UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 20-1979-DOC-(ADSx) Date: April 29, 2021

Title: JOSEPH MIER v. CVS PHARMACY, INC. ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Kelly Davis	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND FOR APPOINTMENT OF CLASS COUNSEL [40] [50] [52]

Before the Court is Plaintiff Joseph Mier's ("Plaintiff") Motion for Certification of Class and for Appointment of Class Counsel (Dkt. 40, 50) ("Motion"). The Court finds these matters appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15.

Having reviewed the moving papers and considered the parties' arguments, the Court GRANTS Plaintiff's Motion.

I. Background

A. Facts

Unless otherwise stated, the following facts are drawn from Plaintiff Joseph Mier's ("Plaintiff" or "Mier") original Complaint ("Compl.") (Dkt. 1-2) in this action. This putative class action stems from Plaintiff's allegations that Defendant CVS

Pharmacy, Inc.'s ("CVS") Advanced Formula Hand Sanitizer, (the "Product") misleads consumers by representing that it kills 99.99% of germs. Compl. ¶ 2, 24.

Plaintiff purchased a bottle of CVS's Advanced Formula Hand Sanitizer on or about August 1, 2019. *Id.* ¶ 2. The front label of the Product read "Kills 99.99% of Germs*." *Id.* ¶¶ 2, 15. The asterisk on the front label refers the consumer to language on the back label "*Effective at eliminating 99.99% of many common harmful germs and bacteria in as little as 15 seconds." *Id.* ¶ 15; Dkt. 46 at 1–2. Plaintiff alleges that a reasonable consumer reading the front label would believe that the Product kills 99.99% of all germs. Dkt. 46 at 1–2. Plaintiff contends the statement on the front label is extremely doubtful in light of evidence that shows many types of germs are not killed by alcohol-based hand sanitizers and no scientific evidence supports the claim that alcohol-based hand sanitizers kill 99.99% of all germs. *Id.* Accordingly, Plaintiff asserts that the CVS misled him and other class members into "purchas[ing] hand-sanitizer which does not perform as advertised." *Id.*

Defendant CVS Pharmacy is a Rhode Island corporation that does substantial business, including selling its health products, in Orange County, California. *Id.* Defendant Vi-Jon, LLC is the manufacturer of the CVS product at issue, Advanced Formula Hand Sanitizer. Motion to Intervene (Dkt. 12).

In response, CVS maintains that its labels are not misleading to a reasonable customer. Dkt. 46 at 1–2. CVS claims that the statements on its labels are truthful, well substantiated by product testing, and are not misleading to a reasonable consumer. *Id.* CVS further asserts that the Products are labeled in compliance with Food and Drug Administration's (FDA) guidelines and are regulated exclusively by the FDA. *Id.* Accordingly, CVS denies that Plaintiff is entitled to any of the relief that he seeks. *Id.*

B. Procedural History

On May 26, 2020, Plaintiff filed the original Complaint in the Superior Court of California, County of Orange. The Defendant removed the case to the United States District Court, Central District of California on October 13, 2020. Notice of Removal (Dkt. 1). Defendants brought a Motion to Dismiss (Dkt. 8) on June 1, 2020 which the Court granted in part and denied in part ("Order") (Dkt. 46 at 7–8). The remaining claims are:

(1) Negligent Misrepresentation,
(2) Violation of California False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq., and

(3) Violation of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.

See generally Compl.

On March 15, 2021 Plaintiff brought the instant Motion (Dkt. 40) seeking class certification and appointment of lead counsel. Defendants CVS and Vi-Jon, LLC ("Defendants") filed their Opposition ("Opp'n") (Dkt. 57) on April 5, 2021, and Plaintiff submitted his Reply (Dkt. 63) on April 12, 2021.

II. Legal Standard

Courts may certify a class action only if it satisfies all four requirements identified in Federal Rule of Civil Procedure 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(a) requires the moving party to show the following:

(i) the class is so numerous that joinder of all members is impracticable;
(ii) there are questions of law or fact common to the class;
(iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(iv) the representative parties will fairly and adequately protect the interests of the class.

See Fed. R. Civ. P. 23(a). These requirements are often referred to as "numerosity," "commonality," "typicality," and "adequacy." *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010).

In addition to the four prerequisites under Rule 23(a), the moving party must also demonstrate that at least one of the requirements of Rule 23(b) is satisfied. Fed. R. Civ. P. 23(b). Here, Plaintiff seeks separate certification under Rule 23(b)(2) (for injunctive and declaratory relief) and Rule 23(b)(3) (for monetary damages). Mot. at 11–12. A class action may be maintained under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). To certify a class under Rule 23(b)(3), the moving party must show that common "questions of law or fact ... predominate over any questions affecting only individual members, and that a class action is superior . . . for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The decision to grant or deny a motion for class certification is committed to the trial court's broad discretion. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). However, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). A party seeking class certification must affirmatively demonstrate compliance with Rule 23—that is, the party "must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Id.*

A court that certifies a class generally must also appoint class counsel. Fed. R. Civ. P. 23(g)(1). Class counsel has a duty to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). When deciding whether class counsel is adequate to carry out this duty, courts must consider four factors:

(i) the work counsel has done in identifying or investigating potential claims in the action;
(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
(iii) counsel's knowledge of the applicable law; and
(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). Courts may also consider any other information relevant to "counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

III. Discussion

Plaintiff asks the Court to certify the following class: "All persons residing in the State of California who purchased CVS brand hand-sanitizer during the period beginning four years from the date of the filing of this Complaint to the date of class certification." Compl. ¶ 24.

A. The Proposed Class is Not Overly Broad

Defendants argue that Plaintiff's class is overbroad because it includes members who were not exposed to the misleading statements. Opp'n at 14–16.

Consumer action classes that have been found to be overbroad generally include members who were never exposed to the alleged misrepresentations, or who were not deceived by them. *See, e.g., Red v. Kraft Foods, Inc.*, No. CV-10-1028-GW(AGRx), 2012 WL 8019257, at *5 (C.D. Cal. Apr. 12, 2012); *Sevidal v. Target Corp.*, 189

Cal.App.4th 905, 926-28 (2010). The Ninth Circuit in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017), however, rejected the idea that a separate overbreadth or administrative feasibility requirement applies to class actions; "the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification." *See also Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624 (9th Cir. 2020).

Accordingly, the Court will address these concerns through Rule 23 requirements below.

B. The Proposed Class is Sufficiently Numerous

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While there is no bright-line numerical cutoff, and other factors can be taken into consideration, courts generally find that numerosity obtains when a class has forty or more members and fails when there are twenty-one or fewer members. *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008) (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). Courts may find that a class is numerous without knowing its exact size or membership, *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008) (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)), and courts "may make common sense assumptions to support a finding that joinder would be impracticable," *Californians for Disability Rights*, 249 F.R.D. at 347.

Plaintiff argues that Defendants sold well over forty CVS brand hand sanitizers in California during the class period, which satifies the numerosity requirement. Mot. at 4–5. Defendants respond that Plaintiff has not established that more than forty people relied exclusively on the front label claim in making making their purchase decision. Opp'n at 14.

Defendants conflate materiality requirement with numerosity. Proof that statements were material to the plaintiff purchaser class, and that class members relied on those statements in making purchasing decisions, does not always require individualized evidence for each class member. *In re Steroid Hormone Prod. Cases*, 181 Cal.App.4th 145, 157 (2010), as modified on denial of reh'g (Feb. 8, 2010) (finding that materiality is established "if a reasonable man would attach importance to [the] existence or nonexistence [of a fact] in determining his choice of action in the transaction in question"); *see also In re Tobacco II Cases*, 46 Cal.4th 298, 327, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009) (quoting *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 976–77, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997) ("'a presumption, or at least an

inference, of reliance arises wherever there is a showing that a misrepresentation was material... [a] misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question'").

Here, the Court addressed the reasonable consumer standard in its Order denying Defendants' motion to dismiss ("Order") (Dkt. 46 at 7–8). In that Order, the Court found that the Plaintiff had alleged sufficient facts for a reasonable juror to find that the front label was misleading to a reasonable consumer. *See id.* (citing *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939 (9th Cir. 2008) ("reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box"). Thus, the Plaintiff has established materiality. Because Defendants do not raise any further challenge to numerosity, the Court finds that the Plaintiff has satified the numerosity requirement as well.

C. The Proposed Class Presents Common Questions of Law and Fact

Next, Defendants conflate the commonality, predominance, and materiality requirement. The Court, however, will address these separately.

Rule 23(a)(2) requires courts to perform a "rigorous analysis" to determine whether "there are questions of law or fact common to the class." *See Wal-Mart*, 564 U.S. at 350-51. Commonality obtains when the class members' claims "depend upon a common contention ... of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Put differently: "What matters to class certification ... is not the raising of common 'questions' ... but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.*

The moving party need not show, however, that "every question in the case, or even a preponderance of questions, is capable of class-wide resolution. So long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." *Wang v. Chinese Daily News*, 737 F.3d 538 (9th Cir. 2013) (quoting *Wal-Mart*, 564 U.S. at 359).

Here, the Plaintiff asserts that there is a common question at the heart of this action because each member of the class was uniformly exposed to Defendants' packaging when purchasing the Product. Mot. at 7. This satisfies the commonality

requirement since there is a common question as to "whether manufacturer's advertisements and product labeling were misleading to reasonable consumer." *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1096–97 (C.D. Cal. 2015) ("There is no question that all class members were exposed to the product packaging; this suffices to show commonality."); *see In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 569 (C.D. Cal. 2014) ("Because all class members were exposed to the statement and purchased [the] products, there is 'a common core of salient facts.'").

Defendants do not challenge the Plaintiff's fulfillment of this requirement. Opp'n at 18–23. Instead, Defendants argue that Plaintiff does not meet the higher standard of predominance under Rule 23(b)(3).

Accordingly, the Court finds that the Plaintiff has met the commonality requirement.

D. Plaintiff's Claim is Typical of the Claims of the Proposed Class

Defendants assert that Plaintiff's facts are not typical of the class he seeks to represent. Opp'n at 16–17. In response, Plaintiff argues that his facts need not be coextensive with those of his class members, they only need to have similar claims and injuries. Reply at 12–14.

A class representative's claims or defenses must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "'Under the Rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1133 (9th Cir. 2016) (quoting *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014)). "In this context, 'typicality refers to the nature of the claim or defense and not to the specific facts from which it arose or the relief sought.'" *Id.* "We do not insist that named plaintiff's injuries be identical with those of other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (holding that "[w]hen determining typicality, the court looks to the nature of the claim or the defense of the class representative, not the specific facts from which it arose or the relief sought.").

Defendants argue that Plaintiff is not typical to the class he wants to represent because he did not rely exclusively on the label in making his purchase decision and he was not "financially bothered" by his purchase. Opp'n at 17. In response, Plaintiff

reasserts his claims from his complaint, stating that "he purchased hand-sanitizer under the belief that the statement on the label—that it "kills 99.99% of germs"—was true, and he was financially damaged because it was not true." Reply at 12–13. Plaintiff further argues that the fact "that the purchase price of the item did not create a significant financial strain when viewing Plaintiff's finances as a whole does not eliminate the real, though admittedly minor financial loss that [Plaintiff] suffered . . . ." *Id.* Based on the Plaintiff's allegations, the Court agrees that the nature of Plaintiff's claim is typical of the class'. Furthermore, the primary reason why a class action is the appropriate vehicle in this case is, as explained below, because individual damages are minor.

Accordingly, the typicallity requirement is met.

E. Plaintiff and Plaintiff's Counsel Can Fairly and Adequately Represent the Proposed Class

Plaintiff argues that he and his counsel adequately represent the proposed class and that representation would not be compromised by any conflicts of interest. Mot. at 5, Reply at 9–11. Defendants challenge the Plaintiff's credibility and integrity in its Opposition. Opp'n at 17–18.

Rule 23(a)(4) requires representative parties to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In the Ninth Circuit, this inquiry requires a court to answer two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

In its Opposition, Defendants do not challenge "(1) [whether] the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class" *See id.*; Opp'n at 17–18. Instead, Defendants allege that Plaintiff does not have the requisite credibility and integrity to lead this suit. *Id.* Defendants assert that Plaintiff "was not misled by the Product's label," Plaintiff "appears to have lied repeatedly . . . regarding when he purchased the Product," and "[w]hen forced to produce the information he allegedly relied on in support of his Complaint, he produced random internet articles from publications he has never read." *Id.*

In response, Plaintiff's asserts that he testified in his deposition that he looked for a hand sanitizer that said it "Kills 99.98 percent' . . . germs" and "expected the [Product

he bought] to kill 99.99% of germs." Reply at 9. Furthermore, Plaintiff asserts that "Defendant's extracare records show that he purchased the products on February 26, 2020, and March 16, 2020." *Id.* at 10. Finally, Plaintiff states that because he is a lay person, he did not know the scientific names and he relies on his attorneys for the science behind the case. *Id.*

In light of these facts, the Court cannot conclude that the issues raised by Defendants create a concern about Plaintiff's credibility that is "'so sharp as to jeopardize the interests of absent class members.'" *Harris v. Vector Mktg. Corp.*, 753 F.Supp.2d 996, 1015 (N.D. Cal. 2010) (quoting *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 177 (S.D.N.Y. 2008)); *see also id.* ("That being said, 'credibility problems do not automatically render a proposed class representative inadequate.'" (quoting *Ross v. RBS Citizens, N.A.*, 2010 WL 3980113, at *4 (N.D. Ill. Oct. 8, 2010))); *In re Computer Memories Secs. Litig.*, 111 F.R.D. 675, 682 (N.D. Cal. 1986) (stating that "questions of personal integrity are but one factor the Court must consider in making the adequacy determination"). Based on his deposition testimony, Plaintiff can plausibly maintain that Plaintiff relied on the statement on the front label of the Product when making his purchase. Further, Plaintiff has alleged that he did not purchase the Product solely to "join" (*see* Opp'n at 8) this lawsuit and has advanced a plausible explanation as to material supporting his Complaint. Finally, as Plaintiff asserts, he fulfills the adequacy requirement as a class representative in this lawsuit because (1) he does not have any conflicts of interest with other class members and (2) Plaintiffs asserts that he will prosecute the action vigorously on behalf of the class. Mot. at 5.

Accordingly, the Court finds that this requirement is met.

F. The Proposed Class Meets the Requirements of Rule 23(b)(2)

Plaintiff asserts that he meets the requirements of Rule 23(b)(2) because he seeks injunctive relief impacting the entire class. Mot. at 11. In response, Defendants argue that the injunctive relief requested by the Plaintiff is not appropriate respecting the class as a whole. Opp'n at 23–25.

A class may be certified under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Certification under Rule 23(b)(2) is only appropriate "when a single injunction or declaratory judgment would provide relief to each member of the

class," and should not be granted if "each individual class member would be entitled to a different injunction or declaratory judgment." *Wal-Mart*, 564 U.S. at 360.

Here, the injunctive relief that Plaintiff seeks requires Defendants to remove misleading statements from its Product. This case exemplifies the kind of action that may be appropriate for certification under Rule 23(b)(2), "at least insofar as plaintiffs request: (1) declaratory relief that the alleged practices are unlawful, and (2) injunctive relief prohibiting defendants from continuing them." *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 541 (N.D. Cal. 2012) (citations omitted). Those requests can be satisfied with "indivisible" equitable relief that benefits all class members at once, as the Rule suggests. *Id.*

Defendants argue that Plaintiff has not fulfilled the requirements of Rule 23(b)(2) because Plaintiff has not shown that all members of the proposed class have relied on the Product's front label in making their purchase. Opp'n at 23–24. As addressed above, however, Plaintiff has sufficiently established materiality to a reasonable consumer, and thereby sufficiently shown that class members relied on the front label of the Product in making their purchase.

Next, Defendants argue that the injunctive relief is moot because Plaintiff now knows that washing hands is the most effective method of avoiding the transmission of germs and there is no future injury. Opp'n at 24. Defendants also argue that "[Plaintiff] cannot possibly benefit from injunctive relief as he now indisputably knows that the Product does not kill 99.99% of all known and unknown germs," and thus, "monetary relief is necessarily his 'primary concern.'" *Id.* Knowledge that there is an alternative, more effective method of killing germs does not mean that the Plaintiff will not use hand sanitizers in the future. And as explained in the Court's order regarding Defendants' motion to dismiss (Dkt. 46 at 16–17), under Ninth Circuit precedent "knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." *Roper v. Big Heart Pet Brands, Inc.*, 2020 WL 7769819, at *7 (E.D. Cal. Dec. 30, 2020) (citing *Davidson v. Kimberly-Clark Corp.*, 889 F. 3d 956, 969 (9th Cir. 2018)). Accordingly, Plaintiff has sufficiently pled the likelihood of future harm, and is not barred from seeking injunctive relief for the same.

Accordingly, Plaintiff has satisfied the requirements of Rule 23(b)(2).

G. The Proposed Class Meets the Requirements of Rule 23(b)(3)

Plaintiff seeks separate certification under Rule 23(b)(3) to pursue monetary damages, arguing that common issues predominate and that a class action would be superior to individual litigation. Mot. at 12–22.

Under Rule 23(b)(3), class certification is appropriate if common questions of law or fact "predominate over any questions affecting only individual members," and if a class action offers a superior method of resolving the dispute. Fed. R. Civ. P. 23(b)(3). The party seeking class certification bears the burden of showing that these requirements are met. *See Ellis*, 657 F.3d at 979-80. Rule 23(b)(3) includes a nonexclusive list of pertinent factors to guide the certification decision: "the class members' interests in individually controlling ... separate actions"; the "extent and nature" of existing litigation "by or against class members"; the utility of "concentrating the litigation ... in the particular forum"; and "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D).

1. Predominance

The predominance inquiry under Rule 23(b)(3) asks "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods.*, 521 U.S. at 623). This standard is "far more demanding" than the commonality requirement of Rule 23(a)(2), *Amchem Prods.*, 521 U.S. at 623-24, and "calls upon courts to give careful scrutiny to the relation between common and individual questions," *Tyson Foods*, 136 S. Ct. at 1045. Predominance obtains when common issues—those "susceptible to general, class-wide proof"—are "more prevalent or important" than individual questions, for which class members "will need to present evidence that varies from member to member." *Id.* at 1045 (citations omitted). This includes the issue of damages, as class plaintiffs must be able to show "that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (citations omitted); *cf. id.* (noting that individualized damages calculations alone cannot defeat class certification). If, on balance, at least one central issue predominates, individual issues will not preclude certification under Rule 23(b)(3). *See Tyson Foods*, 136 S. Ct. at 1045.

Here, "Plaintiff[] must show that the challenged statements are [(1)] material and [(2)] likely to mislead or deceive consumers on a class wide basis." *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1043 (C.D. Cal. 2018). In the context of CLRA, FAL, and UCL claims, "'[a] misrepresentation is judged to be 'material' if a reasonable

man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 332-33 (2011) (citation omitted); *see also Caro v. Proctor & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993) "If the misrepresentation or omission is not material to all class members, the issue of reliance would vary from consumer to consumer and the class should not be certified." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011) abrogated on other grounds by *Comcast Corp. v. Behrend*, 569 U.S. 27, 27 (2013). Finally, Plaintiff must present a damage model capable of calculating damages or restitution on a class wide basis, consistent with his theory of liability. *Comcast*, 569 U.S. at 34-36.

Defendants assert that Plaintiff cannot fulfill this requirement because "[he] has presented no class-wide evidence of materiality, deception, or reliance." Opp'n at 20. As explained above, however, Plaintiff has sufficiently alleged these factors. And as addressed below, the Plaintiff has put forth a sufficient damages model.

Accordingly, Plaintiff has met the predominance requirement.

2. Superiority

The superiority requirement is intended to ensure that a "class action is the most efficient and effective means of resolving the controversy"; that is, courts must decide whether proceeding with a class action would be fair and efficient. *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1175 (9th Cir. 2010). Of particular salience is the policy goal "at the very core of the class action mechanism ... 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." *Amchem Prods.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *cf. Wolin*, 617 F.3d at 1175 ("Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification.").

Defendants do not contest that Plaintiff has satisfied the superiority requirement of Rule 23(b)(3). The Court finds that the requirement is met. As Plaintiff correctly observes, "given the small size of each class member's claim, class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action." Mot. at 20 (citing *Pecover v. Elec. Arts Inc.*, 2010 WL 8742757, at *25 (N.D. Cal. Dec. 21, 2010) ("[T]he modest amount at stake for each purchaser renders individual prosecution impractical. Thus, class treatment likely represents plaintiffs' only chance for adjudication.").

Accordingly, the superiority requirement is met.

3. Plaintiff's Damage Model

Finally, Defendants argue that Plaintiff has failed to provide a reliable class-wide damages model. Opp'n at 23. In response, Plaintiff asserts that he has met his burden because he has supplied a model and described in sufficient detail the future work that will be done. Reply at 19.

In order to show a proposed class is sufficiently cohesive to warrant adjudication by representation, plaintiffs must demonstrate that "damages are capable of measurement on a classwide basis." *Comcast Corp.*, 569 U.S. at 34. This requires plaintiffs to present a damages model consistent with their theory of liability. *Id.* at 35, 133 S.Ct. 1426. While "[c]alculations need not be exact," the model must measure only those damages attributable to plaintiffs' theory of liability. *Id.*

Defendants argue Plaintiff's expert "has outlined a survey he might do in the future," and in thus "failing to present an actual damages model, [he] has deprived Defendants of the opportunity to scrutinize [the expert's] work." Opp'n at 23. Plaintiff counters Defendants' assertion by stating that "it is acceptable at this stage to rely on a study that is subject to future refinement and development." Reply at 19 (quoting *Andrews v. Plains All Am. Pipeline, L.P.*, No. CV154113PSGJEMX, 2018 WL 2717833, at *5 (C.D. Cal. Apr. 17, 2018) (citing *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 843 (9th Cir. 2001) (finding a district court's exclusion of an ongoing, unfinished study was "an abuse of discretion" and "clear error")); *see also In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552 (C.D. Cal. 2014) (contrasting an expert who "provides no damages model at all" with one who "present[ed] a structure or framework [that could be used] to analyze the actual" data) (alterations in original); *cf. Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK (DTBx), 2013 WL 1490667, at *3 (C.D. Cal. Jan. 28, 2013) (striking declaration where the expert "fail[ed] to provide any specific information about the methodology of his proposed survey, much less provide sufficient information for [the court] to evaluate the methodology's soundness"). The Court agrees that as long as Plaintiff has described future work in his damages model with sufficient detail to give Defendants notice, he has satisfied this requirement.

Accordingly, Plaintiff has satisfied the requirements for Rule 23(b)(3).

H. Standing

Separately, Defendants challenge the Plaintiff's standing because "CVS Health Corporation ("CVS Health") neither manufactured, distributed or sold the hand sanitizer Product at issue." Opp'n at 2. Defendants purport that CVS Health, Inc. ("CVS Health") is a mere holding company and that CVS Pharmacy, Inc. ("CVS Pharmacy") controls stores and store-brand products. *Id.* Plaintiff responds, however, by citing to evidence alleging CVS's involvement in the challenged conduct, specifically, in strategizing, innovating, and marketing CVS products. Reply at 3–4.

Plaintiff refers to CVS Health's most recent 10K filing where "CVS Health cited its—and not a subsidiary's—'strategy of innovating with new and unique products and service, using innovative personalized marketing and adjusting the mix of merchandize to match customers' needs and preferences.'" Reply at 3–4 (citing Marquez Decl., Exh. 1). The CVS Health 10K also states that CVS Health—and not a subsidiary—offers the ExtraCare card program, and CarePass, a subscription-based membership. *Id.* The 10K further states that CVS Health— and not a subsidiary—"continues to launch and enhance new and exclusive brands to create unmatched offerings in beauty products and deliver other unique product offerings, including a full range of high-quality CVS Health and other propriety brand products that are only available through CVS stores." *Id.* CVS Health proceeds to state that it carries "approximately 6,000 CVS Health and proprietary brand products, which accounted for approximately 24% of front store revenues during 2020." *Id.* Furthermore, CVS Health states, in its 10K, that it "purchases merchandise from numerous manufacturers and distributors" and sells "a wide assortment of high-quality . . . proprietary brand merchandise." *Id*. Finally, CVS's privacy policy lists CVS Health and its address as the entity/location for contact, and links to a page welcoming comments or questions by mail, which includes the same address for CVS Corporation. *Id.* This same address is listed on Bloomberg for CVS Pharmacy. *Id.*

Through such allegations, the Plaintiff has sufficiently established standing.

IV. Disposition

For the reasons stated above, the Court GRANTS Plaintiff's Motion for Certification of Class and for Appointment of Class Counsel.

The Clerk shall serve this minute order on the parties.