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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ALEX KHASIN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

R.C. BIGELOW, INC.,

Defendant.

Case No. 3:12-cv-2204

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION, FOR APPOINTMENT OF CLASS REPRESENTATIVES, AND FOR APPOINTMENT OF CLASS COUNSEL

Hearing Date:	January 20, 2016
Time:	2:00 p.m.
Location:	Courtroom 2, 17th Floor
Judge:	Hon. William H. Orrick

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 20, 2016, at 2:00 p.m. or as soon thereafter as the matter may be heard, in Courtroom 2, 17th Floor of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff will, and hereby do, move for an order, pursuant to Rule 23 of the Federal Rules of Civil Procedure, certifying this action as a class action, appointing them as class representatives, and appointing their counsel as class counsel.

Specifically, Plaintiff will and hereby do move this Court for the following:

1. To certify the following class:

> **All persons in California who purchased Defendant's Green tea products for personal or household use since May 2, 2008 (the "Class").**

The following persons are expressly excluded from the class: (i) Defendant and its subsidiaries and affiliates; (ii) all persons who make a timely election to be excluded from the Class; (iii) governmental entities; and (iv) the Court to which this case is assigned and its staff.

2. To appoint Plaintiff Alex Khasin as class representative;

3. To appoint the firms of Pratt & Associates, Coleman Law Firm and Barrett Law Group, P.A. as counsel for the class; and

4. To order the parties to meet and confer and present to this Court, within fifteen (15) days of an order granting class certification, proposed notice to the certified class.

This motion is based upon this Notice of Motion and Motion and Memorandum of Points and Authorities, the accompanying Declarations of Plaintiff Alex Khasin (Exhibit 1), Pierce Gore (Exhibit 2), Brian Herrington (Exhibit 3), Price Coleman (Exhibit 4), Dr. Neal Hooker (Exhibit 5), and Dr. Edward Scarbrough (Exhibit 6) as well as the pleadings and papers on file in this action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF ISSUES TO BE DECIDED

Whether the proposed class satisfies the requirements of Fed. R. Civ. P. 23(a), 23(b)(2) and 23(b)(3).

MEMORANDUM OF POINTS AND AUTHORITIES
INTRODUCTION

California law and FDA regulations provide that statements on food labels must conform to certain requirements. Plaintiff alleges, and the evidence presented in this motion shows, that the labels on Defendant's black tea products are misbranded and, therefore, unlawful. The labels at issue are alike, regardless of where the product was bought and regardless of the particular flavor of the product. This case is tailor-made for class certification under Rules 23(b)(2) and (b)(3).

FACTS COMMON TO THE CLASS

Pursuant to Section 403 of the FDCA, a claim that characterizes the level of a nutrient in a food is a "nutrient content claim" that must be made in accordance with the regulations that authorize the use of such claims. 21 U.S.C. § 343(r)(1)(A). California expressly adopted the requirements of 21 U.S.C. § 343(r) in § 110670 of the Sherman Law.

Nutrient content claims are claims about specific nutrients contained in a product. They are typically made on the front of packaging in a font large enough to be read by the average consumer. Because these claims are relied upon by consumers when making purchasing decisions, the regulations govern what claims can be made in order to prevent misleading claims.

21 C.F.R. § 101.13 provides the general requirements for nutrient content claims, which California has expressly adopted. *See* Cal Health & Saf Code § 110100. 21 C.F.R. § 101.13 requires that manufacturers include certain disclosures when a nutrient claim is made and, at the same time, the product contains certain levels of unhealthy ingredients, such as fat and sodium. It also sets forth the manner in which that disclosure must be made.

An "expressed nutrient content claim" is defined as any direct statement about the level (or range) of a nutrient in the food (*e.g.*, "low sodium" or "contains 100 calories").[1] *See* 21 C.F.R. § 101.13(b)(1). An "implied nutrient content claim" is defined as any claim that: (i) describes the food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a certain amount (*e.g.*, "high in oat bran"); or (ii) suggests that the food, because of its

[1] Section 403(r)(1)(A) of the FDCA governs the use of expressed and implied nutrient content claims on labels of food products that are intended for sale for human consumption. *See* 21 C.F.R. § 101.13.

nutrient content, may be useful in maintaining healthy dietary practices and is made in association with an explicit claim or statement about a nutrient (*e.g.*, "healthy, contains 3 grams (g) of fat"). 21 C.F.R. § 101.13(b)(2)(i-ii).

These regulations authorize use of a limited number of defined nutrient content claims. In addition to authorizing the use of only a limited set of defined nutrient content terms on food labels, these regulations authorize the use of only certain synonyms for these defined terms. If a nutrient content claim or its synonym is not included in the food labeling regulations it cannot be used on a label. Only those claims, or their synonyms, that are specifically defined in the regulations may be used. All other claims are prohibited. 21 CFR § 101.13(b). Manufacturers are on notice that the use of an unapproved nutrient content claim is prohibited conduct. 58 Fed. Reg. 2302. In addition, 21 U.S.C. § 343(r)(2), whose requirements have been adopted by California, prohibits using unauthorized undefined terms and declares foods that do so to be misbranded.

Similarly, the regulations specify absolute and comparative levels at which foods qualify to make these claims for particular nutrients (e.g., low fat . . . more vitamin C) and list synonyms that may be used in lieu of the defined terms. Certain implied nutrient content claims (e.g., "healthy") also are defined. The daily values (DVs) for nutrients that the FDA has established for nutrition labeling purposes have application for nutrient content claims, as well. Claims are defined under current regulations for use with nutrients having established DVs; moreover, relative claims are defined in terms of a difference in the percent DV of a nutrient provided by one food as compared to another. *See e.g.*, 21 C.F.R. §§ 101.13 and 101.54.

I. DEFENDANT HAS MADE UNLAWFUL AND MISLEADING NUTRIENT CONTENT CLAIMS

In order to appeal to consumer preferences, Defendant has repeatedly made unlawful nutrient content claims about antioxidants that fail to utilize one of the limited defined terms. These nutrient content claims are unlawful because they failed to comply with the nutrient content claim provisions in violation of 21 C.F.R. §§ 101.13 and 101.54, which have been incorporated in California's Sherman Law. To the extent that the terms used to describe antioxidants without a recognized daily value or RDI (such as "natural source") are deemed to be

a synonym for a defined term like "contain" the claim would still be unlawful because, as these nutrients do not have established daily values, they cannot serve as the basis for a term that has a minimum daily value threshold as the defined terms at issue here do.

Defendant's claims concerning unnamed antioxidant nutrients are false because Defendant's use of a defined term is in effect a claim that the products have met the minimum nutritional requirements for the use of the defined term (antioxidants) when they have not.

For example, nutrient content claims that Defendant make on the labels of its teas are false and unlawful because they use defined terms such as "*packed powerful antioxidants*" Defendant uses these terms to describe antioxidants and flavonoids that fail to satisfy the minimum nutritional thresholds for these defined terms.

An "excellent source" claim requires a nutrient to be present at a level at least 20% of the Daily Value for that nutrient while "contains" and "provides" claims require a nutrient to be present at a level at least 10% of the Daily Value for that nutrient. Defendant's "*packed powerful antioxidants*" claim is an "excellent source" claim requiring 20% DV.

Therefore, for example, the claim that mother nature "*packed powerful antioxidants*" into Defendants products is false and unlawful. Defendant's teas do not meet the minimum nutrient level threshold to make such a claim which is 20% or more of the RDI or the DRV of a nutrient per reference amount customarily consumed. Similarly, claims that Defendant's teas are false and unlawful. Defendant's teas do not meet the minimum nutrient level threshold to make such a claim which is 10% or more of the RDI or the DRV of a nutrient per reference amount customarily consumed.

Defendant's misuse of defined terms is not limited the nutrient content claims on one or two products. Defendant's tea related claims are part of a widespread practice of misusing defined nutrient content claims to overstate the nutrient content of its tea products. The statements regarding antioxidants and the health benefits to be derived from consuming defendant's products appear on each variety of Defendant's Green Tea Products. These other products are substantially similar to the tea products purchased by Plaintiff.

FDA enforcement actions targeting identical or similar claims to those made by Defendant have made clear the unlawfulness of such claims. Defendant knew or should have known about these enforcement actions. For example, on March 24, 2011, the FDA sent Jonathan Sprouts, Inc. a warning letter where it specifically targeted a "source" type claim like the one used by Defendant. In that letter the FDA stated:

> Your Organic Clover Sprouts product label bears the claim "Phytoestrogen Source[.]" Your webpage entitled "Sprouts, The Miracle Food! - Rich in Vitamins, Minerals and Phytochemicals" bears the claim "Alfalfa sprouts are one of our finest food sources of . . . saponin." These claims are nutrient content claims subject to section 403(r)(1)(A) of the Act because they characterize the level of nutrients of a type required to be in nutrition labeling (phytoestrogen and saponin) in your products by use of the term "source." Under section 403(r)(2)(A) of the Act, nutrient content claims may be made only if the characterization of the level made in the claim uses terms which are defined by regulation. However, FDA has not defined the characterization "source" by regulation. Therefore, this characterization may not be used in nutrient content claims.

It is thus clear that a "source" claim like the one utilized by Defendant is unlawful because the "FDA has not defined the characterization 'source' by regulation" and thus such a "characterization may not be used in nutrient content claims."

The types of misrepresentations made above would be considered by a reasonable consumer like the Plaintiff when deciding to purchase the products. Plaintiff placed great importance on the claimed presence of "packed *powerful antioxidants*" in choosing Defendant's products over other tea products and alternative beverage products.

The nutrient content claims regulations discussed above are intended to ensure that consumers are not misled as to the actual or relative levels of nutrients in food products.

Defendant has violated these referenced regulations. Plaintiff relied on Defendant's nutrient content claims when making his purchase decisions and was misled because he erroneously believed the implicit misrepresentation that Defendant's products he was purchasing met the minimum nutritional threshold to make such claims. Antioxidant and nutrient content was important to the Plaintiff in trying to buy "healthy" food products. Plaintiff would not have purchased these products had he known that Defendant's products did not in fact satisfy such minimum nutritional requirements with regard to the claimed antioxidants and nutrients.

For these reasons, Defendant's nutrient content claims at issue in this Amended Complaint are false and misleading and in violation of 21 C.F.R. §§ 101.13 and 101.54 and identical California law, and the products at issue are misbranded as a matter of law. Defendant has violated these referenced regulations. Therefore, Defendant's Misbranded Food Products are misbranded as a matter of California and federal law and cannot be sold or held and thus are legally worthless. Plaintiff and members of the Class who purchased the Defendant's Misbranded Food Products paid an unwarranted premium for the products.

Plaintiff was thus misled by the Defendant's unlawful labeling practices and actions into purchasing products he would not have otherwise purchased had he known the truth about those products. Plaintiff had cheaper alternatives.

Defendant's claims in this respect are false and misleading and the products are in this respect misbranded under identical California and federal laws.

II. DEFENDANT HAS MADE UNLAWFUL AND MISLEADING ANTIOXIDANT NUTRIENT CONTENT CLAIMS

In addition to Defendant's violation of the general, basic provisions of the Sherman Law as to making a nutrient content claim, Defendant also has violated identical California and federal labeling regulations specific to antioxidants.

Federal and California regulations regulate antioxidant claims as a particular type of nutrient content claim. Specifically, 21 C.F.R. § 101.54(g) contains special requirements for nutrient claims that use the term "antioxidant":

1) the name of the antioxidant must be disclosed;
2) there must be an established Recommended Daily Intake ("RDI") for that antioxidant, and if not, no "antioxidant" claim can be made about it;
3) the label claim must include the specific name of the nutrient that is an antioxidant and cannot simply say "antioxidants" (*e.g.*, "high in antioxidant vitamins C and E"),[2] *see* 21 C.F.R. § 101.54(g)(4);

[2] Alternatively, when used as part of a nutrient content claim, the term "antioxidant" or "antioxidants" (such as "high in antioxidants") may be linked by a symbol (such as an asterisk) that refers to the same symbol that appears elsewhere on the same panel of a product label followed by the name or names of the nutrients with the recognized antioxidant activity. If this is done, the list of nutrients must appear in letters of a type size height no smaller than the larger of one half of the type size of the largest nutrient content claim or 1/16 inch.

4) the nutrient that is the subject of the antioxidant claim must also have recognized antioxidant activity, *i.e.*, there must be scientific evidence that after it is eaten and absorbed from the gastrointestinal tract, the substance participates in physiological, biochemical or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions, *see* 21 C.F.R. § 101.54(g)(2);
5) the antioxidant nutrient must meet the requirements for nutrient content claims in 21 C.F.R. § 101.54(b), (c), or (e) for "High" claims, "Good Source" claims, and "More" claims, respectively. For example, to use a "High" claim, the food would have to contain 20% or more of the Daily Reference Value ("DRV") or RDI per serving. For a "Good Source" claim, the food would have to contain between 10-19% of the DRV or RDI per serving, *see* 21 C.F.R. § 101.54(g)(3); and
6) the antioxidant nutrient claim must also comply with general nutrient content claim requirements such as those contained in 21 C.F.R. § 101.13(h) that prescribe the circumstances in which a nutrient content claim can be made on the label of products high in fat, saturated fat, cholesterol or sodium.

The antioxidant labeling for Defendant's Misbranded Food Products promoting these products violate California law: (1) because the names of the antioxidants are not disclosed on the product labels; (2) because there are no RDIs for the antioxidants being touted, including flavonoids and polyphenols; (3) because the claimed antioxidant nutrients fail to meet the requirements for nutrient content claims in 21 C.F.R. § 101.54(b), (c), or (e) for "High" claims, "Good Source" claims, and "More" claims, respectively; and (4) because Defendant lacks adequate scientific evidence that the claimed antioxidant nutrients participate in physiological, biochemical, or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions after they are eaten and absorbed from the gastrointestinal tract.

Plaintiff relied on Defendant's antioxidant and health claims when making his purchase decisions over the last four years and was misled because he erroneously believed the implicit misrepresentation that the Defendant's products he was purchasing met the minimum nutritional threshold to make such claims. Antioxidant and flavonoid content was important to Plaintiff in trying to buy "healthy" food products. Plaintiff would not have purchased these products had she known that the Defendant's products did not in fact satisfy such minimum nutritional requirements with regard to antioxidants and the consumption of defendant's tea did not, in fact, result in the purported health benefits touted by Defendant.

III. Plaintiff Purchased Defendant's Misbranded Food Products

Plaintiff cares about the nutritional content of food and seeks to maintain a healthy diet.

Plaintiff purchased Defendant's Misbranded Food Products at issue in this Fourth Amended Complaint and throughout the Class Period.

Plaintiff purchased Defendant's Misbranded Food Products at issue on numerous occasions throughout the Class Period including the following products: Green Tea; Green Tea with Lemon, and Green Tea Naturally Decaffeinated.

Plaintiff read the labels on Defendant's Misbranded Food Products, including the antioxidant, nutrient content, and health claims, where applicable, before purchasing them. Plaintiff would have foregone purchasing Defendant's products and bought other products readily available at a lower price.

Plaintiff reasonably relied on Defendant's package labeling and packaging and product placement. Plaintiff read the antioxidant, nutrient content and health labeling claims including the "healthy antioxidants," and "packed with powerful antioxidants" claims and based and justified the decision to purchase Defendant's products in substantial part on Defendant's package labeling including the antioxidant, nutrient content and health labeling claims, and representations related to Defendant's food products before purchasing them.

Plaintiff reasonably relied on Defendant's package labeling, packaging, and product placement, and justified the decision to purchase Defendant's Misbranded Food Products in substantial part on Defendant's package labeling as well as product packaging and product placement including the claims, and based and justified the decision to purchase Defendant's products in substantial part on Defendant's package labeling including the antioxidant, nutrient content and health labeling claims including the "healthy antioxidants," and "packed with powerful antioxidants" claims, and representations related to Defendant's food products before purchasing them.

At the point of sale, Plaintiff did not know, and had no reason to know, that Defendant's products were misbranded as set forth herein, and would not have bought the products, or paid a premium for them, had he known the truth about them.

At point of sale, Plaintiff did not know, and had no reason to know, that Defendant's antioxidant, nutrient content and health labeling claims including the "healthy antioxidants," and

"packed with powerful antioxidants claims on the products' labels were unlawful and unauthorized as set forth herein, and would not have bought the products had he known the truth about them.

After Plaintiff learned that Defendant's Misbranded Food Products are falsely labeled, he stopped purchasing them.

Plaintiff justified the decision to purchase Defendant's products in substantial part on Defendant's false and unlawful representations.

As a result of Defendant's misrepresentations, Plaintiff and thousands of others in California purchased the Misbranded Food Products at issue.

Defendant's labeling, advertising and marketing as alleged herein are false and misleading and were designed to increase sales of the products at issue. Defendant's misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a reasonable person would attach importance to Defendant's representations in determining whether to purchase the products at issue.

A reasonable person would also attach importance to whether Defendant's products were legally salable, and capable of legal possession, and to Defendant's representations about these issues in determining whether to purchase the products at issue. Plaintiff would not have purchased Defendant's Misbranded Food Products had he known they were not capable of being legally sold or held.

These Misbranded Food Products 1) whose essential characteristics had been misrepresented by the Defendant; 2) which had their nutritional and health benefits misrepresented and overstated by the Defendant, and 3) which were misbranded products which could not be resold and whose very possession was illegal; were worthless to the Plaintiff and as a matter of law.

IV. ALL MISBRANDED FOOD PRODUCTS ARE SUBSTANTIALLY SIMILAR

Defendant's Misbranded Food Products, i.e., all greens teas, are substantially similar. The Misbranded Food Products have the same labels, packaging, and sizes. The Misbranded Food

Products are the same product, tea. The only difference in the Misbranded Food Products is the flavor of the tea.

ARGUMENT

I. LEGAL STANDARDS

Rule 23 of the Federal Rules of Civil Procedure states, "'A class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 394 (2010) (quoting Fed. R. Civ. P. 23).

The decision regarding whether to certify a class is committed to the discretion of the district court. *See Yokoyama v. Midland Nat'l Life Ins. Co*., 74 Fed. R. Serv. 3d 459 (9th Cir. 2009). Although the plaintiff bears the burden of satisfying the elements of Rule 23, the elements "should be liberally construed." *See* 3 Alba Conte & Newberg, Newberg on Class Actions § 7.20 (4th ed. 2002). "Although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23, it is improper to advance a decision on the merits to the class certification stage." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)); *see also Plascencia v. Lending 1st Mortgage*, 259 F.R.D. 437, 442 (N.D. Cal. 2009) ("In making this determination, the court may not consider the merits of the plaintiff's claims."). The Supreme Court recently affirmed this position stating:

> Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim," Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent — but only to the extent —that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (2013) (internal quotes and citations omitted).

Class actions in the Ninth Circuit are favored, and are particularly appropriate in instances where, like here, individual damages are small. *See, e.g., Ballard v. Equifax Check Servs., Inc*., 186 F.R.D. 589, 600 (E.D. Cal. 1999) ("Class action certifications to enforce compliance with

consumer protection laws are 'desirable and should be encouraged.'") (quoting *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607, 610 (D. Ariz. 1982)); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998) (holding that class certification by district court was appropriate because litigation costs would dwarf potential recovery by members of class if forced to pursue actions individually.).

As the Supreme Court has observed, "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) ("If plaintiffs cannot proceed as a class, some – perhaps most –will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover").

II. THE CLASS IS ASCERTAINABLE.

"A class is ascertainable if the class is defined with 'objective criteria' and if it is 'administratively feasible to determine whether a particular individual is a member of the class.'" *Lanovaz v. Twinings N. Am., Inc.*, Case No. C-12-02646-RMW, 2014 U.S. Dist. LEXIS 57535, at *7 (N.D. Cal. Apr. 24, 2014) (quoting *Wolph v. Acer America Corp.*, No. 09-01314, 2012 U.S. Dist. LEXIS 40159, at *4 (N.D. Cal. Mar. 23, 2012)). In virtually identical litigation involving the same defense counsel, the Hon. Judge Koh has twice found that a definition similar to the one at issue satisfies ascertainability. *See, Brazil v. Dole Packaged Foods, LLC*, Case No.: 12-CV-01831-LHK, 2014 U.S. Dist. LEXIS 74234, at *12-21 (N.D. Cal. May 30, 2014) and *Brazil v. Dole Packaged Foods, LLC*, Case No.: 12-CV-01831-LHK, 2014 U.S. Dist. LEXIS 157575, at *45-48 (N.D. Cal. Nov. 6, 2014).

Here, Plaintiff's proposed class definition is sufficiently definite to identify putative class

members. Only those consumers who purchased Defendant's products whose labels bore the challenged statements are included. *See, Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("As long as the class definition is sufficiently definite to identify putative class members, '[t]he challenges entailed in the administration of this class are not so burdensome as to defeat certification.'") (Internal citations omitted.)

III. PLAINTIFF SATISFIES RULE 23(a)'S REQUIREMENTS.

A. Defendant Does Not Contest Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is "impracticable." Fed. R. Civ. P. 23(a)(1).

B. There Are Questions of Law and Fact Common to All Class Members

Rule 23(a)(2) requires a showing of commonality that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Like all Rule 23(a) elements, this requirement is construed permissively. *See Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id*. (quoting *Hanlon*, 150 F.3d at 1019-1020).

Here, there is a "common core" of fact that binds the entire class: all class members purchased one of Defendant's tea products bearing the same unlawful statements. Defendant's labels will be the same for each class member as Defendant does not use different labels in different areas of the country, and Defendant can't find solace in its post-litigation label changes.

The commonality requirement may be satisfied if the claims of the prospective class have even one significant issue common to the class. *See, e.g., Id.* at 1019-1020. *See also In re THQ, Inc. Secs. Litig.*, No. CV 00–1783AHM (EX), 2002 U.S. Dist. LEXIS 7753, at *30 (C.D. Cal. Mar. 22, 2002). To satisfy this provision, a common question "must be of such a nature that it is capable of class-wide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011). In *Dukes*, Justice Scalia emphasized that Rule

23(a)(2)'s commonality requirement remains distinct from the predominance analysis of Rule 23(b)(3) (discussed below), and that "for purposes of Rule 23(a)(2), even a single common question will do." *Id.* at 2556 (internal quotation and alterations omitted).

There are numerous common questions of law and fact, the answers to which will resolve the claims of all of the class members in one stroke. First, the key common questions regarding Plaintiff's UCL, FAL, CLRA and unjust enrichment claims are whether the challenged label statements are unlawful, unfair, deceptive, or misleading to reasonable consumers. *See Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co*., 20 Cal. 4th 163, 180 (1999) (UCL prohibits conduct that is unfair or deceptive, even if it is not unlawful); *Cortez v. Purolator Air Filtration Prods. Co*., 23 Cal. 4th 163, 181 (2000) (UCL does not require intent to injure); *Lavie v. Procter & Gamble Co*., 105 Cal. App. 4th 496, 506-07 (Ct. App. 1st Dist. 2003) (advertisement "is judged by the effect it would have on a reasonable consumer"); *Nagel v. Twin Laboratories, Inc*., 109 Cal. App. 4th 39, 54 (Ct. App. 4th Dist. 2003) (conduct that is "likely to mislead a reasonable consumer" violates the CLRA); *Chern v. Bank of Am.,* 15 Cal. 3d 866, 876 (1976) ("statement is false or misleading if members of the public are likely to be deceived. Intent of the disseminator and knowledge of the customer are both irrelevant."); *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000) (plaintiff "satisfied the elements for a claim of unjust enrichment" when he alleged receipt of benefit and unjust retention of benefit at expense of another). If Defendant's products are misbranded, the products are misbranded nationwide and in their entirety. If the label statements are unlawful and misleading with regard to one of Defendant's products, it is unlawful as to all of the class products.

Second, the question of "unlawfulness" under the Sherman Law is a separate common question that can be resolved on a class-wide basis. If Defendant's products are "misbranded" under the Sherman law, Defendant could not lawfully sell the products. Cal Health & Saf Code § 110760.

Third, the question of "deceptiveness" under the UCL is common to all members of the class because it asks whether "members of the public are likely to be deceived." *Kasky v. Nike Inc.*, 27 Cal. 4th 939, 951 (2002). As long as Plaintiff relied on the misrepresentations or

omissions (which they did), it is not necessary to show reliance by absent class members. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 306, 313 (2009). In *Tobacco II*, the California Supreme Court reversed decertification of a class of cigarette purchasers where plaintiffs alleged that the defendant manufacturers had engaged in a "campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease." *Id.* at 306. The trial court reached this decision despite the fact that a "myriad of distinct issues exist[ed] as to each class member's exposure to the alleged deceptive marketing, reliance thereon, whether same was a causal factor of the person's smoking and whether each class member sustained injury." *Id.* at 309.

The California Supreme Court held that these issues were not relevant. "The class, as certified, consists of members of the public who were exposed to defendants' allegedly deceptive advertisements and misrepresentations and who were also consumers of defendants' products during a specific period of time. The nature of the claim is the same--the right to be protected against defendants' alleged deceit--and the remedies remain the same--injunctive relief and restitution." *Id.* at 324; *see also In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 155 (Ct.App. 2nd Dist. 2010) (ordering certification of UCL claim against manufacturer of products that contained a controlled substance; holding that there were common questions of "(1) whether GNC's sale of androstenediol products was unlawful; and if so, (2) the amount of money GNC 'may have ... acquired by means of' those sales that must be restored to the class") (quoting Cal. Bus. & Prof. Code § 17203).

Fourth, for reasons similar to Plaintiff's UCL claims, Plaintiffs' FAL claim also raises a common question: whether Defendant's label statements are likely to deceive the public. The California Supreme Court "has recognized that '[a]ny violation of the false advertising law ... necessarily violates' the UCL." *Kasky*, 27 Cal. 4th at 950 (quoting *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 210 (1983)). These laws prohibit "not only advertising which is false, but also advertising which [,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Kasky*, 27 Cal. 4th at 951 (quoting *Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985)). "Thus, to state

a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, 'it is necessary only to show that members of the public are likely to be deceived.'" *Kasky*, 27 Cal. 4th 951 (quoting *Committee on Children's Television, Inc.*, 35 Cal. 3d at 211).

Fifth, the question of materiality – how a reasonable person would perceive the labeling – creates another common issue. Regarding Plaintiff's CLRA claim, although it is necessary to show reliance by the class, such reliance may be presumed when the alleged misrepresentations and omissions were material. *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th at 156-57. Materiality, in turn, is demonstrated by showing that "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question, and as such materiality is generally a question of fact unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." *Id.* at 157 (citations omitted). *See, e.g., Benson v. Kwikset Corporation*, 152 Cal.App.4th 1254 (Ct. App 4th Dist. 2007) (holding that trial courts "must view the labeling from the perspective of those consumers for whom the geographic designation is important…[F]or some people country of origin labeling is a critical factor when making a purchasing decision."); *Lavie*, 105 Cal. App. 4th at 506 (stating "where advertising is aimed at a particularly susceptible audience ..., its truthfulness must be measured by the impact it will likely have on members of that group, not others to whom it was not primarily directed."). Undoubtedly, a reasonable consumer would attach significance to the challenged label statement. *See* Exhibit 2, Declaration of Pierce Gore; Exhibit 3, Declaration of Brian Herrington, and Exhibit 4, Declaration of Price Coleman. Certainly Defendant believes the challenged statements are material or it (1) would not have changed it labels to include the statements and (2) would not have made the claims so prominent on their labels. The statements were certainly material to Plaintiff as he would not have purchased the products had he known the products were misbranded.

C. Plaintiff's Claims Are Typical of All Class Members

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical

of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). As recently recognized by the Ninth Circuit, "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1019-1020 (9th Cir. 1998); *Staton*, 327 F.3d at 957. Some degree of individuality is to be expected in all cases, but that specificity does not necessarily defeat typicality. Rather, typicality results if the representative plaintiffs' claims "arise[ ] from the same event, practice or course of conduct that gives rise to the claims of the absent class members and if their claims are based on the same legal or remedial theory." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, M 02-1486 PJH, 2006 U.S. Dist. LEXIS 39841, at *30 (N.D. Cal. June 5, 2006) (citations omitted). The typicality standard requires only that the named plaintiffs' claims be "reasonably coextensive with those of absent class members[,] not substantially identical." *Staton*, 327 F.3d at 957; *Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990) (Rule 23 "does not require the named plaintiffs to be identically situated with all other class members. It is enough if their situations share a 'common issue of law or fact' and are 'sufficiently parallel to insure a vigorous and full presentation of all claims for relief.'") (citations omitted). It suffices that the class representatives are "part of the class and possess the same interest and suffer the same injury as the class members." *General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) (quotation marks omitted). Any factual variations do not defeat typicality where, as here, the underlying claims rely on the same legal or remedial theory. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (reversing district court's denial of class certification in breach of warranty case). "The fact that Class Members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action, nor is a class action precluded by the presence of individual defenses against class plaintiffs." 3 Alba Conte & Newberg, Newberg on Class Actions § 3.12 (4th ed. 2002). Thus, the typicality requirement is satisfied even if there are factual distinctions between the claims of the named plaintiff and those of other class members. *Armstrong v. Davis*, 275 F.3d 869 (9th Cir. 2001). Typicality is satisfied so long as the named plaintiff's claims stem from the same event, practice, or course of conduct that forms the base of the class claims and is based upon the same legal

remedial theory. *See Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir. 1982).

Plaintiff's claims are typical of those of the putative class. The claims are centered on Defendant's products that are misbranded in the same way. Plaintiff purchased at least one product from each of the challenged product lines. Therefore, Plaintiff and the class members have been exposed to the exact same label statements.

D. Plaintiff Satisfies the Adequacy of Representation Requirement

Rule 23(a)(4) requires that the class representative "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has established a two-prong test for this requirement: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957.

1. The Representative Plaintiff Has No Conflict of Interest With Other Class Members

Because adequacy is closely related to typicality, where, as here, the claims of the class members and the class representative are reasonably co-extensive, there is no conflict. *See General Tel. Co. v. Falcon*, 457 U.S. at 157-158 n. 13. Moreover, if there are any doubts as to the adequacy of representation or potential conflicts, they should be resolved in favor of upholding the class, subject to later possible reconsideration. *See* 3 Alba Conte & Newberg, Newberg on Class Actions § 7.24 (3d ed. 1992). Here, the proposed class representative has no interest that is in conflict with the interests of the members of the proposed class.

2. The Representative Plaintiff Will Vigorously Prosecute This Action

"It is not necessary that a class representative be intimately familiar with every factual and legal issue in the case; rather, it is enough that the representative understand the gravamen of the claim." *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004) (citations and internal quotes omitted). To date, the class representative's participation in this litigation has been exemplary. He has stayed up-to-date on all of the proceedings, communicated with counsel throughout this litigation, and will soon be deposed by defense counsel. He has demonstrated his willingness to prosecute this action vigorously.

3. Plaintiff's Counsel Will Continue to Vigorously Represent the Class

When a court certifies a class, the court must also appoint class counsel unless a specific statute provides otherwise. Fed. R. Civ. P. 23(g)(1)(A). The basic requirement for appointment as class counsel is that counsel must fairly and adequately represent the interests of the class. *See* Fed. R. Civ. P. 23(g)(1)(B). In appointing class counsel, the court considers "the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class…." Fed. R. Civ. P. 23(g)(1)(c)(i).

Plaintiff's counsel are well qualified for appointment as class counsel. Plaintiff's counsel have considerable experience in complex litigation and with consumer class actions. Plaintiff's counsel have no conflicts that would prevent them from adequately representing the interests of the class. (Exhibit 2, Declaration of Pierce Gore; Exhibit 3, Declaration of Brian Herrington; Exhibit 4, Declaration of J. Price Coleman). Plaintiff's proposed class counsel were appointed to serve as class counsel by Judge Whyte in *Lanovaz*, 2014 U.S. Dist. LEXIS 57535, at *25 and by Judge Koh in *Brazil*, 2014 U.S. Dist. LEXIS 74234, at *70.

IV. THIS CASE SATISFIES RULE 23(b)(2)'S REQUIREMENTS

Class certification requires that Plaintiff meets the requirements of Rule 23(a) and one of the three subsections of Rule 23(b). Plaintiff seeks certification of his claim for injunctive relief under Rule 23(b)(2). Certification of this claim under Rule 23(b)(2) does ***not*** require a showing of predominance of common questions of law or fact over individualized ones, but instead requires that Plaintiff shows that Defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

There could not be a clearer example of a defendant "act[ing] or refus[ing] to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). In fact, the Advisory Committee envisioned just this type of case when it stated that Rule 23(b)(2) certification is appropriate where "settling the legality of the behavior with respect to a class as a whole is

appropriate." Fed. R. Civ. P. 23 is appropriate "[w]hen a suit seeks to define the relationship between the defendant(s) and the world at large." *Weiss v. York Hosp.*, 745 F.2d 786, 811 (3d Cir. 1984). Defendant's conduct is applicable to the class as a whole. *See, e.g., Kohl v. Assoc. of Trial Lawyers of Am.*, 183 F.R.D. 475, 486 (D. Md. 1998) ("Since Defendants have acted in a consistent manner toward the putative Class members, and Plaintiff is seeking injunctive relief . . . the prerequisite of Rule 23(b)(2) has been satisfied."). The Court should certify Plaintiffs' claims for injunctive relief and restitution under Rule 23(b)(2).

V. THIS CASE SATISFIES RULE 23(b)(3)'S REQUIREMENTS

In addition to meeting the prerequisites of Rule 23(a), the present action also satisfies the requirements of Rule 23(b)(3) because common questions of law or fact predominate over any purported individual questions, and a class action is the superior method – indeed, the only method – for the fair and efficient adjudication of this controversy.

A. Common Questions of Law or Fact Predominate

"Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen, Inc.*, 133 S. Ct. at 1191 (emphasis in original). Questions that are common to the class predominate over individual questions where a plaintiff alleges a common course of conduct of misrepresentations, omissions, and other wrongdoing that affected all the class members in the same or similar manner. *See Blackie v. Barrack*, 524 F.2d 891, 905-908 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). "The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Visa Checks/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001). This criterion is normally satisfied when there is an essential common factual link between all class members and the defendant for which the law provides a remedy. *Id.* at 136.

Here, each class member purchased Defendant's misbranded products. Each class member was subject to the same challenged label statements. Each class member accordingly proffers the same legal theories and the same theories of recovery. A finding of Defendant's culpability for a single class member will yield the same result for all. Inasmuch as the claims against Defendant

arise out of the same labels and are premised on the same legal theories, the predominance of common questions of law and fact is clear.[3]

As previously discussed, the overriding, cohesive force behind the putative class is the identical misleading and misbranded label statements on Defendant's products. The facts, as well as the law, cohere around these unlawful labels and Defendant's wrongdoing. The predominant issue is whether those labels are misbranded as alleged under California law. Defendant's label statements and ingredients on a given product are the same, everywhere in the country. All consumers would have seen the same labels as Plaintiff. Further, there are no individual reliance components (individual issues) for Plaintiff's UCL, FAL, CLRA and unjust enrichment claims.

B. UCL and FAL

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17500. An FAL violation necessarily constitutes a violation of the UCL. *Williams v. Gerber Prods. Co*., 552 F.3d 934, 938 (9th Cir. 2008).

Because the UCL is intended to deter unfair business practices expeditiously, "relief under the UCL is available without individualized proof of deception, reliance and injury." *Stearns v. Ticketmaster Corp*., 655 F.3d 1013, 1020 (9th Cir. 2011). To state a claim under the UCL, a plaintiff need only "show that members of the public are likely to be deceived" by the defendant's conduct. *In re Tobacco II Cases*, 46 Cal.4th at 312. "'Likely to deceive' ... indicates that the ad[vertisement] is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie*, 105 Cal.App.4th at 508. The FAL uses the same standard as the UCL. *See Block v. eBay, Inc*., 747 F.3d 1135, 1140 (9th Cir. 2014).

As set forth above, Plaintiff has made a *prima facie* showing that Defendant's labeling schemes at issue violate the Sherman Law. Such violations are independently actionable under the UCL. *See Rahman v. Mott's LLP*, No. 13-CV-03482-SI, 2014 U.S. Dist. LEXIS 167744, at *19

[3] Differences among class members concerning the amount of their individual damages, which are unavoidable in class action litigation, do not prevent a suit from proceeding as a class action. *Blackie*, 524 F.2d at 905.

(N.D. Cal. Dec. 3, 2014). Such a showing also gives rise to a presumption of materiality. *See Hinojos v. Kohl's Corp*., 718 F.3d 1098, 1107 (9th Cir. 2013) ("[T]he legislature's decision to prohibit a particular misleading advertising practice is evidence that the legislature has deemed that the practice constitutes a 'material' misrepresentation, and courts must defer to that determination.").

Furthermore, "[a] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material." *In re Tobacco II Cases*, 46 Cal.4th at 327. To satisfy the reliance requirement, "the allegedly deceptive or misleading statement need not be the only cause for the plaintiffs' purchase of the products, but it must be 'an immediate cause' of their purchase." *Allen v. Hyland's Inc*., 300 F.R.D. 643, 666 (C.D. Cal. 2014) (quoting *In re Tobacco II Cases*, 46 Cal.4th at 326). To that end, Plaintiff has actually relied on the misrepresentation on Defendant's products. *See* Exhibit 1 at ¶ 3.

C. CLRA Claim

There are no individual reliance issues on the CLRA claim because class-wide reliance is presumed when the misrepresentations or omissions would have been material to "reasonable persons." *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th at 156-57. Regulated label statements are material as a matter of California law. *See Hinojos*, 718 F.3d at 1106-07. As the court in *Keilholtz v. Lennox Hearth Products Inc*., 268 F.R.D. 330, 343 (N.D. Cal. 2010) held:

> [T]he causation required by the [CLRA] does not make plaintiffs' claims unsuitable for class treatment. Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. As noted above, common questions predominate even if Defendant can defeat the showing of causation as to a few individual class members. As long as Plaintiff can show that material misrepresentations were made to the class members, an inference of reliance arises as to the entire class.

See also, Falk v. Gen. Motors Corp., 496 F. Supp. 2d 1088, 1095 (N.D. Cal. 2007). The challenged label statements are undoubtedly material. In fact, Defendant testified that the labels are the "primary" way that Defendant communicates with consumers.

D. Unjust Enrichment And Restitution

Because unjust enrichment focuses on the conduct of the defendant, courts in this

jurisdiction routinely find that unjust enrichment claims are amenable to class treatment. *Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2014 U.S. Dist. LEXIS 81646 (N.D. Cal. June 13, 2014) (force-placed insurance); *Lane v. Wells Fargo Bank, N.A*, No. C 12-04026 WHA, 2013 U.S. Dist. LEXIS 87669, at *16 (N.D. Cal. June 21, 2013) (same); *Keilholtz*, 268 F.R.D. at 342-43 (products liability); *In re Abbott Labs. Norvir Anti-Trust Litig.*, No. C 04-1511 CW, 2007 U.S. Dist. LEXIS 44459 (N.D. Cal. June 11, 2007) (antitrust)). The central question in this case is whether Defendant's labels are lawful. Either they are and Plaintiff's case fails or they are not and Plaintiff wins. No individual issues arise that predominate over common ones.

Regarding restitution, the Court has enunciated the only formula that Plaintiff may use to measure restitution. On August 12, 2015, the Court stated, "[t]he proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received, not the full purchase price or all profits." (Dkt. No. 68, at 1.) While Plaintiff respectfully disagrees with the Court, this measure is a straightforward mathematical calculation. The "product as labeled" equals the purchase price, which can be established easily from a third-party data gathering company like IRI. Using said data, Plaintiff can establish an average retail purchase price for the class over the relevant time period. From the average retail purchase price, we subtract the product's value, if any, as received by the consumer ("product as received")[4].

Plaintiff contends that the product has no value because it is legally worthless. In fact, its sell was a criminal act. In a similar food misbranding case, Judge Grewal held that:

> The fact remains, however, that in California, "[i]t is unlawful for any person to…hold or offer for sale any food that is misbranded," and the statute establishing that is subject to the punishments described above. That means that Plaintiffs could, in fact, be arrested and prosecuted for unlawful possession of misbranded goods.

Park v. Welch Foods, Inc., No. 5:12-cv-06449-PSG, 2014 U.S. Dist. LEXIS 37796, at *5-6 (N.D. Cal. Mar. 21, 2014). Simply put, Defendant sold Plaintiff a product that was illegal to sell or possess. No reasonable consumer would select a specific tea product over another for the

[4] Attached hereto as Exhibit 5 is the Declaration of Dr. Neal Hooker in which Dr. Hooker discusses the methodology for calculating the average retail purchase price.

knowing privilege of committing a criminal act—not when merely selecting the one right next to it without the misbranding would avoid that risk entirely. Yet, that's precisely what happened here. There is no re-sale of these misbranded products, or reasonable market for them, because they cannot be legally sold or possessed, let alone re-sold. "In this case [the plaintiff] does not put valuation at issue when he alleges that he bought a product that was illegal to sell or possess. *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th at 159-160. Assuming the Court rejects Plaintiffs' proposed, expert methodologies as even "plausible," the fact remains, as it did in *Steroid Hormone Products*, that valuation is not at issue in a case where, as here, Plaintiff was sold illegal products that were and are worthless. Using the Court's formula, the measure of restitution is the average retail purchase price minus $0. More relevant to Plaintiff's class certification motion, individual issues do not come into play. Even if there were individual issues, they do not predominate over common issues.

Courts have repeatedly held that misbranded and adulterated food and drugs have no economic value, and are legally worthless. *United States v. Gonzalez-Alvarez,* 277 F.3d 73, 78 (8th Cir. 2002) ("where a product [milk] cannot be sold lawfully it has a value of zero for the purpose of calculating loss"); *In re Steroid Hormone Product Cases*, 181 Cal. App. 4th at 157 (reasonable person would not purchase a product that could not be legally sold or possessed); *Thomas v. Imbrolio*, No. A130517, 2012 Cal. App. Unpub. LEXIS 3111 at *21-22 (Cal. Ct. App. 2nd Dist., April 25, 2012) ("The jury simply determined the fair market value of the product was zero, perhaps in light of the testimony of class members who stated they would not have purchased Avacor had they known the truth about it. The court also concluded Avacor was worthless.") The parties may cite, and the Court may consider, unpublished state court decisions. *Employers Ins. Of Wausau v. Granite State Ins. Co.,* 330 F.3d 1214, 1220, n.8 (9th Cir. 2003).

Defendant argues by way of an affirmative defense that "Plaintiff and the putative class have enjoyed the full benefit of their purchase of the products that are the subject of the FAC and are thereby barred from making the claims for relief set forth in the FAC. (Answer, Dkt. No. 67 at 24.) However, Defendant bears the burden of establishing its affirmative defense. "It is the defendant's burden to properly plead and prove an affirmative defense. *Kraus v. Presidio Trust*

Facilities Div./Resid. Mgmt. Branch, 572 F.3d 1039, 1046 n. 7 (9th Cir.2009). Defendant has not produced any evidence of what value its unlawful product provided to Plaintiff and the Class.

Assuming *arguendo*, Plaintiff and the Class received value in terms of, say, nutrition or hydration, these categories of value present common, not individual, questions and can be measured on a classwide basis. Surely Defendant does not contend that its black tea products vary in caloric content from one package to the next or that two packages of the exact same product deliver different levels of hydration.

E. In The Alternative, The Court Can Certify A Class For Nominal Damages

A person may recover nominal damages when a breach of duty has caused no appreciable detriment to him or her. Cal. Civ. Code § 3360. Courts allow the recovery of nominal damages in only limited circumstances. First, they may be recovered if no loss or injury has resulted from an act but the law recognizes a technical invasion of a plaintiff's rights or a breach of duty by a defendant. *Avina v. Spurlock*, 28 Cal. App. 3d 1086, 1088 (1972). In this circumstance, the award of nominal damages compensates for the invasion of the right and, therefore, constitutes a recognition of that right and an admonition that it cannot be invaded with impunity. *See Kluge v. O'Gara*, 227 Cal. App. 2d 207, 210 (1964); *Siminoff v. Jas. H. Goodman & Co. Bank*, 18 Cal. App. 5, 15 (1912).

Second, nominal damages may be recovered if real, actual injury has occurred and damages have been suffered, but the extent and amount of the injury and damages cannot be determined from the evidence presented. *Avina*, 28 Cal. App. 3d at 1088; *see also ProMex, LLC v. Hernandez*, 781 F.Supp. 2d 1013, 1019 (C.D. Cal. 2011) (holding plaintiff entitled to recover nominal damages where there was a legal wrong without appreciable damages). In an appropriate case, punitive damages may be awarded in addition to nominal damages of this type since actual damages are shown. *Kluge*, 227 Cal. App. 2d at 210.

Similarly, because the CLRA expressly provides for minimum statutory damages that all Class members would be entitled to, damages can be determined on a classwide basis. As recently held by Judge Alsup in *Pickman v. Am. Express Co.*, No. C 11-05326 WHA, 2012 U.S. Dist.

LEXIS 9662, at *5-6 (N.D. Cal. Jan. 27, 2012), the CLRA provides for minimum statutory penalties of $1000 per violation:

> Plaintiff seeks relief on behalf of a putative class — members of the California public who are American Express cardholders. The amount in controversy is satisfied by multiplying the minimum amount of damages to be sought under the CLRA ($1,000) by the number of alleged violations (5,001). …Plaintiff counters that her claim is not an attempted class action so that the amount in controversy is a mere $8,000 — the minimum amount of damages allowable under the CLRA multiplied by the number of statutory violations. Yet if plaintiff is seeking relief on behalf of others, as she purports to do, she fails to take into account the damages of other cardholders or callers.

Such statutory damages are automatically awarded once liability is established and thus individualized determinations are unnecessary.

F. A Class Action Is The Superior Method For Resolving This Dispute

The test for superiority of the class action mechanism merely requires "determination of whether the objectives of the particular class action procedure will be achieved in the particular case," which "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Hanlon*, 150 F.3d at 1023 (*citing* 7A Wright & Miller, Federal Practice and Procedure § 1779 (2d ed. 1986)); *see also Lymburner v. U.S. Fin. Funds, Inc*., 263 F.R.D. 534 (N.D. Cal. 2010); *Greenwood v. Compucredit Corp*., No. C 08-04878 CW, 2010 U.S. Dist. LEXIS 3839 (N.D. Cal. Jan. 19, 2010).

1. Class Members Have No Interest In Pursing Individual Litigation

The first factor to be considered is the interest of each class member in "individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). Here, as in *Hanlon*, the alternative mechanism would be individual claims for relatively small amounts of damages, literally a few dollars per transaction. Bringing individual claims would not only burden the court system that would be deciding the same legal issues in a number of small cases, but would also not make economic sense for litigants or lawyers. It is clear that in many, if not most, individual cases, "litigation costs would dwarf potential recovery." *Hanlon*, 150 F.3d at 1023; *see also Culinary/Bartender Trust Fund*, 244 F.3d at 1163.

2. There Are No Other Actions Pending

The second factor to be considered, "the extent and nature of any litigation concerning the

controversy already commenced," Fed. R. Civ. P. 23(b)(3)(B), by members of the class, also supports proceeding with certification in this action. Plaintiff is not aware of any other individual or class litigation concerning the claims alleged in this case on behalf of the class.

3. This Court Is the Appropriate Forum For This Litigation

The third factor, the desirability of concentrating the litigation in this forum, equally supports superiority of maintaining this class action. Plaintiff resides in this forum and Defendant's headquarters is located in California.

4. There Are No Manageability Issues

Prosecution of the claims of the putative class members in a single class action would not create more management problems than the alternative (*i.e.*, the prosecution of hundreds or thousands of separate lawsuits by each class member). Significantly, it is proper for a court, in deciding the "best" available method, to consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974).

A determination that one label is misbranded is a determination that all such labels are misbranded. Moreover, it is well accepted that "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative . . . to no litigation at all." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *see also Menagerie Productions v. Citysearch*, CV 08-4263 CASFMO, 2009 U.S. Dist. LEXIS 108768, at *64 (C.D. Cal. Nov. 9, 2009) (*citing Negrete v. Allianz Life Ins. Co. of North America*, 238 F.R.D. 482, 495-96 (C.D. Cal. 2006)).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his motion to certify this case as a class action, appoint him as class representative, and appoint class counsel.

Dated: September 14, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pierce Gore, hereby certify that a true and complete copy of the foregoing was served to all counsel of record via the ECF filing system on September 14, 2015.

/s/ Pierce Gore
Pierce Gore