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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CRYSTAL HILLSLEY, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

OCEAN SPRAY CRANBERRIES, INC.;
ARNOLD WORLDWIDE LLC; and
DOES defendants 1 through 5, inclusive,

Defendants.

Case No.: 17cv2335-GPC(MDD)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF’S
MOTION FOR CLASS
CERTIFICATION AND
APPOINTING CLASS COUNSEL**

[Dkt. No. 23.]

Before the Court is Plaintiff’s motion for class certification and to appoint class counsel. (Dkt. No. 23.) Defendants filed an opposition, and Plaintiff filed a reply.¹ (Dkt. Nos. 30, 35.) Pursuant to the Court’s order, Plaintiff filed a supplemental brief on damages. (Dkt. No. 75.) Defendant filed its response to the supplemental brief. (Dkt. No. 79.) Upon review of the papers, supporting documentation, and the applicable law,

¹ After the reply was filed, Defendants filed a notice of supplemental authority on October 3, 2018. (Dkt. No. 47.) On October 9, 2018, Defendants also filed objections to Plaintiff’s late-filed evidence in support of her reply. (Dkt. No. 60.)

1 the Court GRANTS in part and DENIES in part Plaintiff's motion for class certification
2 and appoints class counsel.

3 **Background**

4 The action was removed to this Court pursuant to the Class Action Fairness Act of
5 2005 on November 16, 2017. (Dkt. No. 1.) Plaintiff Crystal Hilsley ("Plaintiff" or
6 "Hilsley") brings a purported consumer class action against Defendants Ocean Spray
7 Cranberries, Inc. and Arnold Worldwide LLC (collectively "Defendants") for violations
8 of California consumer protection laws based on misrepresentation of labels stating "no
9 artificial flavors" on certain Ocean Spray products. (Dkt. No. 1-2, Compl.) Defendant
10 Ocean Spray Cranberries, Inc. ("Ocean Spray") manufactures, distributes, advertises,
11 markets and sells a variety of juices and juice-based beverage products. Defendant
12 Arnold Worldwide LLC ("Arnold") participates in the labeling and advertising of these
13 products for Ocean Spray. (*Id.* ¶ 6.) More specifically, the labels on Defendants' juice-
14 based beverage products labeled "Cran-Apple" and "Cran-Grape" (collectively the
15 "Products") state "No . . . artificial flavors"² when in fact they contain artificial flavoring
16 chemicals that simulate the advertised fruit flavors. (*Id.* ¶¶ 7, 8, 9, 22.)

17 The Cran-Apple Product lists "malic acid" as an ingredient which Plaintiff
18 contends is an artificial flavor. (*Id.* ¶¶ 23, 28.) Malic acid is not a natural flavoring
19 material but "a synthetic chemical manufactured in a petrochemical factory from
20 petroleum feedstocks." (*Id.* ¶ 24.) Natural malic acid, also known as l-malic acid, is
21 found naturally in some fruits and vegetables but Ocean Spray uses a synthetic
22 manufactured flavoring chemical called dl-malic acid. (*Id.* ¶¶ 31, 32.) Dl-malic acid is
23

24
25 ² Plaintiff filed a request for judicial notice of Defendants' Product Labels that are the subject to this
26 litigation. (Dkt. No. 23-23.) Defendants do not oppose. Federal Rule of Evidence 201 provides for
27 judicial notice of facts that are not subject to reasonable dispute because they are either "generally
28 known" or "can be accurately and readily determined by reference to sources whose accuracy cannot
reasonably be questioned." Fed. R. Evid. 201. Product labels may be judicially noticed. *See Kanfer v.*
Pharmacare US, Inc., 142 F. Supp. 3d 1091, 1098-99 (S.D. Cal. 2015). Accordingly, the Court
GRANTS Plaintiff's request for judicial notice.

1 made in petrochemical plants from benzene or butane “after an intermediate conversion
2 to maleic anhydride through a series of chemical reactions involving toxic chemical
3 precursors and byproducts.” (Id.) Moreover, according to Plaintiff, malic acid is an
4 artificial flavor as defined under federal and California law. (Id. ¶¶ 34, 35.) Malic acid
5 gives a “tart, fruit” flavor to food products. (Id. ¶ 38.)

6 The Cran-Grape product is also flavored with “fumaric acid” which is also
7 artificially synthesized. (Id. ¶¶ 52, 53.) It is derived from petrochemicals, not from
8 natural source materials and constitutes an artificial flavor. (Id. ¶ 53.) Grapes naturally
9 contain fumaric acid but Ocean Spray uses a synthetic fumaric acid to simulate the flavor
10 of grapes in the product. (Id. ¶ 56.) Like dl-malic acid, fumaric acid simulates,
11 resembles and reinforces the characterizing flavors for the Cran-Grape Product. (Id. ¶
12 57.) California and federal laws require that food labels be labeled accurately. (Id. ¶ 43.)

13 Plaintiff alleges that each of the Products labeled “No . . . Artificial Flavors” are
14 false and misleading because each Product contain artificial flavoring ingredients, either
15 dl-malic acid, fumaric acid or both that simulate advertised fruit flavors. (Id. ¶¶ 8, 9, 10.)

16 Plaintiff purchased the 64-ounce Ocean Spray Cran-Apple Product occasionally
17 from 2011 until 2013 and on a monthly basis from 2013 until December 2016. (Dkt. No.
18 23-19, Hilsley Decl. ¶ 4.) She also purchased the 64-ounce Ocean Spray Cran-Grape
19 Product, the Ocean Spray “100% Apple” juice drink, and the Cranberry Juice Cocktail
20 Products multiple times during the class period. (Id.) She read and relied on Ocean
21 Spray’s Products’ labels when buying the products including the label “No artificial
22 flavors or preservatives” and the fact that the labels failed to state that they contained
23 artificial flavorings. (Id. ¶ 5.) Plaintiff would not have purchased the Products if she had
24 known they contained artificial ingredients. (Id. ¶ 7.) She would purchase the Products
25 again, in the future, if the labels were accurate and they contained “No artificial flavors or
26 preservatives.” (Id. ¶ 8.)

27 Plaintiff alleges six causes of action for violations of the Consumer Legal
28 Remedies Act, Cal. Civ. Code § 1750 *et seq*, the unlawful prong of the Unfair

1 Competition Law (“UCL”), Cal. Bus. & Professions Code section 17200 *et seq.*, the
2 unfair prong of the UCL, California’s False Advertising Law, and breach of express
3 warranty and breach of implied warranty. (Id. ¶¶ 115-187.)

4 In the instant motion, Plaintiff seeks to certify a Class consisting of:

5 All California Citizens who purchased one of the following Ocean Spray
6 Products, for personal and household use and not for resale, in California
7 from January 1, 2011 until the date class notice is disseminated:

- 8 • Ocean Spray Cran Apple;
- 9 • Ocean Spray Cran Grape;
- 10 • Ocean Spray “100% Apple” Juice Drink;
- 11 • Ocean Spray Cranberry Juice Cocktail³;
- 12 • Ocean Spray Wave Apple with White Cranberries;
- 13 • Ocean Spray Wave Berry Medley;
- 14 • Ocean Spray Cran Cherry;
- 15 • Ocean Spray Cran Pineapple;
- 16 • Ocean Spray Cran Pomegranate;
- 17 • Ocean Spray Diet Cran Pomegranate;
- 18 • Ocean Spray Diet Cran Cherry;
- 19 • Ocean Spray Cranberry Cherry Flavor 100% Juice.

20 Excluded from the Class are Defendants’ current and former officers and
21 directors, members of the immediate families of Defendants’ officers and
22 directors, Defendants’ legal representatives, heirs, successors, and assigns,
23 any entity in which Defendants have or had a controlling interest during the
24 Class Period, and the judicial officers to whom this lawsuit is assigned.

25 (Dkt. No. 23-1 at 12.⁴)

26 Discussion

27 A. Legal Standard on Class Certification

28 ³ In her reply, Plaintiff recognizes that Cranberry Juice Cocktail does not contain malic acid, as Defendant argues, and does not object to removal of this product from the Class definition. In place, she seek to add Cran Raspberry juice product which contains malic acid. (Dkt. No. 35 at 14 n. 4.)

⁴ Page numbers are based on the CM/ECF pagination.

1 “The class action is an exception to the usual rule that litigation is conducted by
2 and on behalf of individual named parties only. In order to justify a departure from that
3 rule, a class representative must be a part of the class and possess the same interest and
4 suffer the same injury as the class members.” Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct.
5 2541, 2550 (2011) (internal quotation marks and citations omitted). A plaintiff seeking
6 class certification must affirmatively show the class meets the requirements of Rule 23.
7 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (citing Dukes, 131 S. Ct. at
8 2551-52). To obtain certification, a plaintiff bears the burden of proving that the class
9 meets all four requirements of Rule 23(a)--numerosity, commonality, typicality, and
10 adequacy. Ellis v. Costco Wholesale Corp., 657 F.3d 970 979-80 (9th Cir. 2011). If
11 these prerequisites are met, the court must then decide whether the class action is
12 maintainable under Rule 23(b). United Steel, Paper & Forestry, Rubber, Mfg. Energy,
13 Allied Indus. & Serv. Workers Int'l Union AFL–CIO, CLC v. ConocoPhillips Co., 593
14 F.3d 802, 806 (9th Cir. 2010). This case involves Rule 23(b)(3), which authorizes
15 certification when “questions of law or fact common to class members predominate over
16 any questions affecting only individual class members,” and “a class action is superior to
17 other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.
18 Civ. P. 23(b)(3). It also involves Rule 23(b)(2), which permits certification when “the
19 party opposing the class has acted or refused to act on grounds that apply generally to the
20 class, so that final injunctive relief or corresponding declaratory relief is appropriate
21 respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The Court exercises discretion
22 in granting or denying a motion for class certification. Staton v. Boeing Co., 327 F.3d
23 938, 953 (9th Cir. 2003).

24 The Court is required to perform a “rigorous analysis,” which may require it “to
25 probe behind the pleadings before coming to rest on the certification question.” Dukes,
26 131 S. Ct. at 2551. “[T]he merits of the class members’ substantive claims are often
27 highly relevant when determining whether to certify a class. More importantly, it is not
28 correct to say a district court may consider the merits to the extent that they overlap with

1 class certification issues; rather, a district court must consider the merits if they overlap
2 with Rule 23(a) requirements.” Ellis, 657 F.3d at 981. Nonetheless, the district court
3 does not conduct a mini-trial to determine if the class “could actually prevail on the
4 merits of their claims.” Id. at 983 n.8; United Steel, Paper & Forestry, Rubber,
5 Manufacturing Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC, 593
6 F.3d at 808 (citation omitted) (court may inquire into substance of case to apply the Rule
7 23 factors, however, “[t]he court may not go so far . . . as to judge the validity of these
8 claims.”). Rule 23 “grants courts no license to engage in free-ranging merits inquiries at
9 the certification stage. Merits questions may be considered to the extent – but only to the
10 extent—that they are relevant to determining whether the Rule 23 prerequisites for class
11 certification are satisfied” Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455,
12 466 (2013).

13 **B. Federal Rule of Civil Procedure 23(a)**

14 **1. Rule 23(a)(1) - Numerosity**

15 Plaintiff argues that the class is sufficiently numerous to satisfy Rule 23(a)(1) as
16 Ocean Spray admitted in its notice of removal that class members have made “millions of
17 purchases of the twelve products” and the amount in controversy exceeds \$5,000,000.
18 (Dkt. No. 1, Not. of Removal at ¶ 24.) In the notice of removal, Defendant also
19 acknowledges that Plaintiff has alleged a putative class “substantially in excess of 100
20 persons.” (Id. at ¶ 11.) Moreover, in their opposition, Defendants do not dispute
21 numerosity.

22 To establish numerosity, a plaintiff must show that the represented class is “so
23 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); Bates
24 v. United Parcel Serv., 204 F.R.D. 440, 444 (N.D. Cal. 2001). A court may reasonably
25 infer based on the facts of each particular case to determine if numerosity is satisfied.
26 Ikonen v. Hartz Mtn. Corp., 122 F.R.D. 258, 262 (S.D. Cal. 1988). “As a general rule,
27 classes of 20 are too small, classes of 20–40 may or may not be big enough depending on
28 the circumstances of each case, and classes of 40 or more are numerous enough.” Id.

1 Based on Defendants’ assertions in the notice of removal, and their non-opposition,
2 the Court concludes that the class will number significantly more than 40 members and
3 numerosity has been met.

4 **2. Rule 23(a)(2) - Commonality**

5 Next, Plaintiff argues that commonality is satisfied because common questions
6 include whether Ocean Spray’s “No artificial flavor” claims and its failure to disclose
7 that the Products contain artificial flavor is likely to deceive; whether Ocean Spray
8 communicated a representation, through its packaging and labeling, that its products
9 contain “No artificial flavors”; and if so, whether that representation was material to
10 individuals purchasing the Ocean Spray Products; if the representation was material,
11 whether it was truthful; and if reasonable consumers who purchased Ocean Spray
12 Products were deceived by a material misrepresentation, what is the proper method for
13 calculating damages.

14 In response, Defendants argue there is no commonality because Plaintiff has
15 provided no evidence that malic acid and fumaric acid function as flavors in these
16 Products. Without evidence of a key threshold fact that malic acid and fumaric acid
17 function as flavors, the causes of action in the complaint fail. Defendants explain that
18 malic and fumaric acids do not act as flavors in their products but serve as non-flavored
19 acidulants that control the acidity of the respective products. In reply, Plaintiff asserts
20 that whether malic acid and fumaric acid function as artificial flavoring ingredients is a
21 common question that is capable of classwide resolution.

22 As to commonality, Rule 23(a)(2) requires Plaintiff to show “there are questions of
23 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality requires the
24 plaintiff to demonstrate that the class members ‘have suffered the same injury.’” Dukes,
25 131 S. Ct. at 2551. “That common contention . . . must be of such a nature that it is
26 capable of classwide resolution – which means that determination of its truth or falsity
27 will resolve an issue that is central to the validity of each one of the claims in one stroke.”
28 Id. “‘What matters to class certification . . . is not the raising of common ‘questions’ . . .

1 but, rather the capacity of a classwide proceeding to generate common answers apt to
2 drive the resolution of the litigation. Dissimilarities within the proposed class are what
3 have the potential to impede the generation of common answers.” Id. (emphasis in
4 original) (citation omitted). “[C]ommonality only requires a single significant question
5 of law or fact.” Mazza v. American Honda Motor Co., Inc., 666 F.3d 581, 589 (9th Cir.
6 2012) (commonality not disputed as to whether Honda “had a duty to disclose or whether
7 the allegedly omitted facts were material and misleading to the public”); Rodriguez v.
8 Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) (Commonality is satisfied “if the named
9 plaintiffs share at least one question of fact or law with the grievances of the prospective
10 class.”) (quoting Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)).
11 Commonality has been construed permissively. Ellis, 657 F.3d at 981.

12 In misbranding or false advertising cases, courts routinely find that commonality
13 has been satisfied. See Astiana v. Kashi Co., 291 F.R.D. 493, 501-20 (S.D. Cal. 2013)
14 (commonality satisfied concerning whether use of term “Nothing Artificial” that contain
15 allegedly synthetic ingredients violates the UCL, FAL, CLRA, or the defendant’s own
16 warranties) (citing Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 377 (N.D.
17 Cal. 2010) (commonality met as to whether the defendant’s “packaging and marketing
18 materials are unlawful, unfair, deceptive or misleading to a reasonable consumer”)).

19 Here, Defendants do not dispute that there are common issues of fact and law to
20 the class. Instead, they argue that a threshold issue must be resolved as to whether malic
21 or fumaric acid constitute flavors in their Products. If malic and fumaric acids do not
22 function as flavors, then it would be a death knell to Plaintiff’s entire case.

23 On class certification, the Court does not resolve issues of disputed facts. Alcantar
24 v. Hobart Serv., 800 F.3d 1047, 1053 (9th Cir. 2015) (“We conclude that the district court
25 erred in denying class certification because it evaluated the merits rather than focusing on
26 whether the questions presented—meritorious or not—were common to the class.”). “A
27 common contention need not be one that ‘will be answered, on the merits, in favor of the
28 class.’ Amgen, 133 S. Ct. at 1191 . . . [i]t only ‘must be of such a nature that it is capable

1 of classwide resolution.’ Wal-Mart, 131 S. Ct. at 2551.” Alcantar, 800 F.3d at 1053. In
2 Alcantar, the Ninth Circuit held that the district court improperly concluded there was no
3 commonality because the plaintiff had not offered any evidence demonstrating that the
4 defendant had a uniform company-wide policy requiring technicians to commute in their
5 service vehicles. Id. at 1053. The district court incorrectly concluded that “because there
6 is no evidence to suggest that technicians were required to drive the service vehicles to
7 their homes, the lack of a potential legal argument precludes a common issue of fact or
8 law for purposes of Rule 23(a)(2).” Id. According to the Ninth Circuit, this conclusion
9 requires too much of the plaintiff by demanding a common contention that “will be
10 answered, on the merits in favor of the class” instead of simply showing there is a
11 “common contention capable of classwide resolution.” Id. The Ninth Circuit noted that
12 if it is ultimately determined that the plaintiff fails to prove an element of his claim, it
13 would generate a “fatal similarity” that would make the class action fair and efficient. Id.

14 Likewise, Defendants improperly ask the Court to make a determination on the
15 merits of the case which is not proper at class certification. As directed by the Ninth
16 Circuit in Alcantar, the Court’s focus is on whether Plaintiff has presented a common
17 contention capable of class wide resolution, not whether Plaintiff has provided evidence
18 that fumaric and malic acids are flavors. Instead, whether fumaric and malic acids, as
19 used in Defendants’ Products, act as flavor ingredients is one contention common to the
20 class. See Rodriguez, 591 F.3d at 1122 (at least one question of fact or law satisfies
21 commonality). Thus, Plaintiff has demonstrated commonality.

22 Defendants also argue that the ingredient labels of 100% Apple Juice and
23 Cranberry Juice Cocktail do not contain malic or fumaric acid. (Dkt. No. 23-6, Marron
24 Decl., Ex. 3 at 14.) Consequently, Defendants argue that whether the challenged
25 ingredients are even present is not common to all the products for which she seeks to
26 certify. In response, Plaintiff acknowledges that Cranberry Juice Cocktail does not
27 contain malic acid, and does not object to removal of this product from the Class
28 definition but seeks to replace it with the Cran Raspberry juice product which does

1 contain malic acid. (Dkt. No. 35 n. 4.) Also, in response to the 100% Apple Juice label,
2 Plaintiff refers to two websites that show that malic acid is an ingredient in the 100%
3 Apple Juice Product. (Dkt. No. 35-7, Marron Decl., Ex. 6; Dkt. No. 35-8, Marron Decl.,
4 Ex. 7.⁵) While the 100% Apple Juice labels attached in support of Plaintiff’s motion for
5 class certification do not include the ingredients of malic acid or fumaric acid, the two
6 websites pages attached in Plaintiff’s reply state that malic acid is an ingredient in the
7 100% Apple Juice. Neither party has explained the discrepancy in the ingredients for the
8 100% Apple Juice Product. At this stage, Plaintiff has shown that malic acid may be an
9 ingredient in the 100% Apple Juice. If it is later determined to not contain malic acid, the
10 100% Apple Juice can be removed from the Class Definition. In consideration of
11 Plaintiff’s request, the Court removes Cranberry Juice Cocktail from the Class Definition
12 and replaces it with the Cran-Raspberry Juice product. Therefore, all products have the
13 same “no artificial flavor” label statements and all contain either malic or fumaric acid.
14 Accordingly, Defendants’ argument that all Products do not contain malic or fumaric acid
15 and defeats commonality is moot.

16 **3. Rule 23(a)(3) - Typicality**

17 Plaintiff asserts her claims are typical of those of the class members because she
18 and all class members were exposed to the same misleading claims and omissions, were
19 influenced by those claims and omissions and were injured in the same manner.

21 ⁵ On October 9, 2018, Defendants filed objections to these declarations as irrelevant and inadmissible
22 hearsay. (Dkt. No. 60.) In considering a motion for class certification, strict adherence to the Federal
23 Rules of Evidence is not required and inadmissible evidence may be considered. Gonzalez v. Millard
24 Mall Servs., Inc., 281 F.R.D. 455, 459 (S.D. Cal. 2012) (citing Eisen v. Carlisle and Jacquelin, 417 U.S.
25 156, 178 (1974)); Smith v. Microsoft Corp., 297 F.R.D. 464, 473-74 (S.D. Cal. 2014) (courts may
26 consider inadmissible evidence in determining whether a class should be certified). Here, Defendants
27 object to the two labels of 100% Apple Juice on third-party websites as not products purchased by
28 Plaintiffs and are therefore, irrelevant. The screen shot is of the 100% Apple Juice product in a single
serve and a 15.2 oz bottle. While Plaintiff alleges she purchased the 64-ounce juice products, it would
be presumed that the contents of the 100% Apple Juice product would be the same whether in a single
serve or 64-ounce bottle. At this stage, the Court considers these labels, presented in the reply, to
challenge Defendants’ argument in opposition that the 100% Apple Juice contains no malic or fumaric
acid. Therefore, Defendants’ objection is overruled.

1 Defendants argue that Plaintiff’s guru-for-hire services as a “health coach” and “label
2 guru” creates a financial incentive on her part that is not typical of other class members
3 and create bias and credibility issues that could harm the interests of absentee class
4 members. Plaintiff replies that Defendants misapprehend the typicality requirement
5 which focuses on Defendants’ conduct and Plaintiff’s legal theories and not on her
6 expertise or outside experience.

7 Under typicality, the Court must determine whether the claims or defenses of the
8 representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P.
9 23(a)(3). “The purpose of the typicality requirement is to assure that the interest of the
10 named representative aligns with the interests of the class.” Hanon v. Dataproducts
11 Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal citation omitted). “The test of
12 typicality is whether other members have the same or similar injury, whether the action is
13 based on conduct which is not unique to the named plaintiffs, and whether other class
14 members have been injured by the same course of conduct.” Id. “Under the rule’s
15 permissive standards, representative claims are ‘typical’ if they are reasonably co-
16 extensive with those of absent class members; they need not be substantially identical.”
17 Hanlon, 150 F.3d at 1020. “Typicality refers to the nature of the claim or defense of the
18 class representative, and not to the specific facts from which it arose or the relief sought.”
19 Hanon, 976 F.2d at 508.

20 The Court agrees that Defendants’ focus on the personal education and
21 employment background of Plaintiff is not relevant in assessing typicality. The Federal
22 Rules specifically note that the typicality inquiry is on the class representative’s claims or
23 defenses and whether they are typical of the class. See Fed. R. Civ. P. 23(a)(3). Here,
24 Plaintiff has demonstrated that her claims are typical as the Complaint alleges that she
25 and all class members purchased the Products, were deceived by the false and deceptive
26 labeling and lost money as a result. (Dkt. No. 1-2, Compl. ¶ 105.) All class members
27 were exposed to the same omission and affirmative misrepresentation on the labels of the
28

1 Products. (Id. ¶ 107.) Therefore, the Court concludes that Plaintiff has established that
2 her claims and injuries are typical of the claims and injuries of the class.⁶

3 **4. Rule 23(a)(4) - Adequacy**

4 Plaintiff argues that she is an adequate class representative because she has no
5 conflict of interest with other class members, she is aware of her obligations as a class
6 representative, and she has prosecuted and will continue to prosecute the action
7 vigorously on behalf of the class. As for her counsel, Plaintiff contends that they are
8 experienced in consumer protection class actions and other false advertising litigation,
9 have no conflicts and will prosecute the action vigorously on behalf of the class.

10 Defendants respond that Plaintiff and her counsel are not adequate to represent any class
11 primarily due to their conduct during discovery.

12 Rule 23(a)(4) provides that class representatives must “fairly and adequately
13 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In analyzing whether Rule
14 23(a)(4) has been met, the Court must ask two questions: “(1) do the named plaintiffs and
15 their counsel have any conflicts of interest with other class members and (2) will the
16 named plaintiffs and their counsel prosecute the action vigorously on behalf of the
17 class?” Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 1031 (9th Cir. 2012)
18 (quoting Hanlon, 150 F.3d at 1020).

19 Defendants do not allege that Plaintiff and her counsel have any conflict of interest
20 with other class members but appear to argue that they will not prosecute the action
21 vigorously and raise other arguments not relevant to an adequacy inquiry.

22 First, Defendants argue that Plaintiff was recruited by counsel to be a class
23 representative in this case. Before being recruited by counsel, Plaintiff did not have an
24 issue with Ocean Spray products and did not know she was being harmed by the
25

26
27 ⁶ Defendants also summarily argue that Plaintiff will be occupied with defenses unique to her but do not
28 identify which defenses are unique to her and which would “threaten to become the focus of the
litigation.” See Hanon, 976 F.2d at 508. The Court declines to consider an issue not fully developed.

1 Products. She also had no prior legal relationship with her counsel who solicited her, did
2 not interview any other potential law firms to represent her and conducted minimal
3 research into her counsel. Plaintiff replies that even if her counsel recruited her, which
4 she claims they did not, recruitment by counsel is not relevant to the adequacy analysis.

5 In a case where the plaintiff's counsel solicits professional employment for the
6 purposes of filing a class action and violates the Rules of Professional Conduct, such
7 violations do not make the plaintiff an inadequate class representative. Busby v. JRHBW
8 Realty, Inc., 513 F.3d 1314, 1323-24 (11th Cir. 2008). Instead, the proper remedy for
9 improper solicitation is disciplinary action and not denial of class certification. Id.; see
10 also Zaklit v. Nationstar Mortg., LLC, 15cv2190-CAS(KKx), 2017 WL 3174901, at *14
11 (C.D. Cal. July 24, 2017) (a finding of solicitation does not undermine an adequacy
12 finding); In re Vitamin C Antitrust Litig., 279 F.R.D. 90, 108 (E.D.N.Y. 2012) (noting
13 that courts have given less weight to solicitation by class counsel in determining whether
14 a class should be certified); Ballan v. Upjohn Co., 159 F.R.D. 473, 488 (W.D. Mich.
15 1994) ("open solicitation is no longer frowned upon as in the past"). Thus, the alleged
16 solicitation of Plaintiff by her counsel does not make her an inadequate representative for
17 the class.

18 Second, Defendants argue that Plaintiff's refusal to answer interrogatories, refusal
19 to produce documents, refusal to appear for a deposition, and her giving knowingly false
20 testimony during her deposition make her an inadequate class representative. Relatedly,
21 Defendants argue that Plaintiff's counsel are inadequate based on their failure to provide
22 discovery responses, their refusal to make Hilsley available for deposition prior to the
23 class discovery cut-off date, and allowing their client to give false deposition testimony.
24 (Dkt. No. 30 at 20.) Plaintiff replies that Defendants sat on their discovery rights and the
25 fault lies with them because they failed to seek assistance from the court.

26 "Delays in seeking class certification, a failure timely to prosecute the litigation,
27 and any failure to comply with reasonable disclosure obligations or discovery requests
28 are factors that suggest that the class representative is inadequate." Kandel v. Brother

1 Int'l Corp., 264 F.R.D. 630, (C.D. Cal. 2010) (citing cases) (class counsel inadequate
2 where counsel repeatedly erred in ways that prejudiced or could have prejudiced the class
3 had the Court not granted relief from counsel's error); Quinonez v. Pharm. Specialties,
4 Inc., CV 16-5966 BRO(AGR), 2017 WL 4769436, at *3-5 (C.D. Cal. Aug. 10, 2017)
5 (counsel was inadequate to protect interests of the plaintiff and the class based on
6 numerous errors and repeated failure to comply with the federal rules, local rules and the
7 court's standing order). Class counsel may be deemed inadequate based on repeated or
8 numerous errors that could prejudice the class. See id.

9 In this case, Plaintiff's counsels' alleged misconduct in responding to discovery
10 requests do not rise to the level of inadequate counsel for purposes of class certification.
11 On June 1, 2018, Ocean Spray served its Request for Production of Documents and First
12 Set of Interrogatories to Plaintiff. (Dkt. No. 30-2, Shackleford Decl. ¶¶ 4, 7.) On July 5,
13 2018, Plaintiff served her responses to both discovery requests and provided almost all
14 the same response/objections to all 58 requests for production of documents and same
15 response to all 24 responses to the interrogatories. (Id. ¶¶ 5, 8.) In response to most of
16 the Request for Production of Documents she stated:

17 Plaintiff incorporates by reference the general objections set forth above.
18 Plaintiff further objects to this Request on the following grounds:

19 Plaintiff objects to this Request to the extent that it seeks documents that are
20 protected from disclosure by the attorney-client privilege and/or the
21 attorney-work product doctrine. Plaintiff objects to this Request to the extent
22 that it seeks the premature disclosure of expert materials and opinions.
23 Plaintiff objects to this Request to the extent that it seeks documents that are
24 neither relevant nor proportional to the needs of the case. Plaintiff objects to
25 this request as a violation of her right to financial privacy.

26
27 Discovery is ongoing and Plaintiff reserves the right to supplement this
28 response as discovery proceeds.

(Dkt. No. 30-4, Shackleford Decl., Ex. 5, Response to Ds' RPD No. 1.) As to the
interrogatories, Plaintiff responded as to every request as follows:

1 Plaintiff incorporates by reference the general objections set forth above.
2 Plaintiff further objects to this Request on the following grounds:

3 Plaintiff objects to this Interrogatory to the extent that it seeks information
4 that is protected from disclosure by the attorney-client privilege and/or the
5 attorney-work product doctrine. Plaintiff objects to this Interrogatory to the
6 extent that it seeks the premature disclosure of expert materials and
7 opinions. Plaintiff objects to this Interrogatory to the extent that it seeks
8 information that is neither relevant nor proportional to the needs of the case.

9 Discovery is ongoing and Plaintiff reserves the right to supplement this
10 response as discovery proceeds.

11 (Dkt. No. 30-5, Shackelford Decl., Ex. 7, Response to Ds' Interrog. No. 1.) Only 1
12 document was provided in response to Defendant's Request for Production of Documents
13 at Plaintiff's deposition. (Dkt. No. 30-4, Shackelford Decl., Ex. 5.) On July 19, 2018,
14 counsel participated in a meet and confer telephone call about outstanding discovery
15 issues and Plaintiff's counsel indicated no supplement would be provided on Plaintiff's
16 interrogatory responses. (Dkt. No. 30-2, Shackelford Decl. ¶ 9.) Despite these
17 outstanding discovery issues, Defendants did not seek assistance from the Court as
18 provided in the Scheduling Order filed on March 9, 2018, (Dkt. No. 14), and under
19 Federal Rule of Civil Procedure 37.

20 If Defendants deemed Plaintiff's responses and answers as non-responsive, after
21 the meet and confer, they should have filed an appropriate discovery motion with the
22 Magistrate Judge to resolve any discovery issues. (Dkt. No. 14, Sch. Order at 2) ("If the
23 parties reach an impasse on any discovery issues, counsel shall file an appropriate motion
24 within the time limit and procedures outlined in the Chambers Rules."). Moreover,
25 Federal Rule of Civil Procedure 37 provides that a party may seek to compel discovery
26 responses if a party fails to answer an interrogatory or fails to produce documents. Fed.
27 R. Civ. P. 37(a)(3)(B).

28 Defendants' failure to invoke the discovery dispute procedures cannot be a basis
for the Court to conclude that Plaintiff refused to provide discovery responses. Without a

1 determination by the Magistrate Judge, the Court is not able to determine whether
2 Plaintiff's responses were non-responsive. Plaintiff may, in fact, have had valid reasons
3 for objecting to Defendants' discovery requests. Therefore, Defendants' argument that
4 Plaintiff and her counsel are inadequate based on their failure to respond to discovery
5 requests is without merit.

6 Moreover, Defendants complain that Plaintiff and her counsel's refusal to timely
7 appear for her deposition make them inadequate. Defendants inquired about taking
8 Plaintiff's deposition in late May, and again on June 27, 2018. Because Plaintiff's
9 counsel was not responsive, on June 27, 2018, Defendants served a notice of deposition
10 for Hilsley set for July 9, 2018, the class discovery cutoff date. (Id. ¶ 10.) On June 28,
11 2018, Plaintiff's counsel indicated they would not be available on July 9, 2018. (Id. ¶
12 11.) Hilsley's deposition was eventually taken on August 4, 2018 past the deadline for
13 class discovery. (Id. ¶ 14.) Again, Defendants failed to seek relief from the Magistrate
14 Judge and the Court is unable to determine whether there was good cause for delaying
15 Plaintiff's deposition.

16 Next, Defendants argue that Plaintiff knowingly provided false testimony in her
17 deposition when she was asked about paragraph 68 of her complaint. Paragraph 68 of her
18 complaint states,

19 John Compton, the Chief Executive Officer of Ocean Spray's parent
20 company, stated to investors at the Morgan Stanley Consumer & Retail
21 Conference, "We have talked extensively to consumers about this idea, and
22 they come back and tell us the number one motivation for purchase is
products that claim to be all natural."

23 (Dkt. No. 1, Compl. ¶ 68.) Defendants assert that Ocean Spray does not have a parent
24 company but the allegation is a statement made by a PepsiCo executive, which was
25 asserted in one of the other malic acid cases filed by Plaintiff's counsel on behalf of a
26 different named plaintiff. Plaintiff responds that there was a one-word drafting error in
27 paragraph 68 and the word "parent" should have replaced with "partner" and Defendants'
28

1 attack on her for this error and accusing her of providing “knowing false testimony” is
2 preposterous.

3 Defendants’ citation to CE Design Ltd. v. King Architectural Metal, Inc., 637 F.3d
4 721, 727-28 (7th Cir. 2011) is not supportive. In that case, a discrepancy concerning a
5 key issue in the testimony of the president of a class action plaintiff business firm raised
6 serious doubts concerning adequacy. Id. In this case, paragraph 68 is merely background
7 information and not a key element of a cause of action. Years ago, the United States
8 Supreme Court affirmed class certification where the named plaintiff “knew nothing
9 about the content of the suit,” . . . “but did know . . . that she had put over \$2,000 of her
10 hard-earned money into Hilton Hotel stock [and] that she was not getting her dividends.”
11 Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 370, 372 (1966); see also Buus v. WAMU
12 Pension Plan, 251 F.R.D. 578, 587 (W.D. Wash. 2008) (“Although Weber may be
13 unsophisticated and not fully aware of the facts of the case, that alone is not a bar to class
14 certification.”). Another court also explained, “[f]or an assault on the class
15 representative’s credibility to succeed, the party mounting the assault must demonstrate
16 that there exists admissible evidence so severely undermining plaintiff’s credibility that a
17 fact finder might reasonably focus on plaintiff’s credibility, to the detriment of the absent
18 class members’ claims.” Dubin v. Miller, 132 F.R.D. 269, 272 (D. Colo. 1990).

19 Here, the fact that Plaintiff did not know who John Compton was, which was
20 related to background information in her complaint, does not rise to the level of egregious
21 conduct to make her an inadequate class representative. (Dkt. No. 30-3, Shackleford
22 Decl., Ex. 1, Hilsley Depo. at 114:7-24.) Instead, the record shows that Plaintiff is
23 otherwise fully informed about the case. (Dkt. No. 23-19, Hilsley Decl. ¶¶ 9, 10.) She
24 has remained in contact with her attorneys throughout the litigation and kept informed of
25 the status of the case. (Id. ¶ 9.) She understands the responsibilities of a class
26 representative, which include acting on behalf of the Class’s best interest, staying
27 involved, being informed about the case, and actively participating in it including making
28 herself available at trial. (Id. ¶ 10.) She also testified that she spent about six or seven

1 hours going over the information contained in the complaint. (Dkt. No. 30-3,
2 Shackleford Decl., Ex. 1, Hilsley Depo. at 70:6-19.)

3 Finally, Defendants argue that her “self-styled expertise” disguises a lack of
4 knowledge because she failed to produce peer-reviewed scientific papers she had claims
5 she studied. However, they provide no specific legal support that a class representative
6 needs to provide peer-reviewed scientific papers about the underlying issues in the
7 litigation. Defendants’ argument is not supported.

8 In sum, the Court concludes that Plaintiff has demonstrated adequacy as to herself
9 as a class representative, and as to her counsel.

10 **C. Federal Rule of Civil Procedure 23(b)(3)**

11 Under Rule 23(b)(3), the plaintiff must demonstrate “that a class action is superior
12 to other available methods for fairly and efficiently adjudicating the controversy” and that
13 “the questions of law or fact common to class members predominate over any questions
14 affecting only individual members.” Fed. R. Civ. P. 23(b)(3). Predominance is satisfied
15 “[w]hen common questions present a significant aspect of the case and they can be
16 resolved for all members of the class in a single adjudication.” Hanlon, 150 F.3d at 1022
17 (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and
18 Procedure § 1777 (2d ed. 1986)). In addition, class damages must be sufficiently
19 traceable to the plaintiff’s liability case. See Comcast Corp. v. Behrend, 133 S. Ct. 1426,
20 1433 (2013).

21 **1. Predominance**

22 Plaintiff argues that common issues predominate concerning her claims under
23 California’s CLRA, UCL and FAL because the issue is whether Defendants
24 misrepresented the Products and whether the misrepresentations were likely to deceive a
25 reasonable consumer. As to the breach of express warranty claims, Plaintiff maintain
26 that Ocean Spray made the same warranty to every class member that their Products
27 contained “No artificial flavors”; therefore, resolution of the issue only requires whether
28 the “No artificial flavors” is an express warranty, and if so, whether the Products

1 conforms to the promises and descriptions on the labels. Similarly, she argues that the
2 breach of warranty standard is the same as the breach of implied warranty of
3 merchantability.

4 Defendants argue that predominance has not been met for the same reason why
5 they claim that commonality was not met. They contend that because Plaintiff has failed
6 to present evidence that malic and fumaric acids function as flavors in the products at
7 issue, it is a “death knell” to her motion as it pervades each of the claims. (Dkt. No. 30 at
8 21.)

9 “Merits questions may be considered to the extent—but only to the extent—that
10 they are relevant to determining whether the Rule 23 prerequisites for class certification
11 are satisfied.” Amgen, Inc., 568 U.S. at 466. “Rule 23(b)(3) requires a showing that
12 questions common to the class predominate, not that those questions will be answered, on
13 the merits, in favor of the class.” Id. at 459. It only “must be of such a nature that it is
14 capable of classwide resolution.” Wal-Mart, 131 S. Ct. at 2551 (emphasis added); see
15 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (“In determining the propriety of
16 a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of
17 action or will prevail on the merits, but rather whether the requirements of Rule 23 are
18 met.”). As discussed on the commonality factor, merit questions are not appropriate at
19 the class certification stage. See Amgen, 568 U.S. at 459; Alcantar, 800 F.3d at 1053.
20 Rule 23(b)(3) requires a showing that questions common to the class predominate, not
21 whether Plaintiff has proven her case. Therefore, contrary to Defendants’ argument,
22 Plaintiff’s burden at this stage is not to establish that malic and fumaric acids function as
23 flavors but to establish whether “questions of law or fact common to class members
24 predominate over any questions affecting only individual members.” See Fed. R. Civ. P.
25 23(b)(3).

26 “The predominance inquiry ‘asks whether the common, aggregation-enabling,
27 issues in the case are more prevalent or important than the non-common, aggregation-
28 defeating, individual issues.’” Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045

1 (2016) (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49 (5th ed. 2012)).
 2 “When ‘one or more of the central issues in the action are common to the class and can
 3 be said to predominate, the action may be considered proper under Rule 23(b)(3) even
 4 though other important matters will have to be tried separately, such as damages or some
 5 affirmative defenses peculiar to some individual class members.” *Id.* (quoting 7AA C.
 6 Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 (3d ed. 2005)).

7 Here, Defendants do not challenge Plaintiff’s predominance argument that
 8 common issues predominate on her legal claims. Plaintiff’s UCL, FAL and CLRA
 9 claims depend on whether the labels are “unlawful, unfair, deceptive, or misleading to
 10 *reasonable* consumers”, an objective standard. Werdebaugh v. Blue Diamond Growers,
 11 Case No. 12cv2724-LHK, 2014 WL 2191901, at *12 (N.D. Cal. May 23, 2014)
 12 (emphasis in original). Each of the three statutes allows “plaintiffs to establish
 13 materiality and reliance (i.e., causation and injury) by showing that a reasonable person
 14 would have considered the defendant’s representation material.” In re ConAgra Foods,
 15 Inc., 90 F. Supp. 3d 919, 983 (C.D. Cal. 2015) (citations omitted). A plaintiff does not
 16 need to demonstrate individual reliance. *Id.* Therefore, these causes of action requiring
 17 an objective test make such claims amenable to class actions. Tait v. BSH Home
 18 Appliances Corp., 289 F.R.D. 466, 480 (C.D. Cal. 2012). Similarly, for a breach of
 19 express warranty claim,⁷ a plaintiff need not prove reliance on specific representations.
 20 *Id.* at 984. Because each of the elements are subject to common proof, common issues
 21 predominate over individual ones on the UCL, FAL, CLRA and breach of express
 22 warranty.

23 On a claim of breach of implied warranty, a plaintiff must demonstrate that goods
 24 are “fit for the ordinary purpose for which such goods are used.” Cal. Comm. Code §
 25 _____

26
 27 ⁷ “To prevail on a breach of express warranty claim under California law, a plaintiff must prove that:
 28 ‘(1) the seller’s statements constitute an affirmation of fact or promise or a description of the goods; (2)
 the statement was part of the basis of the bargain; and (3) the warranty was breached.’” In re ConAgra
Foods, Inc., 90 F. Supp. 3d at 984 (citation omitted).

1 2314(2)(c). California requires that a plaintiff alleging a breach of implied warranty
2 claim be in vertical privity with the defendant. Clemens v DaimlerChrysler Corp., 534
3 F.3d 1017, 1023 (9th Cir. 2008) (a consumer who buys from a retailer is not in privity
4 with the defendant manufacturer); In re ConAgra Foods, 90 F. Supp. 3d at 986. An
5 exception to the privity requirement exists but only as to breach of express warranty, and
6 not breach of implied warranty.⁸ Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 696
7 (1954) (“[T]he . . . exception, where representations are made by means of labels or
8 advertisements, is applicable only to express warranties.”).

9 The Complaint alleges breach of implied warranty under the California
10 Commercial Code, (Dkt. No. 1-2, Compl. ¶¶ 172-186), which provides for an implied
11 warranty that goods “[a]re fit for [the] ordinary purposes for which such goods are used.”
12 Cal. Com. Code § 2314(2)(c). Because vertical privity is required between the plaintiff
13 and the defendant, and because Plaintiff and class members purchased the Products in
14 retail stores, individual inquiries will be predominate to determine if there is vertical
15 privity between class members and Defendants. See In re ConAgra Foods, 90 F. Supp.
16 3d at 986-97 (individual issues predominate over common ones on breach of implied
17 warranty); Allen v. Hyland’s, Inc., 300 F.R.D. 643, 670 (C.D. Cal. 2014) (no
18 predominance for breach of implied warranty because each class member will be required
19 to demonstrate he or she is in vertical privity with the defendant).

20 In conclusion, the Court concludes that Plaintiff has demonstrated that questions
21 common to the class predominate over any individual questions affecting members as to
22
23

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25 ⁸ District courts have noted the ambiguity as to when the exception to vertical privity applies. In
26 Clemens, the Ninth Circuit implied that the exception to vertical privity based on written labels or
27 advertisements of a manufacturer applies to breach of implied warranty but relies on Burr, a California
28 Supreme Court case that specifically limited the exception to breach of express warranty. See In re
ConAgra Foods, Inc., 90 F. Supp. 3d at 986 n. 201; Allen, 300 F.R.D. at 669 n. 24. These courts have
declined to recognize a vertical privity requirement for a breach of implied warranty claims based on
written labels or advertisements. The Court follows suit.

1 the UCL, FAL, CLRA and breach of express warranty claims but not as to the breach of
2 implied warranty claim.

3 **2. Damages**

4 Plaintiff must present a damages model that is consistent with her liability case,
5 and the court “must conduct a rigorous analysis to determine whether that is so.”

6 Comcast Corp., 133 S. Ct. at 1433 (internal quotation marks omitted). Plaintiff “must be
7 able to show that [her] damages stemmed from the defendant’s actions that created the
8 legal liability.” Leyva v. Medline Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013).

9 “Calculations need not be exact.” Comcast, 133 S. Ct. at 1433. Here, Plaintiff’s liability
10 case is based upon the alleged mislabeling on Ocean Spray “Cran-Apple” and “Cran-
11 Grape” products which state “No . . . artificial flavors” when in fact they contain artificial
12 flavoring chemicals that simulate the advertised fruit flavors. Plaintiff asserts that these
13 misrepresentations led consumers to pay more than they otherwise would have.

14 Damages under the UCL⁹, FAL¹⁰, and the CLRA¹¹ provide for restitution. Colgan
15 v. Leatherman Toll Grp., 135 Cal. App. 4th 663, 694 (2006). Restitution restores the
16 status quo “by returning to the plaintiff funds in which he or she has an ownership
17 interest.” Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1149 (2003).

18 “The proper measure of restitution in a mislabeling case is the amount necessary to
19 compensate the purchaser for the difference between a product as labeled and the product
20 as received.” Werdebaugh, 2014 WL 2191901, at *22 (citing Colgan, 135 Cal. App. 4th
21 at 700). “Restitution can . . . be determined by taking the difference between the market
22 price actually paid by consumers and the true market price that reflects the impact of the
23 unlawful, unfair, or fraudulent business practices.” Werdebaugh, 2014 WL 2191901, at
24 *22. While a plaintiff must present the likely method for determining class damages, “it
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26
27 ⁹ Cal. Bus. & Prof. Code § 17203.

28 ¹⁰ Cal. Bus. & Prof. Code § 17535.

¹¹ Cal. Civ. Code § 1780(a)(3).

1 is not necessary to show that [this] method will work with certainty at this time.” Chavez
2 v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 379 (N.D. Cal. 2010). Comcast
3 demands that Plaintiff demonstrates, with evidence, that there is a class-wide method of
4 determining damages that is consistent with her theory of liability. See Comcast Corp.,
5 133 S. Ct. at 1433.

6 Plaintiff presents two proposed Price Premium damages models that she claims are
7 consistent with her theory of liability and satisfy Comcast. She claims that damages can
8 be calculated on a class wide basis by showing the price premium or the premium amount
9 that consumers are willing to pay for Ocean Spray’s “No artificial flavors” labeling
10 claims. Defendants oppose.

11 Plaintiff’s first damages model is based on a consumer survey conducted by her
12 expert, Dr. George E. Belch. Dr. Belch was retained to determine whether a “claim made
13 on a package label that Ocean Spray Cranberry juice-based beverage products, such as
14 Cran-Apple and Cran-Grap, contain no artificial flavors and the absence of a label
15 declaration of artificial flavors, affect the price a reasonable consumer is willing to pay
16 for them.” (Dkt. No. 23-20, Belch Expert Report ¶ 6.) Towards this end, Dr. Belch
17 conducted a consumer survey. In a supplemental declaration, Dr. Belch specifies that this
18 consumer survey is based on contingent valuation methodology.¹² (Dkt. No. 75-1,
19 Suppl. Belch Decl. ¶ 5.) He explains that contingent valuation is “a survey based method
20 of estimating the value that a consumer places on an item by varying its features and
21 having them directly report what they are willing to pay for it.” (Id.) The methodology
22

23
24 ¹² Because the parties did not sufficiently brief the issue of damages as to Dr. Belch’s survey, the Court
25 ordered supplemental briefing including specifying which theory Plaintiff relies on as it appeared that
26 the conjoint theory applied based on Dr. Belch’s report but no detailed analysis was conducted. (Dkt.
27 No. 68.) Dr. Belch explains that conjoint analysis would also have been a method to assess price
28 sensitivity and to assess the impact of the disclosure regarding use of artificial flavors but conjoint
analysis is more appropriate when the information sought includes multiple independent variables on
product price, perceived value or willingness to buy a product; however, in this case, when there is only
one independent variable, contingent valuation is a more useful survey methodology. (Dkt. No. 75-1,
Suppl. Belch Decl. ¶¶ 7, 8.)

1 measures “what a reasonable consumer would have paid for the Ocean Spray Cranberry
2 juice products if they were aware of the use of artificial flavors in them.” (Id.) The
3 survey asks “respondents to consider a hypothetical scenario and they are then asked to
4 consider new information to help them make a purchase decision.” (Id. ¶ 6.)

5 Dr. Belch’s multi-part consumer survey focused on Defendants’ misleading labels
6 and derived a damages model determining how much the allegedly mislabeled Products
7 would have been worth if they had been labeled correctly. (Dkt. No. 23-20, Dr. Belch’s
8 Expert Report at ¶¶ 10-38.) He administered four versions of an online survey with 100
9 participants each and limited the participants to those consumers who purchased “Ocean
10 Spray Cranberry juice” in the past six months. (Id. ¶ 14.) The purpose of selecting those
11 purchasers was to select price premium representative consumers who would pay for
12 naturally-flavored Ocean Spray juice products compared to an artificially-flavored one.
13 (Dkt. No. 35 at 12.) Two of the surveys included bottles and package labels for Ocean
14 Spray Cran-Apple juice and the other two for Ocean Spray Cran-Grape juice. (Dkt. No.
15 23-20, Belch Expert Report ¶ 13.) For each juice product, one label contained the
16 banner, “No High Fructose Corn Syrup, Artificial Colors or Flavors”, while the other
17 “control” label was modified and labeled “Artificially Flavored” in the same banner
18 location. (Id.) Initially, participants were asked to evaluate the design of the labels as to
19 whether they were attractive, interesting, unique, colorful, appealing, and informative.
20 (Id. ¶ 15.) Then they were asked whether any images on the labels would be important
21 when evaluating whether to purchase the product. (Id.) If they answered yes, then they
22 were asked to respond to additional questions. (Id.) After questions relating to the
23 importance of the different information contained on the labels, the survey asked about
24 the price the respondents were willing to pay for the Cran-Apple and Cran-Grape juices
25 with both sets of labels. (Id. ¶ 17.) The purpose of the question was to determine how
26 consumers would respond if they knew the Cran-Apple and Cran-Grape juices were
27 artificially flavored and how this would influence the price they might be willing to pay.
28 (Id.)

1 After analyzing the survey results, Dr. Belch concluded, “[c]onsumers who see
2 Ocean Spray Cranberry juice product labels stating the product has no artificial flavors
3 evaluate it more favorably on important product attributes such as nutritional value,
4 healthiness, and having natural ingredients compared to those who see labels disclosing
5 that the product is artificially flavored. Consumers also have higher levels of purchase
6 likelihood for Ocean Spray Cranberry juice products that use the claim of no artificial
7 flavors on the label versus those products that include a disclosure of artificial flavors on
8 the package label.” (Id. ¶ 35.) Based on the surveys, Dr. Belch determined that the price
9 premium attributable to Ocean Spray’s “No artificial flavors” labeling claim was 61
10 cents. (Id. ¶ 38.)

11 In opposition, Defendants challenge Dr. Belch’s methodology and his Price
12 Premium damages model. As to methodology, they argue that Dr. Belch assumed that
13 fumaric and/or malic acids function as flavors without specifically asking the survey-
14 takers whether they believed that malic or fumaric acids are artificial flavors. Defendants
15 also challenge Dr. Belch’s selection of survey takers to those who had purchased Ocean
16 Spray “cranberry juice” in the past six months and claim the survey questions were
17 skewed because the survey takers were responding to product questions that were distinct
18 from the Products at issue. Lastly, Defendants contend that the survey only provided
19 respondents with various renderings of Ocean Spray bottles depicting only the front
20 display panel and not the back panel which includes legally required labeling standards.

21 Typically, “[c]hallenges to survey methodology go to the weight given the survey,
22 not its admissibility.” Wendt v. Host Int’l, Inc., 125 F.3d 806, 814 (9th Cir. 1997); see
23 e.g., Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1263 (9th Cir. 2001)
24 (“issues of methodology, survey design, reliability, the experience and reputation of the
25 expert, critique of conclusions, and the like go to the weight of the survey rather than its
26 admissibility”). While Defendants may have issues with Dr. Belch’s methodology, on
27 class certification, such challenges do not address whether Plaintiff’s damages models
28 comport with Comcast.

1 As to his damage model, Defendants argue that Dr. Belch has provided a demand-
2 side analysis which fails to satisfy Comcast. They challenge Dr. Belch’s contingent
3 valuation model as one that measures “hypothetical scenarios” and is unconnected to
4 what Ocean Spray actually makes. Plaintiff responds that the contingent valuation model
5 is a reliable survey methodology to determine the price premium.

6 District courts have held that contingent valuation analysis is a reliable survey
7 based methodology to determine price premium damages. See Toyota Motor Corp.
8 Hybrid Brake Mktg., Sales Practices & Prod. Liab. Litig., No. MDL 10-2172-CJC, 2012
9 WL 4904412, at *1 (C.D. Cal. Sept. 20, 2012) (“hedonic regression, contingent valuation,
10 and discrete choice, are generally accepted, have been tested, and are part of peer-
11 reviewed studies”); Dzielak v. Whirlpool Corp., Civ. No. 12cv89 (KM)(JBC), 2017 WL
12 1034197, at *16-18 (D.N.J. Mar. 17, 2017) (Daubert¹³ analysis); Miller v. Fuhu Inc., No.
13 2:14cv6119-CAS-AS, 2015 WL 7776794, at *21 (C.D. Cal. Dec. 1, 2015) (“numerous
14 courts, including this one, have accepted both [Choice-Based Conjoint Analysis] and
15 [Contingent Valuation Method] as reliable methodologies for calculating price premiums
16 on a class[-]wide basis in consumer class actions.”).

17 However, what matters is not whether a methodology is admissible under Daubert
18 but whether it is sufficiently linked to the theory of damages and is capable of identifying
19 damages on a class-wide basis. Hadley v. Kellogg Sales Co., 324 F. Supp. 3d 1084, 1106
20 (N.D. Cal. 2018) (whether [the] proposed conjoint analysis is sufficiently reliable from a
21 methodological standpoint—and therefore admissible under Daubert—is a different issue
22 from whether the conjoint analysis satisfies Comcast”) (citing In re ConAgra Foods, Inc.,
23 90 F. Supp. 3d 919, 946 (C.D. Cal. 2015). As such, the critical question is whether Dr.
24 Belch’s methodology complies with Comcast.

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28 ¹³ Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

1 On that question, Plaintiff contends that her damages model satisfies Comcast and
2 can be calculated on a class wide basis. Dr. Goedde, Plaintiff's economic expert, was
3 provided with Dr. Belch's expert report and Ocean Spray's wholesale unit sales
4 information. (Dkt. No. 75-4, Suppl. Goedde Decl. ¶¶ 18, 22.) During discovery,
5 Defendants disclosed the number of "wholesale unit sales" sold in California and the
6 "wholesale \$ sales" of their products sold to retailers from 2011-2017. (Dkt. No. 78-2,
7 Suppl. Goedde Decl., Schedule 6 at 29 (UNDER SEAL).) Based on a \$3.25 standard
8 retail price for Defendant's Products and Ocean Spray's wholesale unit sales in
9 California, Dr. Goedde was able to determine the estimated retail sales from 2011-2017.
10 (Dkt. No. 75-4, Suppl. Goedde Decl. ¶ 22.) Based on this number, Dr. Goedde applied
11 the price premium determined through Dr. Belch's survey results and calculated the
12 amount of restitution. (Id. ¶ 23.)

13 Defendants object to Dr. Belch's survey arguing it addresses only the demand side
14 of the transaction and not the supply side which courts have held to be inadequate under
15 Comcast.¹⁴ For example, Dr. Belch's survey does not address whether there are any
16 products available for purchase at any price that closely resemble the proxy product in
17 Belch's survey and does not have any information that retailers would be willing to sell
18 the Ocean Spray products for some 19% less than they currently charge, or that the "no
19 artificial flavors" claim is responsible for all or any portion of his so-called premium.
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21

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23 ¹⁴ In its supplemental brief, Defendants again argues that Dr. Belch's failure to specifically ask the
24 survey takers about malic and fumaric acids, his survey results are irrelevant. As discussed above, this
25 challenges the weight of Dr. Belch's methodology, not admissibility. Also, Defendants argue that Dr.
26 Belch's study is flawed because he used a product with a label "artificially flavored" that is non-existent
27 and therefore the conclusions are far removed from any underlying data and should be deemed
28 inadmissible. (Dkt. No. 79 at 7-8.) However, hypothetical products are used in surveys involving
contingent valuation methodology. See Hadley, 324 F. Supp. 3d at 1103 (survey takers were asked "to
choose between hypothetical cereal or breakfast bar products that differ in brand, flavor, labeling
statements, price, and, for the survey corresponding to Kellogg's Frosted Mini Wheats, biscuit size.").
Defendants' arguments are not persuasive.

1 District courts have held that demonstrating a consumer’s willingness to pay is
2 insufficient to satisfy Comcast as it fails to take into consideration any “corresponding
3 gain by the defendant.” See Hadley, 324 F. Supp. 3d at 1105 (“courts have repeatedly
4 rejected conjoint analyses that only measure demand-side willingness-to-pay”). “The
5 ultimate price of a product is a combination of market demand and market supply.” In re
6 NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050, 1119-20 (C.D. Cal.
7 2015) (rejecting expert’s conjoint and direct method analyses because it “completely
8 ignores the price for which NJOY is willing to sell its products, what other e-cigarette
9 manufacturers say about their products, and the prices at which those entities are willing
10 to sell their products.”).

11 At the same time, courts have found that the supply side of the conjoint analysis
12 damages model is satisfied if the prices in the surveys reflect the actual market prices
13 during the class period and the quantities used reflect the actual quantities of products
14 sold. Hadley, 324 F. Supp. 3d at 1105; Brookfield v. Craft Brew Alliance, Inc., Case No.
15 17cv1027-BLF, 2018 WL 4952519, at *18-19 (N.D. Cal. Sept. 25, 2018); In re MyFord
16 Touch Consumer Litig., 291 F. Supp. 3d 936, 969-71 (N.D. Cal. 2018) (finding that the
17 conjoint analysis adequately accounted for supply-side factors “by assuming that the
18 supply—the quantity—was fixed”); Davidson v. Apple, Inc., Case No. 16cv4942-LHK,
19 2018 WL 2325426, at *22 (N.D. Cal. May 8, 2018) (finding that a proposed conjoint
20 analysis from the same expert adequately “account[ed] for the supply side of the
21 equation” and because the supply remains constant as it is not affected by the failure to
22 disclose or not).

23 In Hadley, the defendant packaged breakfast cereals and cereal bars as healthy but
24 excess added sugar allegedly caused those products to be unhealthy. Id. In a conjoint
25 analysis, “[s]urvey respondents are . . . asked to choose between different sets of product
26 attributes, the responses are aggregated, and statistical methods are then used to
27 determine the value (often termed “partworth”) that consumers attach to each specific
28 attribute.” 324 F. Supp. 3d at 1105. The court recognized that district courts have

1 rejected conjoint analyses because the plaintiff failed to account for the supply side and
2 only measured demand-side willingness to pay, but noted that courts have found conjoint
3 analysis can account for supply-side factors “without running afoul of Comcast” when
4 “(1) the prices used in the surveys underlying the analyses reflect the actual market prices
5 that prevailed during the class period; and (2) the quantities used (or assumed) in the
6 statistical calculations reflect the actual quantities of products sold during the class
7 period.” Id. at 1105. The court concluded that the expert’s proposed conjoint analysis
8 accounted for supply-side factors by utilizing prices that are observed in the market and
9 relied on actual sales data or quantities of the challenged products actually sold during the
10 class period which are constant. Id. at 1106.

11 In another recent case, Schneider v. Chipotle Mexican Grill, Inc., --F.R.D.--, 2018
12 WL 4700353, at *15 (N.D. Cal. Sept. 29, 2018), the plaintiff brought suit against
13 Chipotle for falsely and misleadingly advertising its food products as “non-GMO” when
14 in fact the food products contained ingredients that came from animals that fed on
15 genetically modified feed. Id. at *8. The plaintiff sought restitution which is the
16 “difference between the market price actually paid by consumers and the true market
17 price that reflects the impact of the unlawful, unfair, or fraudulent business practices.”
18 Id. at *7. Plaintiff’s expert used a survey to measure the impact of the “non-GMO claims
19 and concluded that the supply-side factor was accounted for because the expert report
20 based its price on “actual prices that Chipotle charged for their food items” which was
21 sufficient to link the “measured willingness to pay to the real-world marketplace in which
22 Chipotle’s products are sold.” Id. at *15. The court recognized that the expert report will
23 be subject to many challenges on cross-examination but it was sufficient to satisfy
24 Comcast. Id.

25 Here, Dr. Belch’s survey methodology addresses only the consumers’ willingness
26 to pay and does not address the supply side factors. However, Plaintiff implicitly
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1 addresses the supply side factors through Dr. Goedde’s supplemental declaration.¹⁵ Dr.
2 Goedde relied on Dr. Belch’s survey results and created a formula using a \$3.25 standard
3 retail price¹⁶ and Ocean Spray’s actual wholesale unit sales in California. Because
4 Plaintiff’s expert relied on the actual unit sales of Ocean Spray products during the class
5 period and a standard \$3.25 retail price to reflect actual prices,¹⁷ Defendants’ argument
6 that Plaintiff’s demand-side model fails to account for real world market conditions and
7 is based on hypotheticals is without merit. See Hadley, 324 F. Supp. 3d at 1105;
8 Brookfield, 2018 WL 4952519, at 19-20. Because Plaintiff has demonstrated she is able
9 to account for supply-side factors, the Court concludes that Plaintiff has demonstrated a
10 damages framework to determine that the price premium paid for the “no . . . artificial
11 flavors” labels is attributed to Defendants’ alleged misrepresentations and predominance
12 has been satisfied as required by Comcast on the UCL, FAL and CLRA claims.

13 Alternatively, in her motion, Plaintiff also retained Dr. Alan G. Goedde to conduct
14 a survey of published juice prices from retailers in Southern California as a means to
15 determine the price premium for Ocean Spray’s “no artificial flavors” labels. (Dkt. No.
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18 ¹⁵ Defendants argue that the Court should disregard Dr. Goedde’s supplemental declaration which was
19 filed long after class certification motion briefing was concluded and Ocean Spray has not had the
20 opportunity or address or respond to this new information. In the Court’s order directing supplemental
21 briefing, the Court invited a supplemental declaration. (Dkt. No. 68 at 3.) Plaintiff presented the
22 supplemental declaration to support her contingent valuation damages theory. Defendants have had an
23 opportunity to respond by filing its response to the supplemental brief. (Dkt. No. 79.) The Court
24 declines to disregard Dr. Goedde’s supplemental declaration.

25 ¹⁶During discovery, Plaintiff sought retail pricing data compiled by Nielsen Company LLC (“Nielsen”)
26 to which Ocean Spray subscribes. (Dkt. No. 34 at 4.) On October 4, 2018, non-party Nielsen filed a
27 motion for protective order. (Dkt. No. 51) On November 21, 2018, the Magistrate Judge granted
28 Nielsen’s motion for protective order. (Dkt. No. 82.) Although Plaintiff is barred from obtaining
Nielsen’s data, Plaintiff may be able to obtain average retail pricing data either “directly from retailers
or from websites of retailers who sell the disputed Products.” (Dkt. No. 75-4, Dr. Goedde Suppl. Decl. ¶
21.)

¹⁷ Defendants do not dispute the \$3.25 average retail price for their products and \$3.25 may be an
appropriate average retail price. See Brookfield, 2018 WL 4952519, at 19 (concluding that price range
comports with real world pricing data where expert report did not include prices that were charged by
the defendant but reflect a “‘realistic’ price range for the product, which can and must include prices
‘higher or lower than the prices of currently offered products.’”).

1 23-21, Goedde Expert Report ¶¶ 9-16.) He concluded that the average price for
2 artificially flavored juices sold in 59 to 64 ounce packaging was \$2.30 while the average
3 price for natural juices in 59 to 64 fluid ounce packaging was \$2.96 indicating a price
4 premium of “\$.66 or 29% over similarly sized artificially flavored products.” (Id. ¶ 13.)
5 Defendants argue that Dr. Goedde’s proposed damages model is fatally flawed
6 challenging his use of diverse comparative products, retailing concepts, juice percentages
7 and an irrelevant specific time period, August 1-3, 2018, in his analysis. The Court
8 agrees.

9 Dr. Goedde conducted an analysis which purported to determine price differences
10 between naturally flavored and artificially flavored juices. (Id. ¶ 9.) He conducted a
11 survey of published juice prices from Southern California retailers from August 1-3,
12 2018. (Id.) Product comparisons were made between similarly sized or packaged
13 products. (Id. ¶ 12.) Based on the survey of published juice prices, Dr. Goedde
14 concluded that there was a price premium of 25% for all natural juice products. (Id. ¶
15 13.)

16 Dr. Goedde’s methodology is similar to those rejected by a number of courts. For
17 example, in In re Pom Wonderful, the district court decertified a class action based on
18 damages where the plaintiff alleged that POM falsely advertised the various health
19 benefits of its products. In re POM Wonderful LLC, No. ML-10-2199 DDP(RZx), 2014
20 WL 1225184, at *1 (C.D. Cal. Mar. 25, 2014). In that case, the plaintiff proposed a Price
21 Premium Model for damages under the FAL, UCL and CLRA and quantified damages by
22 comparing the price of POM with other refrigerated juices of the same size and assumed
23 that absent the alleged misrepresentation, the market price for POM would have been
24 lower. Id. at 3. The court noted that the damages expert did not conduct a survey or
25 consider other evidence to determine what consumers’ behavior might otherwise have
26 been. Id. at 5. Instead, the expert merely used an average of refrigerated juice prices as a
27 benchmark and made no attempt to show how POM’s alleged misrepresentation caused
28 any amount of damages. Id. The expert failed to explain why the price difference existed

1 and to what extent it was a result of POM's actions. Id. He simply calculated what the
2 price difference was and assumed, without a methodology, that the price differential was
3 attributable with POM's misrepresentations. Id. The court held the Price Premium
4 Model proposed in the case did not satisfy Comcast. Id.

5 Similarly, in Wedebaugh, the plaintiff's expert compared the price of the accused
6 Products to the price of allegedly comparable products that did not have the "All Natural"
7 and "evaporated Cane Juice" label statements and calculated the price difference as
8 restitution of the alleged misrepresentation. Wedebaugh, 2014 WL 2191901, at *23.
9 However, the damages model did not link the price difference to the allegedly unlawful
10 or deceptive label statements. Id. Relying on In re Pom, the court concluded, "[r]ather
11 than answer the critical question why that price difference exist[s], or to what extent it
12 [is] the result of [the defendant's] actions, [the expert] instead assumed that 100% of that
13 price difference [is] attributable to [Defendant's] alleged misrepresentations." Id. The
14 Price Premium Model, as proposed by the plaintiff, was unable to account for any
15 differences between the accused products and the expert's chosen comparable products,
16 or for any factors that may cause consumers to prefer the accused products over other
17 identical products. Id. Therefore, the Price Premium Model was insufficient under
18 Comcast. Id.

19 Just as in In re POM and Werdebaugh, Dr. Goedde's model fails to take into
20 account Comcast's requirement that class-wide damages be connected to the legal
21 theories and attributed to Defendants' alleged misrepresentations. See In re POM
22 Wonderful, 2014 WL 1225184, at *5; Werdebaugh, 2014 WL 2191901, at *23 ("Price
23 Premium Model runs afoul of Comcast. . . [it] has no way of linking the price difference,
24 if any, to the allegedly unlawful or deceptive label statements or controlling for other
25 reasons why allegedly comparable products may have different prices."). Accordingly,
26 the Price Premium Model proposed by Dr. Goedde does not satisfy Comcast's
27 requirements as a standalone damages model or comply with predominance requirements
28 under Rule 23(b)(3). See Comcast, 133 S. Ct. at 1430. This ruling only applies to Dr.

1 Goedde’s separate retail price model and does not affect his calculation of restitution
2 damages based on Dr. Belch’s survey results as explained in his supplemental
3 declaration.

4 Lastly, Plaintiff has wholly failed to demonstrate how the Premium Price Model
5 satisfies Comcast as to her breach of warranty claims. Accordingly, the Court concludes
6 that predominance, as to damages, has been satisfied as to the UCL, FAL and CLRA
7 claims but not the breach of express warranty or breach of implied warranty causes of
8 action.

9 **2. Superiority**

10 “Rule 23(b)(3) requires that a class action be ‘superior to other available methods
11 for fairly and efficiently adjudicating the controversy,’ and it specifically mandates that
12 courts consider ‘the likely difficulties in managing a class action.’” Briseno v. ConAgra
13 Foods, Inc., 844 F.3d 1121, 1128 (9th Cir. 2017). Superiority requires a consideration of
14 “(A) the class members’ interests in individually controlling the prosecution or defense of
15 separate actions; (B) the extent and nature of any litigation concerning the controversy
16 already begun by or against class members; (C) the desirability or undesirability of
17 concentrating the litigation in the particular forum; and (D) the likely difficulties in
18 managing a class action.” Fed. R. Civ. P. 23(b)(3)(a)-(d).

19 The superiority requirement tests whether “classwide litigation of common issues
20 will reduce litigation costs and promote greater efficiency.” Valentino v. Carter-Wallace,
21 Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). “If each class member has to litigate numerous
22 and substantial separate issues to establish his or her right to recover individually a class
23 action is not superior.” Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1192 (9th
24 Cir. 2001). Superiority is met where the case involves multiple claims for relatively
25 small individual sums and where some or all of the plaintiffs may not be able to proceed
26 as individuals because of the disparity between their litigation costs and what they hope
27 to recover. Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands,
28 Inc., 244 F.3d 1152, 1163 (9th Cir. 2001). “Class actions . . . may permit the plaintiffs to

1 pool claims which would be uneconomical to litigate individually.” Id. (citing Phillips
2 Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985)).

3 Here, Defendants do not dispute that a class action is superior to other available
4 methods for the fair and efficient adjudication of this issue. In this case, because the
5 misrepresentation claims are common to the class, involve small sums of money, \$0.61
6 cent premium, and do not rely on individual determinations, a class action is the superior
7 method of efficiently and fairly adjudicating Plaintiff and the class members’ claims in
8 this case. Therefore, the Court finds the superiority requirement of Rule 23(b)(3) met as
9 to the UCL, FAL, CLRA and breach of express warranty claims.

10 Based on the foregoing, the Court GRANTS Plaintiff’s motion for class
11 certification pursuant to Rule 23(b)(3) on the UCL, FAL and CLRA claims.¹⁸

12 **D. Federal Rule of Civil Procedure 23(b)(2)**

13 Plaintiff also seeks certification for an injunctive relief class under Rule 23(b)(2).
14 Defendants’ sole argument against certifying a class under Rule 23(b)(2) is that Plaintiff
15 lacks standing to pursue a claim for injunctive relief because she testified she has no
16 desire to purchase products containing either malic or fumaric acid from Ocean Spray or
17 otherwise, no matter what the label says.

18 Rule 23(b)(2) permits class treatment when “the party opposing the class has acted
19 or refuses to act on grounds that apply generally to the class, so that final injunctive relief
20 or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed.

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23 ¹⁸ In the motion for class certification, Plaintiff asserts that the class is ascertainable. However, the
24 Ninth Circuit has declined to adopt an ascertainability and/or administrative feasibility requirement for
25 class plaintiffs to demonstrate for purposes of class certification explaining that “Rule 23 does not
26 impose a freestanding administrative feasibility prerequisite to class certification.” Briseno v. ConAgra
27 Foods, Inc., 844 F.3d 1121, 1126, 1133 (9th Cir. 2017) (joining Sixth, Seventh, and Eighth Circuits and
28 declining to impose an additional hurdle beyond those delineated in Rule 23). The court explained that
policy concerns concerning administratively feasibility are already addressed by Rule 23. Id. at 1133;
see Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136-39 (9th Cir. 2016) (addressing an overbroad
class definition as part of predominance issue). Accordingly, the Court does not address
ascertainability.

1 R. Civ. P. 23(b)(2). In a recent case, the Ninth Circuit resolved a district court split and
2 held that “a previously deceived consumer may have standing to seek an injunction
3 against false advertising or labeling, even though the consumer now knows or suspects
4 that the advertising was false at the time of the original purchase, because the consumer
5 may suffer an ‘actual and imminent, not conjectural or hypothetical’ threat of future
6 harm.” Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 969 (9th Cir. 2018). In
7 providing some context to this holding, the Court explained, “[i]n some cases, the threat
8 of future harm may be the consumer’s plausible allegations that she will be unable to rely
9 on the product’s advertising or labeling in the future, and so will not purchase the product
10 although she would like to.” Id. at 969-70 (citations omitted). “In other cases, the threat
11 of future harm may be the consumer’s plausible allegations that she might purchase the
12 product in the future, despite the fact it was once marred by false advertising or labeling,
13 as she may reasonably, but incorrectly, assume the product was improved.” Id. at 970
14 (citation omitted).

15 In Davidson, the plaintiff paid a premium for wipes labeled “flushable” as opposed
16 to “non-flushable” wipes and alleged that she continues to desire to purchase wipes that
17 are flushable in a household toilet, would purchase truly flushable wipes if they were
18 manufactured by the defendant, regularly visits stores where the defendant’s flushable
19 wipes are sold and is continually presented with the defendant’s flushable wipes
20 packaging but does not know if the representations are true. Id. at 970-71.

21 The court explained that the plaintiff alleged an injury that is “concrete and
22 particularized” because she claimed she is unable to rely on the validity of the
23 defendant’s advertisement despite her desire to purchase truly flushable wipes. Id. at
24 971. She also demonstrated that she will likely be wronged in a similar way because
25 should she encounter the “flushable” wipes at the stores, she could not rely on the
26 representation. Id. Lastly, an injunction would redress her injury by requiring the
27 defendant to make truthful representations on its wipe products. Id. at 972. The court
28 held that the plaintiff established Article III standing to allege a claim for injunctive relief

1 because “she has no way of determining whether the representation ‘flushable’ is in fact
2 true when she regularly visits stores . . . where Defendants’ ‘flushable’ wipes are sold
3 [and] constitutes a threatened injury [that is] certainly impending.” Id. at 972 (internal
4 quotations omitted).

5 In this case, when Plaintiff was asked “[a]s long as Ocean Spray CranApple
6 contains malic acid as an ingredient, would you ever buy it again”, (Dkt. No. 30-3,
7 Shackelford Decl., Ex. 1, Hilsley Depo. at 119:4-6), she responded, “Maybe, maybe not.
8 I don’t know. If they could certify that it was natural and wasn’t artificial.” (Id. at 119:9-
9 12.) Then she was asked, “The Ocean Spray CranGrape, as long as it contains fumaric
10 acid, would you ever buy that product again?” (Id. at 119:13-15.) She responded, “The
11 answer is no, as long as they contain anything that’s artificial, I wouldn’t purchase it.”
12 (Id. at 18-20.) “And that’s regardless of what the label says; is that true?” (Id. at 119:22-
13 23.) “Correct.” (Id. at 119:24.) In a declaration, she states she would and intends to
14 purchase the Ocean Spray Products again in the future if the labels were accurate and
15 they actually contained “No artificial flavors or preservatives.” (Dkt. No. 23-19, Hilsley,
16 Decl. ¶ 7.) The Complaint also allege that she “intends to, desire to, and will purchase
17 the Products again when she can do so with the assurance that Products’ labels, which
18 indicate that the Products are solely naturally-flavored, are lawful and consistent with the
19 Products’ ingredients.” (Dkt. No. 1-2, Compl. ¶ 90.) Her assertions show that she
20 intends to purchase the Ocean Spray Products again in the future if the labels were
21 accurate. However, she is unable to “rely on the product’s advertising or labeling in the
22 future, and so will not purchase the product although she would like to.” Davidson, 889
23 F.3d at 969-70.

24 Defendants misconstrue Plaintiff’s deposition testimony; she did not testify that
25 she would never buy an Ocean Spray Product again, with or without malic or fumaric
26 acid, instead she stated that she would not buy the Products again if they contained
27 artificial flavors but she would buy them if they were accurate. Here, Plaintiff has
28 standing to seek injunctive relief under Rule 23(b)(2).

1 Defendants do not challenge whether Plaintiff is entitled to class certification under
 2 Rule 23(b)(2). Rule 23(b)(2) permits class treatment when “the party opposing the class
 3 has acted or refuses to act on grounds that apply generally to the class, so that final
 4 injunctive relief or corresponding declaratory relief is appropriate respecting the class as
 5 a whole.” Fed. R. Civ. P. 23(b)(2). “Rule 23(b)(2) applies only when a single injunction
 6 . . . would provide relief to each member of the class.” Dukes, 564 U.S. at 360. The “key
 7 to the (b)(2) class is ‘the indivisible nature of the injunctive or declaratory remedy
 8 warranted—the notion that the conduct is such that it can be enjoined . . . only as to all of
 9 the class members or as to none of them.’” Id. (citation omitted). Rule 23(b)(2) “does
 10 not authorize class certification when each individual class member would be entitled to a
 11 *different* injunction . . . against the defendant,” or “to an individualized award of
 12 monetary damages.” Id. at 360-61 (emphasis in original).

13 Here, Plaintiff asserts that all Products contain the “no artificial flavors” labels, all
 14 class members were exposed to the same or substantially similar misleading labels and a
 15 single final injunctive relief would provide relief to each member of the class. Therefore,
 16 the Court concludes that certification under Rule 23(b)(2) is appropriate.

17 **Conclusion**

18 The Court GRANTS in part and DENIES in part Plaintiff’s motion for class
 19 certification under Rule 23(b)(3).¹⁹ The Court GRANTS Plaintiff’s motion to certify a
 20 class as to the UCL, FAL, and CLRA causes of action but DENIES the motion to certify
 21 a class as to the breach of express and implied warranty claims under Rule 23(b)(3).
 22 Also, the Court GRANTS Plaintiff’s motion for class certification under Rule 23(b)(2).

23 The Court certifies a Class consisting of:
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 27 ¹⁹ In the conclusion of their opposition, Defendants assert “Arnold Worldwide had nothing whatsoever
 28 to do with malic or fumaric acid and not class can be certified against it.” (Dkt. No. 30 at 30.)
 Defendants’ summary assertion in their conclusion paragraph does not suffice to deny class certification
 as to Defendant Arnold Worldwide. Accordingly, the Court rejects Defendants’ summary argument.

1 All California Citizens who purchased one of the following Ocean Spray
2 Products, for personal and household use and not for resale, in California
3 from January 1, 2011 until the date class notice is disseminated:

- 4 • Ocean Spray Cran Apple;
- 5 • Ocean Spray Cran Grape;
- 6 • Ocean Spray “100% Apple” Juice Drink;
- 7 • Ocean Spray Cran Raspberry;
- 8 • Ocean Spray Wave Apple with White Cranberries;
- 9 • Ocean Spray Wave Berry Medley;
- 10 • Ocean Spray Cran Cherry;
- 11 • Ocean Spray Cran Pineapple;
- 12 • Ocean Spray Cran Pomegranate;
- 13 • Ocean Spray Diet Cran Pomegranate;
- 14 • Ocean Spray Diet Cran Cherry;
- 15 • Ocean Spray Cranberry Cherry Flavor 100% Juice.

16 Excluded from the Class are Defendants’ current and former officers and
17 directors, members of the immediate families of Defendants’ officers and
18 directors, Defendants’ legal representatives, heirs, successors, and assigns,
19 any entity in which Defendants have or had a controlling interest during the
20 Class Period, and the judicial officers to whom this lawsuit is assigned.

21 Because the Court GRANTS class certification, the Court appoints Plaintiff Crystal
22 Hilsley as the Class Representative.

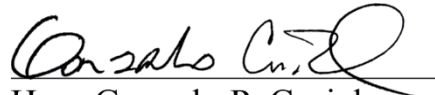
23 Plaintiffs also seeks to have the Law Offices of Ronald A. Marron and the Law
24 Office of David Elliot appointed as Class Counsel. When appointing class counsel the
25 Court considers “(i) the work counsel has done in identifying or investigating potential
26 claims in the action; (ii) counsel’s experience in handling class actions, other complex
27 litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the
28 applicable law; and (iv) the resources that counsel will commit to representing the class.”
Fed. R. Civ. P. 23(g)(1)(A). “A court may also consider “any other matter pertinent to
counsel’s ability to fairly and adequately represent the interests of the class.” Fed. R.
Civ. P. 23(g)(1)(B). Based on Plaintiff’s counsel extensive experience in class action
litigation involving consumer class actions including false advertising, as well as

1 mislabeling of consumer products, (Dkt. No. 23-2, Marron Decl.; Dkt. No. 23-18, Elliot
2 Decl.), and their performance in prosecution this case, the Court appoints Law Offices of
3 Ronald A. Marron and the Law Office of David Elliot as Class Counsel.

4 Plaintiff also seeks approval of Notice to the Class under Rule 23(c)(2)(B) which is
5 submitted by Plaintiff. (Dkt. No. 23-16, Marron Decl., Ex. 13.) Because of the changes
6 made to the Class Definition discussed above, the Court DIRECTS the parties to meet
7 and confer regarding the proposed method and form of class notice. Any agreed-upon
8 notice shall be presented to the Court for approval no later than **December 14, 2018**. In
9 the event the Parties cannot agree upon the form of the notice, each side shall file its
10 proposal on **December 21, 2018**.

11 IT IS SO ORDERED.

12 Dated: November 29, 2018

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14 Hon. Gonzalo P. Curiel
15 United States District Judge
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