered the same injury, which does not mean merely that they have all suffered a
4 violation of the same provision of law.” *Dukes*, 131 S. Ct. at 2551. The “claims must
5 depend on a common contention” and “that common contention . . . must be of such a nature
6 that it is capable of class-wide resolution.” *Id.* The existence of shared legal issues with
7 divergent factual predicates is sufficient, as is a common core of salient facts coupled with
8 disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019
9 (9th Cir. 1998). The commonality requirement of Rule 23(a)(2) is construed less rigorously,
10 for example, than the “predominance” requirement of Rule 23(b)(3). *Id.* Indeed, for
11 purposes of Rule 23(a)(2), even a single common question will suffice. *Dukes*, 131 S. Ct.
12 at 2556.

13 Plaintiffs have identified several questions of law or fact common to the class: (1)
14 whether the 24 hour/no transfer representation is true, or is misleading, or objectively
15 reasonably likely to receive; (2) whether Maybelline engaged in false or misleading
16 advertising; (3) whether Maybelline’s alleged conduct violates public policy; (4) whether
17 Maybelline’s alleged conduct constitutes violations of the laws asserted; (5) the proper
18 measure of the loss suffered by Plaintiffs and Class members; and (6) whether Plaintiffs and
19 Class members are entitled to other appropriate remedies, including corrective advertising
20 and injunctive relief. Maybelline’s contention, that the proposed class includes uninjured
21 purchasers, is properly analyzed under the commonality requirements of Rule 23(a) and
22 Rule 23(b)(3).
23

24 In light of the objective evidence showing that there was a substantial number of class
25 members who were not misled by the 24 hour claim, whether Maybelline’s conduct was
26 false or misleading or likely to deceive is not subject to common proof on a classwide basis.
27 According to survey results, purchasers had a variety of duration expectations. Indeed, more
28 purchasers expected the product to last less than 24 hours or had no specific duration

1 expectations. (Seggev Rep. ¶¶ 74-75, ¶¶ 94-95.) Moreover, given the persuasive evidence
2 presented on consumer expectations, the varying factors that influence purchasing decision,
3 and consumer satisfaction, the Court finds that Plaintiffs have also failed to demonstrate that
4 the elements of materiality and reliance are subject to common proof.

5 Expert evidence shows that materiality and reliance varies from consumer to
6 consumer. Accordingly, the Court finds that these elements are not an issue subject to
7 common proof. *See Johnson v. Harley-Davidson Motor Co. Group, LLC*, 285 F.R.D. 573,
8 581 (E.D. Cal. 2012) (finding materiality not subject to common proof where defendants
9 offer persuasive evidence that there are numerous individualized issues as to whether the
10 reasonable consumer would find the misconduct complained of material); *Webb v. Carter's*
11 *Inc.*, 272 F.R.D. 489, 503 (C.D. Cal. 2011) (finding the elements of materiality and reliance
12 not subject to common proof where defendants put forth evidence that they would vary
13 consumer to consumer).

14 Finally, the existence of economic injury is also not a common question as many
15 purchasers were satisfied with the Class Products. Expert Report of Keith R. Ugone
16 (“Ugone Rep.”) ¶35; (e.g., reviews say “This is best lipcolor ever . . . I will be back for
17 more,” “I love this [lipcolor] . . . I will order more in the future,” and “I am so happy I tried
18 this foundation . . . this is my new foundation.”); *see Moheb v. Nutramax Laboratories Inc.*,
19 2012 WL 6951904, at *4 (C.D. Cal. 2012) (finding existence of economic injury not a
20 common question because many purchasers found the class products were worth the amount
21 paid and fully satisfied).

22 As for the other questions of law and fact posed, it is arguable that they may support
23 a finding of commonality under the permissive standards governing this inquiry. As noted
24 above, commonality can be established by the presence of a single significant common
25 issue. However, Plaintiffs meet their downfall with the typicality requirement.

26 //

27 //

1 3. Typicality

2 Typicality requires a determination as to whether the named plaintiffs' claims are
3 typical of those of the class members they seek to represent. See Fed. R. Civ. P. 23(a)(3).
4 “[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with those of
5 absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020;
6 *see also Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal.1985). Typicality, like
7 commonality, is a “permissive standard [].” *Hanlon*, 150 F.3d at 1020. Indeed, in practice,
8 “[t]he commonality and typicality requirements of Rule 23(a) tend to merge.” *Gen. Tel. Co.*
9 *of Sw. v. Falcon*, 457 U.S. 147, 157–58 n. 13, 102 S. Ct. 2364 (1982). To assess whether
10 or not named Plaintiffs’ claims are typical, the Court examines “‘whether other members
11 have the same or similar injury.’” *Hanlon*, 976 F.3d at 508 (quoting *Schwartz v. Harp*, 108
12 F.R.D. 279, 282 (C.D. Cal. 1985). In other words, the inquiry is whether other members
13 have the same or similar injury, whether the action is based on conduct which is not unique
14 to named plaintiffs, and whether other class members have been injured by the same course
15 of conduct. *Id.*

16 The Court’s analysis of the commonality requirement also informs the analysis for
17 typicality. Based upon the evidence presented, the named Plaintiffs’ reliance on the alleged
18 misrepresentations was not typical of other class members.

19 Accordingly, the Court finds Plaintiffs have not met the requirements of Rule 23(a).
20 While this alone is sufficient to deny the motion to certify the class, the Court will continue
21 with the analysis of the 23(b) classes. The Court further concludes that class certification
22 under either 23(b)(2) or 23(b)(3) is improper.

23 **F. Rule 23(b)(2)**

24 A class is proper under 23(b)(2) where the party opposing the class has acted or
25 refused to act on grounds that apply generally to the class, so that final injunctive relief or
26 corresponding declaratory relief is appropriate respecting the class as a whole. Fed. R. Civ.
27 P. 23(b)(2). Class certification under Rule 23(b)(2) is appropriate only where the primary
28

1 relief sought is declaratory or injunctive.” *Ellis*, 657 F.3d. at 986. For classes certified
2 pursuant to Rule 23(b)(2), monetary damages must be “merely incidental to the primary
3 claim for injunctive relief. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1195
4 (9th Cir. 2001).

5 Plaintiffs argue that a class under 23(b)(2) is proper given Maybelline’s uniform and
6 widespread marketing, labeling, promoting, branding and advertising of its products; an
7 action that is generally applicable to the entire class. Plaintiffs further contend that any
8 damages sought are merely incidental to the injunctive relief sought. The Court disagrees.
9

10 Given the facts of the instant case, the injunctive relief requested by Plaintiffs is not
11 “appropriate respecting the class as a whole.” *Dukes*, 131 S. Ct. at 2557. Plaintiffs, and the
12 portion of the class who purchased the Class Products expecting them to last 24 hours, are
13 now well aware of the realities of the products. Indeed, as Maybelline contends, with
14 cosmetics such as the products at issue here, consumers can readily discern whether or not
15 the claimed duration is true. The Court is not dealing with products such as dietary
16 supplements where the purported benefits are hard to ascertain or take time to actualize.
17 These consumers will not benefit from the injunctive relief as they cannot demonstrate a
18 probability of future injury; if they know the “truth” they cannot be further deceived. *See*
19 *Moheb*, 2012 WL 6951904, at *6 (finding certification improper under Rule 23(b)(2) where
20 Plaintiffs and the members of the class cannot demonstrate a probability of future injury as
21 they no longer buy the challenged product). Indeed, the only potential beneficiaries of any
22 injunctive relief are future purchasers of the Class Products who have never purchased them
23 before. However, the current class definition excludes them.

24 Moreover, the restitution and disgorgement sought are not “incidental.” Named
25 Plaintiffs cannot possibly benefit from injunctive relief as they are now (or at least should
26 be) fully knowledgeable that the Class Products do not last 24 hours. Thus monetary relief
27 is necessarily their “primary concern.” *Moheb*, 2012 WL 6951904, at * 7 (quoting *Jiminez*
28 *v. Domino’s Pizza, Inc.*, 238 F.R.D. 241, 250 (C.D. Cal. 2006); *see also Ries*, 287 F.R.D.

1 at 541 (“[A]lthough the monetary amount sought may be small per class member, in the
2 aggregate they can hardly said to be incidental to the injunctive relief sought.”). Rule
3 23(b)(2) “does not authorize class certification where each class member would be entitled
4 to an individualized award of monetary damages.” *Dukes*, 131 S. Ct. at 2557. Monetary
5 recovery may be granted only if it is sufficiently incidental to warrant certification under
6 Rule 23(b)(2), such as statutory or punitive damages that do not turn on the individual
7 circumstances of class members. By contrast, in the instant case Plaintiffs seek individual-
8 ized monetary relief that would require assessment of each class member’s claim based on
9 how many products she purchased, which products she purchased, where she purchased, if
10 she used a coupon, and so forth. *See Ries*, 287 F.R.D. at 541. In such a situation, the
11 computation of the damages is not a mere “mechanical step” once rights are established.
12 Certification is improper where, as here, the request for injunctive and/or declaratory relief
13 is merely a foundational step towards a damages award which requires follow-on individual
14 inquiries to determine each class member’s entitlement to damages.

15
16 **G. Rule 23(b)(3)**

17 Certification pursuant to Rule 23(b)(3) requires Plaintiffs to establish that “the
18 questions of law or fact common to the members of the class predominate over any
19 questions affecting only individual members and that a class action is superior to other
20 available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ.
21 P. 23(b)(3).

22 1. Common Questions do not Predominate over Individual Inquiries

23 Rule 23(b)(3) predominance requires the class to be sufficiently cohesive to warrant
24 adjudication by representation. *AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).
25 This inquiry is more stringent than the commonality requirement of Rule 23(a)(2). Indeed,
26 the analysis under Rule 23(b)(3) “presumes that the existence of common issues of fact or
27 law have been established pursuant to Rule 23(a)(2).” *Hanlon*, 150 F.3d at 1022.
28

1 The Courts analysis with regards to commonality under Rule 23(a) is fully applicable
2 in the analysis of predominance. Given the number of individual purchasing inquiries as
3 well as the evidence showing materiality and reliance varies consumer to consumer, it is
4 evident that common issues do not predominate. *See Moheb*, 2012 WL 6951905, at *7
5 (finding plaintiffs cannot demonstrate that common issues predominate where issues of
6 reliance and injury require individualized inquiry); *Hodes*, 2009 WL 2424214, at *4
7 (“Courts in the Ninth Circuit and in California have regularly found that where [individual-
8 ized purchasing] inquiries predominate over common questions of law or fact, courts may
9 refuse to certify a class action.”). Additionally, and of great importance, is the fact that
10 Plaintiffs have failed to demonstrate sufficient evidence showing that any damages claimed
11 to stem from the alleged misconduct.
12

13 Under the UCL, a court may grant restitution as a form of relief. This relief is an
14 equitable remedy and its purpose is to restore the status quo by returning to the plaintiff
15 funds in which she has an ownership interest. *Korea Supply Co. v. Lockheed Martin Corp.*,
16 29 Cal. 4th 1134, 1149 (Cal. 2003). Under California law, the two purposes are to return
17 money unjustly taken from the class and deter the defendant from engaging in future
18 violations of the law. *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 697-
19 98 (Cal. Ct. App. 2006). After *Comcast v. Behrand*, a party seeking certification must offer
20 a class-wide means for calculating damages. 133 S. Ct. 1426, 1433 (2013).

21 The Ninth Circuit has acknowledged that under the *Comcast* decision, a plaintiff must
22 be able to show that damages stemmed from the defendant’s actions that created the legal
23 liability. *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). While a court
24 of equity “may exercise its full range of powers in order to accomplish complete justice
25 between the parties,” the restitution awarded must be a “quantifiable sum” and must be
26 supported by substantial evidence. *Colgan*, 135 Cal. App. 4th at 698. The restitution
27 awarded “must correspond to a measurable amount representing the money that the
28 defendant has acquired from each class member by virtue of its unlawful conduct.” *Astiana*

1 *v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *11 (N.D. Cal. Jan 7, 2014) (citing
2 *Colgan*, 135 Cal. App. 4th at 697-98).

3 Plaintiffs propose the "price premium" method of determining classwide damage,
4 arguing that California law permits plaintiffs to seek recovery of a price premium regardless
5 of whether plaintiffs are able to quantify the premium that was paid or the identity of other
6 products sold at a lower price that did not bear the alleged deceptive representations. (Doc.
7 No. 63 at 22.) Here, the premium represents the amount consumers overpaid for the 24
8 hour/no transfer claim. Plaintiffs thus contend that their damage theory is "simple,"
9 "damages are the difference between the SuperStay 24 HR Products and other lipsticks, lip
10 glosses and foundations made by Maybelline and its competitors without the 24 HR/no
11 transfer representation but that are otherwise comparable." (Doc. No. 70 at 7-8.) As
12 Plaintiffs have stated, Maybelline charges \$1.00-\$3.00 more for the Class Products than its
13 comparable products that do not bear the 24 hour/no transfer claims.
14

15 As an initial matter, it is not intuitively obvious at all that the 24 hour/no transfer
16 claim commands a premium of \$1.00-\$3.00. Indeed, it is pure speculation on the part of
17 Plaintiffs. The Court can fathom a number of reasons why the Class Products may be priced
18 as they are. For example, perhaps it is due to a higher quality of ingredients, perhaps it is
19 because of the selection of colors offered, or perhaps it reflects the costs Maybelline
20 expended in the research and development of the products. Plaintiffs' method of using
21 comparable products is inconsistent with the law. To establish that any difference in price
22 is attributed solely to the alleged misrepresentation, the Court must use a product, exactly
23 the same but without the 24 hour claim. As Maybelline stated, the Court would have to
24 control and neutralize all other product differences. Such a task is nearly impossible as no
25 two products are completely identical.

26 As the court in *Ben & Jerry's* explained, one method of quantifying the amount of
27 restitution to be awarded is to compute the effect of the unlawful conduct on the market
28 price of the class products. 2014 WL 60097, at *12. This measure contemplates the

1 “production of evidence that attaches a dollar value to the ‘consumer impact or advantage’
2 caused by the unlawful practice. *Id.* (quoting *Colgan*, 135 Cal. App. 4th at 700). Expert
3 testimony may be necessary to establish the price inflation attributable to the challenged
4 practice. *See id.* As it stands now, Plaintiffs have not offered a method that would attach a
5 dollar value to the alleged misrepresentations other than the general assertion - it exists and
6 therefore it must be so. The inadequacies are readily apparent as Plaintiffs’ theory does not
7 even attempt to isolate the amount attributed solely to the alleged misrepresentation.
8 Plaintiffs have failed to produce any expert testimony that demonstrate a gap between the
9 market price of the SuperStay 24 HR products and the price they purportedly should have
10 sold at without the 24 hour/no transfer representations. As such, the Court cannot conclude
11 that Plaintiffs have met their burden of showing a classwide method of awarding relief
12 consistent with their theory of liability.
13

14 Moreover, Maybelline contends that the proposed price premium method is
15 inappropriate given the substantial variability in retail prices among the Class Products and
16 competing products. (Doc. No. 69 at 18-19.) The Court shares this concern. Maybelline
17 does not sell retail and does not set retail prices. Establishing a higher price for a
18 comparable product would be difficult where prices in the retail market differ and are
19 affected by the nature and location of the outlet in which they are sold and/or the use of
20 promotions and coupons. (“Ugone Rep.” ¶¶ 7-8, ¶¶37-51); *see Ben & Jerry’s*, 2014 WL
21 60097, at *12. Although, Plaintiffs’ rebuttal expert, Keith A. Reutter has also proposed the
22 “wholesale price premium,” which compares the wholesale prices of the Class Products and
23 comparable products to represent the amount of injury, this does not assuage the issue of
24 variability. Plaintiffs have failed to produce any data or other evidence that rebuts
25 Maybelline’s contention that wholesale prices are also affected by the same variability
26 problems. The Court cannot simply assume that all retailers throughout California purchase
27 the Class Products and competing products at the sale wholesale price. Even if price
28 variation problems did not invade the analysis, Plaintiffs have still failed to propose a viable

1 method supported by evidentiary proof of awarding relief that is consistent with Plaintiffs'
2 theory of liability.

3 2. The Class is Not Superior

4 Rule 23(b)(3) requires courts to find class litigation is superior to other methods of
5 adjudication before certifying the class. Maybelline argues that its out-of-court Refund
6 Program is a superior alternative. The Court questions the appropriateness of comparing
7 such a private method of resolution.

8 Based on the language of Rule 23(b)(3) which requires a class action to be “superior
9 to other available methods for . . . *adjudicating* the controversy,” this determination involves
10 a comparison of the class action as a procedural mechanism to available alternatives.
11 Newberg on Class Actions, §4:64 (5th ed.) In other words, Rule 23(b)(3) asks a court to
12 compare the class action to other types of court action. Although the Court is mindful of
13 cases which have considered whether the class action is superior to other “non-judicial”
14 methods of handling the controversy⁷, the Court is wary of stepping outside the text of Rule
15 23(b)(3).
16

17 However, included in the superiority analysis is whether the proposed class action
18 would be manageable. “Courts are ‘reluctant to permit action to proceed’ where there are
19 ‘formidable . . . difficulties of distributing any ultimate recovery to the class members,’
20 because such actions ‘are not likely to benefit anyone but the lawyers who bring them.’”
21 *Moheb*, 2012 WL 6951904, at*8 (quoting *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 164
22 (1974)). The Court has already concluded that the class is unmanageable and that common
23

24 _____
25 ⁷ See e.g., *In re Conagra Peanut Butter Prod. Liability Lit.*, 251 F.R.D. 689, 699-
26 719 (N.D. Ga. 2008) (defendant issued full refunds); *In re Phenylpropanolamine Prod.*
27 *Liability Lit.*, 214 F.R.D. 615 (W.D. Wash. 2003) (defendant issued refund and product
28 replacements).

Indeed, these private methods of resolution have a number of appealing attributes,
such as affording class members better remedies than a class action and not having to
divert a substantial amount of the recovery to line the pockets of attorneys.

1 issues do not predominate, accordingly the class action is not a superior method of
2 adjudicating the controversy.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiffs' motion for class certification is DENIED.
5 Counsel for the Parties are ordered to contact Judge Bartick's Chambers within fourteen
6 days of this Order to set a case management conference for final scheduling of the case.
7

8 IT IS SO ORDERED.
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10 DATED: May 12, 2014
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14 Hon. Anthony J. Battaglia

15 U.S. District Judge
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