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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CHANEY THURSTON, LAWRENCE
G. KNOWLES, III, and MILAN
BABIC, on behalf of themselves and
others similarly situated,

Plaintiffs,

vs.

BEAR NAKED, INC.,

Defendant.

CASE NO. 3:11-CV-02890-H
(BGS)¹

**ORDER GRANTING IN
PART AND DENYING IN
PART PLAINTIFFS’
MOTION FOR CLASS
CERTIFICATION**

On April 15, 2013, Plaintiffs Chaney Thurston, Lawrence G. Knowles III, and Milan Babic (“Plaintiffs”) filed a motion for class certification. (Doc. No. 73.) On June 17, 2013, Defendant Bear Naked, Inc. (“Bear Naked” or “Defendant”) filed its opposition to Plaintiffs' motion for class certification. (Doc. Nos. 89, 91.) On July 15, 2013, Plaintiffs filed a reply. (Doc. No. 97.) On July 24, 2013, with leave of Court, Defendant filed a sur-reply. (Doc. No. 106.) The Court held a hearing on the motion on July 26, 2013. David Bower, Michael Braun, Rosemary Rivas, and Joseph Kravec appeared on behalf of Plaintiffs. Kenneth Lee and Kelly Morrison appeared on behalf

¹ This is the lead case of consolidated case 11-CV-2985-H (BGS). (Doc. No. 34.) This Order applies to both cases.

1 of Defendant. For the following reasons, the Court grants in part and denies in part
2 Plaintiffs' motion for class certification.

3 **Background**

4 This is a consumer class action lawsuit brought on behalf of people who have
5 purchased certain Bear Naked food products. Plaintiffs claim the products contained
6 deceptive and misleading labeling and advertisements. (Doc. No. 36 ("Complaint") ¶
7 1-2.) Plaintiffs allege that Defendant packaged, marketed, distributed, and sold Bear
8 Naked food products as being "100% Pure & Natural" or "100% Natural" (the natural
9 representations). (Id.) Plaintiffs claim certain ingredients or processes used to
10 manufacture Bear Naked food products are not "natural," but rather are synthetic. (Id.)
11 Plaintiffs identify 11 Bear Naked products that include the natural representations. (Id.
12 ¶ 39.) Defendant contends that consumers and producers have no uniform definition
13 of natural and, accordingly, the natural representations are not materially false.

14 Plaintiffs filed this lawsuit on September 21, 2011. (Doc. No. 1.) Plaintiffs seek
15 class certification for the following causes of action: violation of the unlawful, unfair,
16 and fraudulent prongs of California's Unfair Competition Law ("UCL"), Cal. Bus. &
17 Prof. Code §§ 17200 et seq.; violation of California's False Advertising Law ("FAL"),
18 Cal. Bus. & Prof. Code §§ 17500 et seq.; violation of California's Consumer Legal
19 Remedies Act ("CLRA"), Cal. Civ. Code §§ 1770 et seq.; breach of express warranty;
20 and quasi-contract. (Complaint ¶ 4.)

21 The named Plaintiffs claim that they purchased Bear Naked products at least in
22 part because of the natural representations, and that they would have paid less for Bear
23 Naked products or purchased other products had they believed those representations
24 were false. (Complaint ¶¶ 7-9; Doc. No. 98-2 at 142:3-5, 153:16-25; Doc. No. 98-3 at
25 75:1-25, 100:10-11; Doc. No. 101-1 at 169:10-21.) Plaintiffs seek to certify a
26 nationwide class, or alternately multi-state or state-wide classes, for customers who
27 purchased any of the identified Bear Naked products on or after September 21, 2007
28 (the "class period"). Defendant opposes class certification.

Discussion

I. Class Certification Standards

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (citing Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)). To qualify for the exception to individual litigation, the party seeking class certification must provide facts sufficient to satisfy the requirements of Federal Rules of Civil Procedure 23(a) and (b). Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001); Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977). Rule 23(a) requires Plaintiffs to demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

The Court considers "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Wal-Mart Stores, Inc., 131 S. Ct. at 2551. The district court must conduct a rigorous analysis to determine whether the prerequisites of Rule 23 have been met. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982). It is a well-recognized precept that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Wal-Mart Stores, Inc., 131 S. Ct. at 2551 (quoting Falcon, 457 U.S. at 160). "The district court is required to examine the merits of the underlying claim in this context [class certification], only

1 inasmuch as it must determine whether common questions exist; not to determine
2 whether class members could actually prevail on the merits of their claims." Ellis v.
3 Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011) (citations omitted). Rather,
4 the Court's review of the merits should be limited to those aspects relevant to making
5 the certification decision on an informed basis. See Fed. R. Civ. P. 23 advisory
6 committee notes. The Court must consider the merits if they overlap with the Rule 23
7 requirements. Ellis, 657 F.3d at 981 (citing Wal-Mart Stores, Inc., 131 S. Ct. at
8 2551-52; Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992)). If a court
9 is not fully satisfied that the requirements of Rules 23(a) and (b) have been met,
10 certification should be refused. Falcon, 457 U.S. at 161.

11 **II. California Class**

12 For the following reasons, the Court certifies a class of California consumers
13 who purchased Bear Naked products that contain hexane-processed soy ingredients and
14 were labeled with the natural representations.

15 **A. Ascertainability**

16 Defendant contends that the Court may not certify any class because of the
17 administrative difficulty of identifying class members. "Although there is no explicit
18 requirement concerning the class definition in FRCP 23, courts have held that the class
19 must be adequately defined and clearly ascertainable before a class action may
20 proceed." Wolph v. Acer Am. Corp., 272 F.R.D. 477, 482 (N.D. Cal. 2011) (internal
21 quotation omitted). "The class definition must be sufficiently definite so that it is
22 administratively feasible to determine whether a particular person is a class member."
23 Id. The proposed class definition here meets that standard, and Defendant does not
24 identify any portion of the class definition that it believes to be vague or confusing.
25 Indeed, the proposed class definition simply identifies purchasers of Defendant's
26 products that included the allegedly material misrepresentations. Because the alleged
27 misrepresentations appeared on the actual packages of the products purchased, there
28 is no concern that the class includes individuals who were not exposed to the

1 misrepresentation.

2 Defendant's concern that the Court will have difficulty identifying members of
3 the class is unavailing. Because Defendant does not have records of consumer
4 purchases, and potential class members will likely lack proof of their purchases,
5 Defendant argues that the Court will have no feasible mechanism for identifying class
6 members and will have to pursue proof individual to each class member. However,
7 "[t]here is no requirement that "the identity of the class members . . . be known at the
8 time of certification." Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 536
9 (N.D. Cal. 2012); Wolph, 272 F.R.D. at 482. If class actions could be defeated because
10 membership was difficult to ascertain at the class certification stage, "there would be
11 no such thing as a consumer class action." Ries, 287 F.R.D. at 536. As long as the
12 class definition is sufficiently definite to identify putative class members, "[t]he
13 challenges entailed in the administration of this class are not so burdensome as to
14 defeat certification." Id.

15 Defendant further argues that the class must "be defined in such a way that
16 anyone within it would have standing." Burdick v. Union Sec. Ins. Co., No. 07-4028,
17 2009 WL 4798873, at *4 (C.D. Cal. Dec. 9, 2009). Defendant contends that the class
18 definitions include members who were either unexposed to the alleged
19 misrepresentations or whose purchasing decisions were unaffected by the
20 representations and accordingly suffered no injury. In the Ninth Circuit, "standing is
21 satisfied [under the UCL and FAL] if at least one named plaintiff meets the
22 requirements. . . . Thus, we consider only whether at least one named plaintiff satisfies
23 the standing requirements." Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th
24 Cir. 2011); see also Kwikset Corp. v. Sup. Ct., 51 Cal. 4th 310, 328-29 (2011) (holding
25 alleged false information on labels sufficient for standing for UCL and FAL claims).
26 Here, Plaintiffs contend that they were induced to purchase Defendant's products at
27 least in part because of Defendant's representations, and that otherwise they would
28 have paid less or purchased other products. (Complaint ¶¶ 7-9; Doc. No. 98-2, Dep.

1 of L. Knowles at 153:16-154:5; Doc. No. 98-3, Dep. of C. Thurston at 75:24-25; Doc.
2 No. 101-1, Dep. of M. Babic at 169:10-15); see Mazza v. Am. Honda Motor Co., Inc.,
3 666 F.3d 581, 595 (9th Cir. 2012) (“Plaintiffs contend that class members paid more
4 for the CMBS than they otherwise would have paid, or bought it when they otherwise
5 would not have done so, because Honda made deceptive claims To the extent that
6 class members were relieved of their money by Honda’s deceptive conduct—as
7 Plaintiffs allege—they have suffered an ‘injury in fact.’); In re Google AdWords Litig.,
8 No. 5:08-CV-3369, 2012 WL 28068, at *10 (N.D. Cal. Jan. 5, 2012) (“The requirement
9 of concrete injury is satisfied when the Plaintiffs and class members in UCL and FAL
10 actions suffer an economic loss caused by the defendant, namely the purchase of
11 defendant's product containing misrepresentations.”).

12 Likewise, under the CLRA, “[c]ausation, on a classwide basis, may be
13 established by materiality. If the trial court finds that material misrepresentations have
14 been made to the entire class, an inference of reliance arises as to the class.” Stearns,
15 655 F.3d at 1022. The materiality of Defendant’s alleged misrepresentations and the
16 inference of reliance satisfy the “actual injury” requirement of the CLRA and alleviate
17 any concerns regarding standing. See id. The Court concludes that the proposed class
18 is sufficiently ascertainable to merit certification.

19 **B. Numerosity**

20 Rule 23(a)(1) requires the proposed class to be "so numerous that joinder of all
21 members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticability does not mean
22 impossibility," rather the inquiry focuses on the difficulty or inconvenience of joining
23 all members of the class. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909,
24 913-14 (9th Cir. 1964). In determining whether numerosity is satisfied, the Court may
25 consider reasonable inferences drawn from the facts before it. Gay v. Waiters' & Dairy
26 Lunchmen's Union, 549 F.2d 1330, 1332 n.5 (9th Cir. 1977).

27 Here the parties estimate that Bear Naked has sold millions of Bear Naked
28 products in the last four years in the United States, representing thousands of products

1 sold in each state with labels including the alleged misrepresentations. (Doc. No. 73-
2 19 ¶ 3.) Defendant does not dispute the numerosity of any of the proposed classes.
3 Accordingly, the Court concludes that Plaintiffs have satisfied this requirement.

4 **C. Typicality**

5 Rule 23(a)(3) requires the representative party to have claims or defenses that
6 are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality
7 is satisfied "when each class member's claim arises from the same course of events, and
8 each class member makes similar legal arguments to prove the defendants' liability."
9 Rodriguez, 591 F.3d at 1124 (citations omitted). The typicality requirement is
10 "permissive and requires only that the representative's claims are reasonably
11 co-extensive with those of the absent class members; they need not be substantially
12 identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). "[C]lass
13 certification is inappropriate where a putative class representative is subject to unique
14 defenses which threaten to become the focus of the litigation." Hanon, 976 F.2d at 508
15 (citations omitted).

16 Defendant argues that the differences in Plaintiffs' perceptions and knowledge
17 about Bear Naked products, as well as differences in their preferences and reasons for
18 purchasing Bear Naked products, render them atypical of the proposed classes. "In
19 determining whether typicality is met, the focus should be 'on the defendants' conduct
20 and the plaintiffs' legal theory,' not the injury caused to the plaintiff." Simpson v.
21 Fireman's Fund Ins. Co., 231 F.R.D. 391, 396 (N.D. Cal. 2005). Moreover, "individual
22 experience with a product is irrelevant" because "the injury under the UCL, FAL and
23 CLRA is established by an objective test. Specifically, this objective test states that
24 injury is shown where the consumer has purchased a product that is marketed with a
25 material misrepresentation, that is, in a manner such that 'members of the public are
26 likely to be deceived.'" Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 534
27 (C.D. Cal. 2011).

28 Plaintiffs' allegations include point-of-purchase loss. "Plaintiffs and class

1 members . . . were all exposed to the same alleged misrepresentations on the packages
2 and advertisements.” Johns v. Bayer Corp., 280 F.R.D. 551, 557 (S.D. Cal. 2012).
3 Contrary to Defendant's assertion, Plaintiffs testified that they would not have
4 purchased the Bear Naked products or would have paid less for the Bear Naked
5 products had she known it contained artificial ingredients. Thus, Plaintiffs allege to
6 have suffered the same type of economic injury and seek the same type of damages as
7 the putative class members; namely, a refund of all or part of the purchase price. As
8 such, Plaintiffs’ interests “align[] with the interests of the class.” Wolin v. Jaguar
9 Land Rover North America, LLC, 617 F.3d 1168, 1175 (9th Cir. 2010). Plaintiffs need
10 not show that the representations were the only cause, or “even the predominant or
11 decisive factor,” influencing their conduct. In re Tobacco II Cases, 46 Cal. 4th 298,
12 326-27 (2009). That Plaintiffs may have considered other factors in their purchasing
13 decisions does not make them atypical. Bruno, 280 F.R.D. at 534 (rejecting argument
14 that plaintiff was atypical because she considered other facts in making purchases).
15 Moreover, the fact that Plaintiffs may also purchase unhealthy or otherwise artificial
16 foods says nothing about whether they purchased Bear Naked products specifically
17 because they were supposedly healthy and natural. Plaintiffs and class members share
18 the same interests in determining whether Bear Naked products were deceptively
19 advertised and labeled.

20 Plaintiffs seek to show misrepresentations common to the identified Bear Naked
21 products and thus common to members of the putative class. Regardless of whether
22 they are “substantially identical,” Plaintiffs’ “claims are reasonably co-extensive with
23 those of the absent class members.” Hanlon, 150 F.3d at 1020. The Court therefore
24 concludes that Plaintiffs’ claims satisfy the typicality requirement under Rule 23(a).

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1 **D. Adequacy of Representation**

2 Rule 23(a) also requires the representative parties to "fairly and adequately
3 protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit set a
4 two-prong test for this requirement: "(1) do the named plaintiffs and their counsel have
5 any conflicts of interest with other class members and (2) will the named plaintiffs and
6 their counsel prosecute the action vigorously on behalf of the class?" Staton v. Boeing
7 Co., 327 F.3d 938, 957 (9th Cir. 2003) (citing Hanlon, 150 F.3d at 1020).

8 The named Plaintiffs meets the two-prong test in Staton. Id. Plaintiffs and the
9 proposed class share the same claims and interest in obtaining relief, and they are
10 vigorously pursuing relief on behalf of the proposed class. Plaintiffs and the class were
11 exposed to the same alleged misrepresentation on Bear Naked product labels, and they
12 assert that they would have either paid less or purchased other products had they not
13 been deceived. Plaintiffs' interests are therefore coextensive with the proposed class.
14 Defendant fails to show that Plaintiffs are so uninterested in or uninformed about the
15 case so as to be inadequate representatives of the class. See Moeller v. Taco Bell
16 Corp., 220 F.R.D. 604, 611 (N.D. Cal. 2004) ("The threshold of knowledge required
17 to qualify a class representative is low; a party must be familiar with the basic elements
18 of her claim[], and will be deemed inadequate only if she is 'startlingly unfamiliar' with
19 the case." (citation omitted)). Plaintiffs are sufficiently familiar with their claims to
20 adequately represent the members of the proposed class.

21 Plaintiffs would adequately represent the class. Additionally, the interim co-lead
22 counsel have experience in prosecuting consumer fraud and warranty class actions.
23 (Doc. No. 73-1 at 16.) The Court concludes that Plaintiffs and their counsel are
24 adequate representatives of the proposed classes.

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1 **E. Commonality and Predominance**

2 "Commonality requires the plaintiff to demonstrate that the class members 'have
3 suffered the same injury,'" which "does not mean merely that they have all suffered a
4 violation of the same provision of law." Wal-Mart, 131 S. Ct. at 2551. The "claims
5 must depend on a common contention" and "[t]hat common contention ... must be of
6 such a nature that it is capable of classwide resolution—which means that
7 determination of its truth or falsity will resolve an issue that is central to the validity
8 of each one of the claims in one stroke." Id. Commonality is satisfied by "the
9 existence of shared legal issues with divergent factual predicates" or a "common core
10 of salient facts coupled with disparate legal remedies within the class." Hanlon, 150
11 F.3d at 1019-20. All questions of fact and law need not be common to satisfy the rule.
12 Id. Rather, in deciding whether plaintiffs share a common question with the
13 prospective class, the named Plaintiffs must share at least one question of fact or law
14 with the prospective class. Rodriguez, 591 F.3d at 1122 (citing Baby Neal for & by
15 Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)); see Mazza v. American Honda Motor
16 Co., Inc., 666 F.3d 581, 589 (9th Cir. 2012) ("[C]ommonality only requires a single
17 significant question of law or fact.").

18 In addition to meeting the conditions imposed by Rule 23(a), the parties seeking
19 class certification must also show that the action is appropriate under Rule 23(b)(1),
20 (2) or (3). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Certification
21 under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be
22 served best by settling their differences in a single action." Hanlon, 150 F.3d at 1022
23 (internal quotations omitted). Rule 23(b)(3) calls for two separate inquiries: (1) do
24 issues common to the class "predominate" over issues unique to individual class
25 members, and (2) is the proposed class action "superior" to other methods available for
26 adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); Hanlon, 150 F.3d at 1022. In
27 evaluating predominance and superiority, the Court must consider: (1) the extent and
28 nature of any pending litigation commenced by or against the class involving the same

1 issues; (2) the interest of individuals within the class in controlling their own litigation;
2 (3) the convenience and desirability of concentrating the litigation in a particular
3 forum; and (4) the manageability of the class action. Fed. R. Civ. P. 23(b)(3)(A)-(D);
4 Amchem, 521 U.S. at 615-16.

5 The predominance analysis under Rule 23(b)(3) is more stringent than the
6 commonality requirement of Rule 23(a)(2). The analysis under Rule 23(b)(3)
7 “presumes that the existence of common issues of fact or law have been established
8 pursuant to Rule 23(a)(2).” Hanlon, 150 F.3d at 1022. In contrast to Rule 23(a)(2),
9 “Rule 23(b)(3) focuses on the relationship between the common and individual issues.”
10 Id. Class certification under Rule 23(b)(3) is proper when common questions present
11 a significant portion of the case and can be resolved for all members of the class in a
12 single adjudication. Id. To satisfy the predominance inquiry, it is not enough to
13 establish that common questions of law or fact exist, as it is under Rule 23(a)(2)’s
14 commonality requirement. The predominance inquiry under Rule 23(b) is more
15 rigorous as it “tests whether proposed classes are sufficiently cohesive to warrant
16 adjudication by representation.” Amchem, 521 U.S. at 623-24.

17 1. Consumer Protection

18 Plaintiffs seek to certify a class of all purchasers of Bear Naked products during
19 the class period that contained one or more of the challenged ingredients and were
20 labeled “100% Pure & Natural” or “100% Natural.” Plaintiffs allege causes of action
21 under California’s consumer protection laws. Defendant contends that the nature of
22 Defendant’s representation precludes it from class treatment based on issues with
23 commonality and predominance. Based on the record, the Court declines to certify the
24 broad class Plaintiffs propose. The Court certifies a narrower class for products labeled
25 “100% Natural” or “100% Pure & Natural” that contain hexane-processed soy
26 ingredients.

27 California's UCL prohibits “any unlawful, unfair or fraudulent business act or
28 practice and unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof.

1 Code § 17200. California's FAL prohibits any “unfair, deceptive, untrue or misleading
2 advertising.” Id. § 17500. California's CLRA prohibits “unfair methods of competition
3 and unfair or deceptive acts or practices.” Cal. Civ. Code § 1770. Under these
4 California statutes, conduct is deceptive or misleading if it is likely to deceive an
5 ordinary, reasonable consumer. Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th
6 Cir. 2008). “‘Likely to deceive’ implies more than a mere possibility that the
7 advertisement might conceivably be misunderstood by some few consumers viewing
8 it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is
9 probable that a significant portion of the general consuming public or of target
10 consumers, acting reasonably in the circumstances, could be misled.” Lavie v. Procter
11 & Gamble Co., 105 Cal. App. 4th 496, 508 (2003). “Generalized, vague, and
12 unspecified assertions constitute ‘mere puffery’ upon which a reasonable consumer
13 could not rely, and hence are not actionable” under the UCL, FAL, or CLRA.
14 Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005).

15 For class action purposes, relief under any of the UCL's three prongs is available
16 “without individualized proof of deception, reliance and injury,” so long as the named
17 plaintiffs demonstrate injury and causation. Mass. Mut. Life Ins. Co. v. Sup. Ct., 97
18 Cal. App. 4th 1282, 1289 (2002); Tobacco II, 46 Cal. 4th at 326-27. “The UCL and
19 false advertising law are both intended to preserve fair competition and protect
20 consumers from market distortions,” meaning that “in the eyes of the law, a buyer
21 forced to pay more than he or she would have is harmed at the moment of purchase.”
22 Kwikset Corp. v. Sup. Ct., 51 Cal. 4th 310, 331, 334 (2011). “A plaintiff may establish
23 that the defendant's misrepresentation is an ‘immediate cause’ of the plaintiff's conduct
24 by showing that in its absence the plaintiff ‘in all reasonable probability’ would not
25 have engaged in the injury-producing conduct.” Tobacco II, 46 Cal. 4th at 326-27.
26 “[A] presumption, or at least an inference, of reliance arises wherever there is a
27 showing that a misrepresentation was material.” Id. Similarly, relief under the CLRA
28 is available to “any consumer who suffers any damage as a result of the use or

1 employment” of any unlawful “method, act, or practice.” Cal. Civ. Code § 1780(a).
2 Such damage may be shown “through the materiality” of an alleged omission. See
3 Parkinson v. Hyundai Mot. Am., 258 F.R.D. 580, 595-96 (C.D. Cal. 2008).

4 Plaintiffs contend that the materiality of Defendant’s misrepresentation yields
5 an inference of reliance, creating common issues that predominate among the class.
6 In evaluating whether common issues predominate, “the district court is required to
7 make a rigorous analysis of the case before it. . . . Frequently, that ‘rigorous analysis’
8 will entail some overlap with the merits of the plaintiff’s underlying claim.” Stearns,
9 655 F.3d at 1019 n.7 (9th Cir. 2011) (quoting Wal-Mart, 131 S. Ct. at 2548); see also
10 Ellis, 657 F.3d at 981 (“[A] district court must consider the merits if they overlap with
11 the Rule 23[] requirements.”). Here, for the majority of the challenged ingredients,
12 Plaintiffs make an inadequate showing of materiality to infer reliance by the class.

13 Defendant contends that Plaintiffs fail to show that either consumers or food
14 producers have any kind of uniform definition of natural that affects purchasing
15 decisions, such that the natural representation was not materially false. (See Doc. No.
16 91 at 4-8 (surveying Defendant’s evidence showing disparity in definitions of “natural”
17 in food industry and among named plaintiffs).) Defendant provides evidence
18 demonstrating that food producers, consumers, and the Food and Drug Administration
19 all fail to define “natural” in any definite manner. (Id.) Defendant represents that its
20 challenged products contain as little as 0.003% and, at most, 5% by weight the
21 challenged ingredients. (See Doc. No. 91-2.) Defendant presents evidence that many
22 consumers would still view a product as a “natural food product” despite those amounts
23 of allegedly artificial ingredients. (See Doc. No. 91-4 at K0000384.) Three of the four
24 challenged ingredients are even allowed in certified “organic” goods, see 7 C.F.R. §,
25 205.605(b),² and consumers, including named plaintiffs, often equate “natural” with

27 _____
28 ² They are glycerin, tocopherols, and potassium carbonate. Hexane-processed
ingredients are not permitted in certified organic goods.

1 “organic” or hold “organic” to a higher standard. (See Doc. No. 89-2, Dep. of Kashi
2 Company and Bear Naked, Inc. at 112:16-20, 113:19-25; Doc. No. 89-7, Dep. of C.
3 Thurston at 54:15-17 (“A natural product doesn’t contain additives. It’s organic,
4 maybe, possibly. It’s natural.”); Doc. No. 91-1 ¶ 74; Doc. No. 91-4 at K0000374
5 (marketing survey showing differing definitions of “natural,” including “close to
6 organic”).) Additionally, Bear Naked includes ingredient lists in the nutrition facts,
7 and states on the labels of several of the challenged products that the products include
8 processed ingredients. (See Doc. Nos. 89-8, 89-9, 89-22.)

9 Plaintiffs fail to sufficiently show that class members would view the presence
10 of three of the challenged ingredients as violative of the natural representations;
11 specifically, the ingredients permitted in certified “organic” foods. “If the
12 misrepresentation or omission is not material as to all class members, the issue of
13 reliance ‘would vary from consumer to consumer’ and the class should not be
14 certified.” Stearns, 655 F.3d at 1022 (quoting In re Vioxx Class Cases, 103 Cal. Rptr.
15 3d 83, 94 (2009)). At this time, Plaintiffs fail to sufficiently show that “natural” has
16 any kind of uniform definition among class members, that a sufficient portion of class
17 members would have relied to their detriment on the representation, or that Defendant’s
18 representation of natural in light of the presence of the challenged ingredients would
19 be considered to be a material falsehood by class members. See Lavie, 105 Cal. App.
20 4th at 508 (stating advertisements are deceptive only if a “significant portion” of
21 reasonable consumers might be misled). Even the named plaintiffs disagree about the
22 definition of natural and over whether they would have purchased Bear Naked products
23 regardless of the presence of the challenged ingredients. (See, e.g., Doc. No. 89-5,
24 Dep. of M. Babic at 116:4-19, 147:10-13; Doc. No. 89-6, Dep. of L. Knowles at 109:5-
25 12; Doc. No. 89-7, Dep. of C. Thurston at 54:22-55:21; Doc. No. 98-2, Dep. of L.
26 Knowles at 141:20-142:1 (admitting he “probably” would have purchased same
27 products even if they did not say “all natural”).) Class members’ views of “natural”
28 may very well accommodate the presence of the challenged ingredients. See Moheb

1 v. Nutramax Labs. Inc., 2012 WL 6951904, at *7-8 (C.D. Cal. Sep. 4, 2012) (refusing
2 to certify class where plaintiffs failed to make showing that consumers relied on or
3 cared about representations). Absent stronger “evidence as to what consumers
4 perceived or what they would find material, the inference” of reliance does not apply.
5 Vioxx, 103 Cal Rptr. 3d at 99.

6 In contrast, Plaintiffs make a sufficient showing of materiality to justify
7 certification of a class pertaining to hexane-processed soy ingredients. Hexane is listed
8 in federal regulations as a “synthetic organic chemical manufacturing industry
9 chemical.” See 40 C.F.R. 63, Subpt. F, Tbl. 1. Unlike the other challenged ingredients,
10 Defendant does not refute Plaintiffs’ charge that hexane is unnatural. Moreover,
11 Defendant admits that hexane processing violates the definition of natural proffered on
12 the website of Kashi Company, Bear Naked’s parent and the defendant in an identical,
13 related lawsuit also before this Court.³ Plaintiffs make a sufficient showing for the
14 purposes of class certification that the challenged ingredient might be considered
15 unnatural, and that the named plaintiffs and putative class members might have relied
16 on the representation to their detriment. See Tobacco II, 46 Cal. 4th at 326-27 (noting
17 plaintiffs need not show that the representations were the only cause, or “even the
18 predominant or decisive factor” influencing their conduct). The alleged material
19 misstatement was part of a common advertising scheme to which the entire class was
20 exposed, and is a sufficiently definite representation whose accuracy has been
21 legitimately called into question. Based on Plaintiffs’ showing of materiality, common
22 issues exist and predominate with respect to products containing hexane-processed soy
23 ingredients. See Hanlon, 150 F.3d at 1019-22; In re POM Wonderful LLC Marketing
24 & Sales Practices Litig., No. ML 10–02199, 2012 WL 4490860, at *1 (C.D. Cal. Sept.
25 28, 2012); In re Ferrero Litigation, 278 F.R.D. at 560; Johns, 280 F.R.D. at 557-58 &

27
28 ³ The lead case in the related consolidated lawsuits is Astiana, et al. v. Kashi Co., 3:11-
CV-01967-H (BGS) (S.D. Cal. filed August 24, 2011).

1 n. 4; Allen v. Holiday Universal, 249 F.R.D. 166, 193 (E.D. Pa. 2008).

2 The Court therefore certifies a class of California purchasers of Defendant's
3 products that contain hexane-processed soy ingredients and were labeled with the
4 natural representations.

5 2. Breach of Warranty and Quasi-Contract

6 Common issues exist and predominate on Plaintiffs' claims for quasi-contract
7 and breach of express warranty as to the products containing hexane-processed soy
8 ingredients. Plaintiffs' claims are based on common contentions of deceptive conduct
9 by Defendant in marketing its products. Specifically, this case concerns whether
10 Defendant's products contained artificial ingredients and whether Defendant made
11 material representations to the contrary. A determination of whether Defendant
12 misrepresented its products and, as a result, whether warranties were breached, are
13 common issues appropriate for class treatment. See Wolin, 617 F.3d at 1173-74; see
14 also, e.g., Keegan v. Am. Honda Motor Co., Inc., 284 F.R.D. 504, 534-37 (C.D. Cal.
15 2012) (certifying warranty claims). .

16 Likewise, quasi-contract claims are appropriate for class certification as they
17 require common proof of the defendant's conduct and raise the same legal issues for
18 all class members. See, e.g., Keilholtz v. Lennox, 268 F.R.D. 330, 344 (N.D. Cal.
19 2010) (certifying class for unjust enrichment claim); Cartwright v. Viking Indus., Inc.,
20 No. 2:07-CV-02159, 2009 WL 2982887, at *12-13 (E.D. Cal. Sep. 14, 2009) (finding
21 predominance of common issues because "the crux of plaintiff's claims is that
22 defendant unjustly retained the benefits of its sale of window products to consumers
23 after it failed to disclose material facts about the defective nature of those products").
24 Plaintiffs' quasi-contract and breach of express warranty claims raise common factual
25 and legal issues that predominate over individual issues and therefore satisfy Rule
26 23(b)(3) for a California class.

27 ///

28 ///

3. Damages

Defendant contends that the difficulties inherent in determining damages owed to each class member defeats predominance. Typically, however, the individual nature of damages does not overcome the predominance of common issues regarding liability. The “amount of damages is invariably an individual question and does not defeat class action treatment.” Levya v. Medline Indus. Inc., 716 F.3d 510, 513-14 (9th Cir. 2013); Dilts v. Penske Logistics, LLC, 267 F.R.D. 625, 639-40 (S.D. Cal. 2010); Guido v. L'Oreal, USA, Inc., 284 F.R.D. 468, 479 (C.D. Cal. 2012).

Plaintiffs claim the same type of economic injury and damages as the putative class members. Plaintiffs allege point-of-purchase loss and seek restitution in the form of a refund of all or part of the purchase price. Cf. Comcast v. Behrend, 133 S. Ct. 1426, 1435 (2013) (stating in antitrust cases plaintiffs must translate “the legal theory of the event into an analysis of the economic impact of that event”). While Plaintiffs, should they prevail, are likely not entitled to a full refund of the purchase price, having obtained some benefit from the products purchased even if they were not as advertised, Plaintiffs may seek some amount representing the disparity between their expected and received value. See, e.g., Ries, 287 F.R.D. at 532; Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 700 (2006) (observing that a proper measure of restitution for making false claims that a product was made in the U.S.A. could be “the dollar value of the consumer impact or the advantage realized by” such claims compared to similar products made in China). A court awarding restitution under the California consumer protection laws has “‘very broad’ discretion to determine an appropriate remedy award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the amount that the defendant wrongfully acquired.” Weiner v. Dannon Co., Inc., 255 F.R.D. 658, 670-71 (C.D. Cal. 2009) (noting that “although the Court recognizes the problems inherent in calculating damages for a class action based on consumer products sold at varying prices,” such difficulties should not defeat class certification).

1 “At class certification, plaintiff must present a likely method for determining
2 class damages, though it is not necessary to show that his method will work with
3 certainty at this time.” Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 379
4 (N.D. Cal. 2010). Plaintiffs represent that they can calculate the total restitutionary
5 damages based upon sales, profits and prices data from records generally maintained
6 by Bear Naked. (See Doc. No. 73-19 ¶ 2 (stipulation of parties that Bear Naked
7 maintains sales data for each product).) If individual issues as to how much reward
8 each class member is entitled later predominate, the Court can address such concerns
9 at that time. At this time, the Court is satisfied that Plaintiffs have a viable theory of
10 how to calculate damages. See Zeisel v. Diamond Foods, Inc., 2011 WL 2221113, at
11 *10 (N.D. Cal. June 07, 2011) (accepting plaintiff’s contention for class certification
12 purposes that “he will be able to prove the proper amount of restitution by relying on
13 documents produced by [defendant] relating to net sales, profits, and costs, as well as
14 retail prices of” the products at issue). As a result, the Court determines that the
15 potential recovery is not an impediment to the requirements of commonality or
16 predominance at this time.

17 **F. Superiority**

18 Rule 23(b)(3) requires the Court to find “a class action is superior to other
19 available methods for fairly and efficiently adjudicating the controversy.”
20 Considerations pertinent to this finding include:

21 (A) the class members’ interests in individually controlling the
22 prosecution or defense of separate actions;

23 (B) the extent and nature of any litigation concerning the controversy
24 already begun by or against class members;

25 (C) the desirability or undesirability of concentrating the litigation of the
26 claims in the particular forum; and

27 (D) the likely difficulties in managing a class action.

28 Fed. R. Civ. P. 23(b)(3)(A)-(D). The superiority requirement tests whether “classwide
litigation of common issues will reduce litigation costs and promote greater efficiency.”

1 Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). “If each class
2 member has to litigate numerous and substantial separate issues to establish his or her
3 right to recover individually a class action is not superior.” Zinser, 253 F.3d at 1192.

4 Plaintiffs assert they were misled by Defendant's common advertising campaign
5 of Bear Naked food products. The claims are common, involve small sums, and do not
6 depend on individual determinations. Where a case involves multiple claims for
7 relatively small individual sums, some plaintiffs may not be able to proceed as
8 individuals because of the disparity between their litigation costs and what they hope
9 to recover. Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas
10 Sands, Inc., 244 F.3d 1163 (9th Cir. 2001). Here, it would not be economically feasible
11 to obtain relief for each class member given the small size of each class member's
12 claim. See Deposit. Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).
13 Accordingly, the Court finds that class action is clearly superior to ensure a fair and
14 efficient adjudication of the present action.

15 **III. Nationwide Class**

16 Plaintiffs request certification of a nationwide class asserting claims under
17 California law. Defendant contends that Mazza v. Honda American Honda Motor Co.,
18 666 F.3d 581 (9th Cir. 2012) bars this Court from certifying nationwide classes based
19 on California law in this case. The Court agrees with Defendant.

20 Under California's choice of law rules, the class action proponent bears the initial
21 burden to show that California has “significant contact or significant aggregation of
22 contacts” to the claims of each class member. Wash. Mut. Bank v. Sup. Ct., 24 Cal.4th
23 906, 921 (2001) (citations omitted). Such a showing is necessary to ensure that
24 application of California law is constitutional. See Allstate Ins. Co. v. Hague, 449 U.S.
25 302, 310-11 (1981). Once the class action proponent makes this showing, the burden
26 shifts to the other side to demonstrate “that foreign law, rather than California law,
27 should apply to class claims.” Wash. Mut. Bank, 24 Cal.4th at 921.

28 “California law may only be used on a classwide basis if the interests of other

1 states are not found to outweigh California's interest in having its law applied.”
2 Mazza, 666 F.3d at 589-90. To determine whether the interests of other states
3 outweigh California's interest, courts apply a three-step governmental interest test:

4 First, the court determines whether the relevant law of each of the
5 potentially affected jurisdictions with regard to the particular issue in
6 question is the same or different.

7 Second, if there is a difference, the court examines each jurisdiction's
8 interest in the application of its own law under the circumstances of the
9 particular case to determine whether a true conflict exists.

10 Third, if the court finds that there is a true conflict, it carefully evaluates
11 and compares the nature and strength of the interest of each jurisdiction
12 in the application of its own law to determine which state's interest would
13 be more impaired if its policy were subordinated to the policy of the other
14 state, and then ultimately applies the law of the state whose interest would
15 be more impaired if its law were not applied.

16 McCann v. Foster Wheeler LLC, 48 Cal.4th 68, 81-82 (Cal. 2010).

17 In Mazza, the Ninth Circuit reviewed the application of California consumer
18 protection laws, specifically the UCL, FAL, CLRA, and unjust enrichment, to a
19 nationwide class. Mazza, 666 F.3d at 587, 590. In conducting California's choice-of-
20 law analysis, the court determined the following: (1) there are material differences
21 between California consumer protection laws and those of other states, such as
22 requirements of scienter or reliance and available remedies; (2) foreign jurisdictions
23 have a significant interest in regulating interactions between their citizens and
24 corporations doing business within their state, insofar as consumer protection laws
25 affect a states' ability to attract industry; and (3) the application of California law to
26 those jurisdictions would significantly impair their “ability to calibrate liability to foster
27 commerce,” while “California's interest in applying its law to residents of foreign states
28 is attenuated.” Id. at 591-94. Based on this analysis, the court held that “each class
member's consumer protection claim should be governed by the consumer protection
laws of the jurisdiction in which the transaction took place,” and vacated the district
court's certification of a nationwide class. Id. at 594.

This case involves application of similar consumer protection laws as Mazza,

1 and Defendant identifies the same material differences in the laws that dissuaded the
 2 Ninth Circuit from applying California law to other states. (Doc. No. 89-28; Doc. No.
 3 91 at 35-37.) The Court declines to apply California consumer protection law to a
 4 nationwide class in this matter. Accordingly, the Court denies Plaintiffs' motion to
 5 certify nationwide or multi-state classes.

6 Conclusion

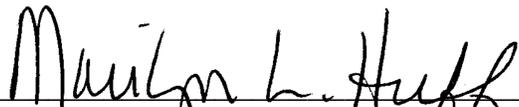
7 Based on the record, the Court grants in part and denies in part Plaintiffs' motion
 8 for class certification. The Court certifies the following class, representing California
 9 purchasers of Bear Naked products:

10 All California residents who purchased Bear Naked, Inc.'s food products
 11 on or after September 21, 2007 in the State of California that were labeled
 12 "100% Pure & Natural" or "100% Natural" but which contained Hexane-
 13 Processed Soy Ingredients. The Court excludes from the class anyone
 14 with a conflict of interest in this matter.

15 The Court appoints Chanee Thurston as representative of the class.⁴ The Court
 16 appoints Joseph N. Kravec, Jr. of Feinstein Doyle Payne & Kravec, LLC, Rosemary
 17 Rivas of Finkelstein Thompson LLP, Michael D. Braun of the Braun Law Group, P.C.,
 18 and Janet Lindner Spielberg of the Law Offices of Janet Lindner Spielberg as class
 19 counsel. The Court denies the remainder of Plaintiffs' motion.

20 **IT IS SO ORDERED.**

21 DATED: July 30, 2013

22 
 23 _____
 24 MARILYN L. HUFF, District Judge
 25 UNITED STATES DISTRICT COURT

26 ⁴ The Consolidated Amended Complaint alleges that Plaintiffs Milan Babic and
 27 Lawrence Knowles purchased only Bear Naked's Fruit and Nut Granola. (Complaint ¶¶ 8-9.)
 28 Plaintiffs do not identify these products as containing hexane-processed soy ingredients. (Id.
 ¶ 39.) Because the Complaint does not allege that they purchased Bear Naked products
 containing hexane-processed soy ingredients, the Court declines to appoint Plaintiffs Babic and
 Knowles as class representatives.