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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

TRACY HOWARD, ADINA RINGLER, and
TRECEE ARTIS on behalf of themselves and
those similarly situated,

Plaintiffs,

v.

THE HAIN CELESTIAL GROUP, INC. d/b/a
EARTH'S BEST,

Defendant.

Case No.: 3:22-cv-00527-VC

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR CLASS
CERTIFICATION**

Date: January 11, 2024

Time: 10:00 a.m.

Courtroom: 4

Hon. Vince Chhabria

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

Please take notice that on January 11, 2024, at 10:00 a.m., or soon thereafter as this motion may be heard, Plaintiffs Tracy Howard, Adina Ringler, and Trecee Artis will, and hereby do, move, pursuant to Rule 23 of the Federal Rules of Civil Procedure, to certify the following class:

All persons in the State of California who purchased the Products¹ between January 26, 2018 and the present.

The Class will pursue claims under the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 et seq. (“UCL”), the California Legal Remedies Act, Cal. Civ. Code §§ et seq., (“CLRA”); the California False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 et seq. (“FAL”); and for common law fraud, deceit and/or misrepresentation, and unjust enrichment.

Plaintiffs further request that the Court (1) appoint Plaintiffs Howard, Ringler, and Artis as class representatives on all claims, and (2) appoint Gutride Safier LLP as lead counsel. Plaintiffs finally request the Court to order the parties to meet and confer and present this Court, within fifteen (15) days of an order granting class certification, a proposed notice to the certified class.

This motion is based upon this Notice of Motion and Motion, Memorandum of Points and Authorities, and the accompanying Declarations in support of Class Certification by the following persons:

- Hayley Reynolds,
- Seth Safier,
- Stephen Gaskin,
- Colin Weir, and
- Michael Dennis.

In the Memorandum of Points and Authorities that follows, these declarations shall be referred to by the last name of the declarant, followed with the abbreviation “Decl.” (For example:

¹ The Products are all Earth’s Best products that were intended for children under two and made a nutrient content claim during the class period. A non-exhaustive list is attached as Exhibit A to the Second Amended Complaint filed November 2, 2022.

“Reynolds Decl.”) This Motion is also based on the pleadings and papers on file in this action and all matters of which this Court may take notice.

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I. INTRODUCTION

In the last fifteen years, the baby food market has been dramatically reshaped by selling purees in a new format: pouches. Gone are the days when the typical customer purchased jarred purees for few months while introducing solids. Now, customers are made and kept for years with misleading claims that pureed food in pouches are healthy long-term choices from the earliest age. Defendant Hain Celestial d/b/a Earth's Best was one of the first to add nutrient claims to its pouch products in order to make parents think the products were healthy and thus they could [REDACTED] [REDACTED] Reynolds Decl., Ex. 1 at 35:13-15. Over 85% of surveyed consumers similarly believe the Products are healthy based on the label claims. Yet such nutrient content claims are strictly prohibited for products intended for children under age two, because they imply that claimed levels of nutrients are desirable, even though "the [FDA] lacks evidence that . . . an increased intake for nutrients such as fiber are appropriate and recommended for infants and toddlers." 56 Fed. Reg. 6042. The claims also mislead reasonable consumers to believing that use of the products is healthy, when in fact such use impedes children's growth and development.

In an attempt to shield itself from liability for its regulatory violations, Hain, prior to the proposed class period, modified the back label of the Products to add, in tiny font, the words "For ages 2+." At best, these words commonly indicated to reasonable consumers that the immediately following *nutritional fact panel* on the back label contained information for children over two. Hain did nothing to qualify that its *front label nutrient content claims* were age-limited. Nor did it make clear to reasonable consumers that the Products themselves were intended only for older children. To the contrary, Hain continued explicitly to market the Products as being for children under two.

This case is a textbook example for class certification. Whether Hain's conduct unlawfully violated FDA regulations is a necessarily common question. Whether Hain's nutrient content claims were likely to mislead the "reasonable consumer" is another common question. Throughout the class period, the relevant labels stayed the same in all material respects: they all included nutrient content claims on Products that were (1) intended for children under two and (2)

nutritionally and developmentally unhealthy for children under two. The class's injury is likewise susceptible to class-wide proof in the form of Plaintiffs' proposed conjoint price premium model. Plaintiffs' model shows that for California consumers, the "4g protein per serving" claim on the Beef Medley and Chicken Casserole pouches commanded a 22.7% price premium; the "3g plant protein" claim on the Veggie Red Lentil Bake and Four Bean Feast pouches commanded a 12.6% price premium; and the "Excellent source of Calcium, Vitamins C & D" claim on the Fruit Yogurt Smoothie pouches commanded a 24.4% price premium. Because these common issues predominate over any individualized issues Hain may conjure up, class certification should be granted.

II. STATEMENT OF FACTS

A. Earth's Best Uses Nutrient Content Claims to Increase Profits.

Hain's products first featured a nutrient content claim on the Sesame Street pouch products as far back as 2015. As its pouch products grew in popularity, Hain expanded its product line and added more pouch products and non-pouch snack products such as bars and cookies. Along the way, Hain has added nutrient content claims, even in the face of advice that the Products could not include claims because they were intended for children under two.

Hain knew from its research that [REDACTED]
[REDACTED]
Reynolds Decl., Ex. 4 at 7. Prior to October 2019, the Beef Medley and Chicken Casserole protein pouches were sold with no front-label protein claim but were labeled as "Stage 3, 9+ months." Hain decided to develop a new label which [REDACTED] (Reynolds Decl., Ex. 6 at 1) because [REDACTED]
Reynolds Decl., Ex. 7 at 5. Hain relied on consumer research that confirmed [REDACTED]
[REDACTED] *Id.* Ultimately, Hain advertised the quantity of protein in the pouch on the front label because [REDACTED]
[REDACTED] Reynolds Decl., Ex. 8 at 22. As the Vice President of marketing at the time concluded, the packaging design ensured that

the [REDACTED] (Reynolds Decl., Ex. 9 at 1) and listed the protein claim as a [REDACTED] of the products. Reynolds Decl., Ex. 15 at 2. Besides the addition of the protein claim on the front label, everything else about the Product stayed the same: the formula was the same and the label still included the “3” flag. *See* Reynolds Decl., Ex. 5 [REDACTED] [REDACTED]. Thereafter, [REDACTED] [REDACTED] Reynolds Decl., Ex. 17 at 2.

Although the Sesame Street products have always had an “excellent source” nutrient content claim, the Products went through a redesign in 2018 to [REDACTED] Reynolds Decl., Ex. 10 at 30. On all of the Products, since the beginning of the class period, Hain commonly included a prominent nutrient content claim on the principal display panel touting the amount of nutrients in the products. And despite some redesigns, these only *enhanced* the prominence of the nutrient content claims. *Id.*

Unsurprisingly, Hain used the nutrient content claims to communicate to consumers that the Products are [REDACTED] [REDACTED] Reynolds Decl., Ex. 1 at 35:13-15. This is because it concluded [REDACTED] [REDACTED] Reynolds Decl., Ex. 4 at 7. Yet, amazingly, [REDACTED] Reynolds Decl., Ex. 1 at 150:23-151:11. Hain even admits that it [REDACTED] [REDACTED] [REDACTED] [REDACTED] For example, when adding the protein claims to the protein pouches, Hain did so in part because [REDACTED]

[REDACTED] Reynolds Decl., Ex. 7 at [REDACTED] [REDACTED]

B. The Nutrient Content Claims Deceive Consumers.

Plaintiffs allege that in the context of the Product labels, the nutrient content claims lead reasonable consumers to falsely believe the Products are healthy for their children under two. One need not look further than the labels themselves, which are labeled as “wholesome snacks,” to make “healthy habits happen,” to understand why a claim such as “excellent source of calcium, vitamins C&D” would lead a consumer to believe the Products are healthy for their babies. *See, e.g.,* Reynolds Decl., Ex. 18 at 1. Countless internal documents confirm that Hain intended consumers to believe as much. Hain’s mission is stated as building a [REDACTED] [REDACTED] Reynolds Decl., Ex. 11 at 98. An expert survey further demonstrates that the nutrient content claims communicated to a substantial portion of relevant consumers that the Products are healthy for children under two. Dennis Decl., ¶ 83. Just as Hain intended, Plaintiffs relied on these misleading messages in purchasing the Products. Reynolds Decl., Ex. 2 at 62:15-19; *Id.*, Ex. 3 at 61:9-21.

Plaintiffs have engaged an expert who will testify regarding the harm of the Products for children under two. Reynolds Decl., ¶ 4. Purees are meant to be time-bound, meaning that they are intended to be used in the very short term until a baby transitions to more textured foods. But allowing kids to slurp purees from pouches leads to much longer-term use than does parental spoon-feeding from a jar. Further, pouches are developmentally regressive; they hinder natural development of feeding skills including sensory skills, oromotor skills and fine motor skills. *See* ECF 58 (“SAC”) ¶ 6. This can lead to long-term feeding issues such as sensory aversion and weak oromotor skills preventing age-appropriate eating after 12 months. *See id.* ¶ 118. And pouches are easier and faster to consume which increases the risk of overconsuming. *Id.* ¶ 120. The increased rate of consumption of pouches negatively impacts satiation and satiety leading to overfeeding, excessive weight gain and disturbed glucose homeostasis, all of which have been associated with a markedly increased risk of later obesity. *See id.* ¶ 6.

Repeated pouch feedings also lead kids to develop aversions to healthier foods. Most pouches contain fruit, which when mixed with vegetables masks the taste of the vegetable. Thus, children learn to like sweet vegetables versus the plain vegetable. As a spokeswoman for the American Academy of Pediatrics said in 2018 of the overuse of baby food pouches, “Parents are feeling reassured that their kids are getting the fruits and vegetables... [but] kids need the taste of what the actual food is to come to like it later.” SAC at ¶ 121. Use of pouches substantially contributes to a child becoming a picky eater that is less likely to receive healthful sources of nutrition. Notably, Hain actively developed products [REDACTED] to appeal to parents, despite the AAP’s stark recommendation against it. Reynolds Decl., Ex. 12 at 6.

Worse yet, the “Letter of the Day” cookie Products include the claim, “excellent source of Iron, Zinc, & six B vitamins” but include added sugar which is harmful for children under two. Reynolds Decl., Ex. 20. Studies have shown that introducing added sugars before the age of two leads to older children and adults preferring sweeter foods later in life which can lead to overweight, obesity and other preventable diseases such as type 2 diabetes, heart disease, high blood pressure and obesity related cancers. *See* SAC, n. 19 (WHO paper).

C. The Nutrient Content Claims Are Unlawful.

FDA regulations unequivocally state that: “no nutrient content claims may be made on food intended specifically for use by infants and children less than 2 years of age.” 21 C.F.R. § 101.13(b)(3). It is a common question whether Hain intended the Products for children under two, and Hain’s intent will be proven with common evidence.

Although the Products have, during the class period, included a microscopic disclaimer on the back panel that states “For Ages 2+,” Hain consistently marketed the Products for children under two, demonstrating that regardless of the fine print on the back label, it still intends the Products be consumed by children under two.² Thus, the Products violate parallel state and federal

² [REDACTED]

regulations, which serves as the predicate for Plaintiffs' unlawful claim under state law. In any event, issues related to the disclaimer are yet another common question.

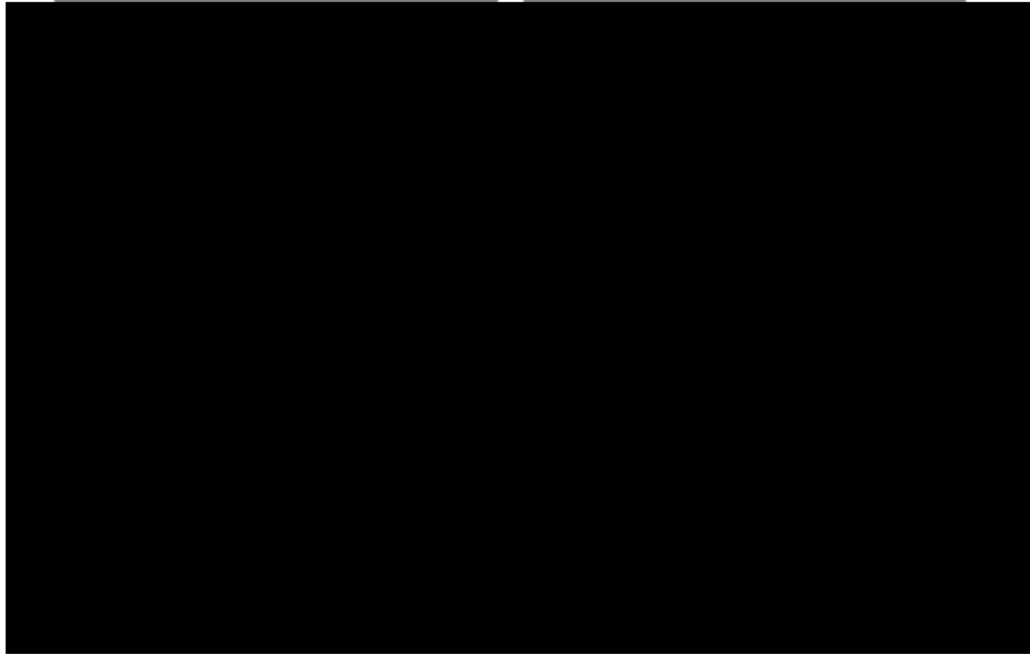
Hain has stated that its "target" consumer is [REDACTED]
Reynolds Decl., Ex. 16 at 32. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The new small print on the back label
[REDACTED] does not satisfy the law or disprove Hain's intent. It
certainly does not change the fact that Hain's intent remains a common question.

Similarly, as seen in multiple retailer presentations, Hain emphasized the appeal of Sesame Street characters to children under two.



The protein pouches are a prime case study for showing the Products are intended for children under two, regardless of the small print on the back. [REDACTED]

[REDACTED]

Although there are 14 products at issue in this case, constituting different flavors and varieties of meal pouches and snack pouches,³ all of the Products have maintained at least one nutrient content claim on the front label during the class period, Reynolds Decl., Exs. 18-31(product labels), and all were consistently marketed and sold to parents of children under two during the class period. *Id.*

Thus, common evidence will show that Hain “specifically intended” the Products be purchased for children under the age of two.

³ For example, for smoothie pouches, there are 6 flavors representing 6 products. These are all “separate products” even though they are all highly similar in all respects that matter for purposes of this lawsuit.

D. Earth's Best Charged a Price Premium as a Result of its Unlawful and Misleading Labeling.

Plaintiffs' survey expert, Steve Gaskin, and damages expert, Colin Weir, propose a widely accepted methodology to measure and isolate the price premium that consumers paid as a direct result of the inclusion of nutrient content claims on the front label: conjoint analysis. Gaskin Decl. ¶ 11; Weir Decl. ¶¶ 20, 38. Conjoint analysis utilizes a survey where respondents are presented with various choices of product attributes, prices and alternatives, and asked to select their preferred product, which allows researchers to then apply statistical methods, including regression analysis, to value those attributes in the market. Gaskin Decl., ¶¶ 12-25; Weir Decl., ¶¶ 20-31. Mr. Gaskin, in consultation with Mr. Weir, designed a carefully controlled conjoint survey to measure the price premium solely attributable to the nutrient content claim on the front label of the product. Gaskin Decl., ¶¶ 26-34; Weir Decl., ¶¶ 32-38. Based on this analysis, which is described more fully below and in Mr. Gaskin's and Mr. Weir's declarations, they concluded that for California consumers, the "4g protein per serving" claim commanded a 22.7% price premium, the "3g plant protein" claim commanded a 12.6% price premium, and the "Excellent source of Calcium, Vitamins C & D" claim commanded a 24.4% price premium. Gaskin Decl. ¶ 12; Weir Decl., ¶ 58.

III. ARGUMENT

Rule 23 provides district courts with broad discretion to determine whether a class should be certified. *See Armstrong v. Davis*, 275 F.3d 849, 872, n.28 (9th Cir. 2001). Class actions are favored where, like here, there is alleged wrongdoing against a large number of persons, each of whom has suffered only a small amount of damages. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998) (class certification appropriate because litigation costs would dwarf potential recovery by class members if forced to pursue actions individually).

A class action must satisfy all four requirements in Fed. R. Civ. P. 23(a)(1) numerosity; (2) commonality (3) typicality and (4) adequacy. The class must also satisfy at least one subdivision of Fed. R. Civ. P. 23(b). Here, the Class satisfies Rule 23(b)(3) because "questions of law or fact common to the members of the class predominate over any questions affecting only individual

members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” In some cases, “it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,” and certification is proper only if “the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-351 (2011) (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982)).

A. The Class Satisfies the Requirements of Rule 23(a).

1. The class is sufficiently numerous.

Rule 23(a)(1) requires the class to be so numerous that joinder of all class members is “impracticable.” Fed. R. Civ. P. 23(a)(1). [REDACTED]

[REDACTED] This is sufficient. *See, e.g., Pettit v. Procter & Gamble Co.*, No. 15-CV-02150-RS, 2017 WL 3310692, at *2 (N.D. Cal. Aug. 3, 2017); *Vizcarra v. Unilever United States Inc.*, No. 4:20-cv-02777 YGR, 2023 U.S. Dist. LEXIS 38208, at *16-17 (N.D. Cal. Feb. 24, 2023) (numerosity satisfied where tens of thousands of units sold).

2. There are common questions of fact and law.

“Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury and that the class’s claims depend on ‘a common contention ... of such a nature that it is capable of classwide resolution.’” *Pettit*, 2017 WL 3310692, at *2 (quoting *Wal-Mart*, 564 U.S. at 350). Not all questions need be common to satisfy the rule. *Id.*; *see also Mazza v. Honda Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (“[C]ommonality only requires a single significant question of law or fact.”). In a misleading labeling case, such as this, “the central question is whether [the Defendants’ labels] were likely to deceive a reasonable consumer.” *Kumar v. Salov N. Am. Corp.*, No. 14-CV-2411- YGR, 2016 U.S. Dist. LEXIS 92374, at *11 (N.D. Cal. July 15, 2016); *see Williams v. Gerber Products Co.*, 553 F.3d 934, 938 (9th Cir. 2008) (“[T]he primary evidence in a false advertising case is the advertising itself.”). The UCL, CLRA, and FAL require a plaintiff to show “that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.” *Ebner v. Fresh*,

Inc., 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 512 (Cal. 2003)). “Where the advertising or practice is targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer, the question whether it is misleading to the public will be viewed from the vantage point of members of the targeted group, not others to whom it is not primarily directed.” *Lavie*, 105 Cal. App. 4th at 512 (citing *Committee on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197 (1983))). Where there are “identical statements on the labels of the products at issue,” the answer to that question will “be based on common facts.” *Id.*; see also *Korolshteyn v. Costco Wholesale Corp.*, No. 3:15-CV-709-CAB-RBB, 2017 WL 1020391, at *5 (S.D. Cal. Mar. 16, 2017) (“By definition, class members were exposed to these labeling claims, creating a ‘common core of salient facts.’”). As a result, “[i]n misbranding and false advertising cases, courts routinely find that commonality has been satisfied based on the question of whether the label would be deceptive to a reasonable consumer.” *Young v. Neurobrands*, No. 18-cv-05907-JSW, 2020 U.S. Dist. LEXIS 259264, at *12 (N.D. Cal. Oct. 15, 2020) (collecting cases).

This case is no different. The “central question” is whether Earth’s Best labels were unlawful under 21 C.F.R. § 101.13(b)(3) and misleading. This is necessarily a common question based on an objective standard. *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 564, 565, 575 (N.D. Cal. 2020) (discussing the objective nature of the key inquiries under the UCL, CLRA, and FAL); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1115 (N.D. Cal. 2018) (“[B]ecause deception and materiality under the FAL, CLRA, and UCL are objective questions, they are ‘ideal for class certification because they will not require the court to investigate class members’ individual interaction with the [challenged] product[s].’”). Moreover, common, class-wide evidence establishes that throughout the class period: (1) a nutrient content claim appeared on all relevant Product packages (Reynolds Decl., ¶ 3, Exs. 18-31); (2) the Products were intended for children under two (see, e.g., Reynolds Decl. Ex 14 at 15); (3) reasonable consumers shopping for children under two (i.e., the “target audience”) interpret the claim to mean that the products would be healthy for their child (Dennis Decl., ¶ 83); and (4) the Products are harmful for the health and

development of children under two. Reynolds Decl. ¶ 4). *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971) (holding that, where “numerous consumers are exposed to the same dubious practice by the same seller [] proof of the prevalence of the practice as to one consumer would provide proof for all.”).

It is immaterial that the nutrient content claims on the Products differed, i.e., some include “excellent source” claims and others include quantitative protein claims. Whether or not any product label was unlawful or deceptive is a common question because the theory of liability is the same across all products. All the Products were and are intended for children under two. All the Products included nutrient content claims. Thus, all violated parallel state and federal food labeling laws that prohibit nutrient content claims on products intended for children under two. 21 C.F.R. § 101.13(b)(3).

Similarly, all the Products contained nutrient content claims in the context of labels that led reasonable consumers shopping for children under two to believe the Products were healthy for their child. *See Reynolds Decl.*, Ex. 18-31 (Product labels). Over 86% of respondents, in fact, agreed the nutrient content claim “excellent source of calcium, vitamins C&D” communicated the Peach Banana Fruit Yogurt Smoothie pouch was healthy. Dennis Decl. ¶ 83. Thus, surveys will provide classwide evidence of the reasonable consumer’s perception of the claims. Further, the packaging provides classwide evidence. All of the pouches include the word “organic” three times on the front label, along with the brand name “Earth’s Best.” As Earth’s Best itself admits, these statements communicate the Products are healthy. Reynolds Decl., Ex. 1 at 35:13-21; 76:6-8 (“I do believe that ‘organic’ certainly communicates healthy to some folks.”); 77:14-20 (Q: And part of how it’s communicating it’s wholesome, it has label claims like it’s organic and excellent source of certain vitamins; is that right? A: Certainly organic. It says “wholesome snacks,” so I think that’s under the word “crackers,” so that’s part of how it communicates wholesome is literally by saying it.”). Other label statements and Earth’s Best documents also demonstrate that Hain intended consumers believe the Products were healthy. The protein pouches also include the front label protein claims alongside photos of whole, unprocessed vegetables and meat. The “Organic

Crunchin’ Crackers” are labeled as “wholesome snacks” and the side label encourages consumers to “make nutritious habits happen.” SAC at ¶ 63. The back label of the Organic Letter of the Day Cookies states “Earth’s Best Organic Letter of the Day Cookies are a nutritious and great tasting way for kids to learn their ABC’s.” Reynolds Decl., Ex. 20.

Whether these labels were unlawful and/or misleading is a common question. The variance among the nutrient content claims goes only to the amount of the price premium, not liability, and is therefore does not defeat class certification.

3. Plaintiffs are typical of the class.

“Typicality focuses on the class representative’s claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative aligns with the interests of the class.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017). “The requirement is permissive, such that representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical.” *Id.*

“Some degree of individuality is to be expected in all cases, but that specificity does not necessarily defeat typicality.” *Hanlon*, 150 F.3d at 1020. Typicality is satisfied if the named plaintiffs’ claims stem from the same practice or course of conduct that forms the basis of the class’s claims and are based upon the same legal remedial theory. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010); *see also Just Film*, 847 F.3d at 1116 (“Her claim is typical of the class because it shares ‘some common question of law and fact with class members’ claims.”) (quoting Newberg on Class Actions § 3:31 (5th ed.)).

Plaintiffs’ claims are typical of those of the other Class members. They, like all class members: purchased Hain Products during the class period that had a nutrient content claim on the front label for their children under the age of two (Reynolds Decl., Ex. 2 at 62:10; *Id.*, Ex. 3 at 59:1-13; Howard Decl. ¶ 2); believed that the Products would be healthy for their child under two (Reynolds Decl., Ex. 2 at 71:8-72:2; *Id.*, Ex. 3 at 64:1-11; Howard Decl. ¶ 4); and paid a price premium as a result of the misrepresentation (Gaskin Decl., ¶ 12). Courts routinely find similar facts sufficient for typicality. *See, e.g., Pettit*, 2017 WL 3310692, at *4 (finding typicality because

the plaintiff purchased Freshmates under the apprehension they were appropriate for flushing down the toilet, and now alleges she is owed restitution of the price premium she paid for an ostensibly ‘flushable’ product because P&G’s ‘flushable’ label was false”); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 502 (S.D. Cal. 2013) (finding typicality where the named-plaintiff “suffered the same type of economic injury and seeks the same type of damages as the putative class members”). It does not matter that Plaintiffs did not purchase each product included in the class because the underlying facts and theory of liability with respect to each product is the same. *See Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 U.S. Dist. LEXIS 71575, at *56 (N.D. Cal. May 23, 2014); *Astiana*, 291 F.R.D. at 502-03; *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523 at 539-40 (N.D. Cal. 2012); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365 at 377-78 (N.D. Cal. 2010).

4. Plaintiffs and counsel will adequately protect the interests of the class.

Fed. R. Civ. P. 23(a)(4) requires that the class representative and class counsel “fairly and adequately protect the interests of the class.” In the Ninth Circuit this is satisfied if (1) neither the representative plaintiffs nor their counsel “have any conflicts of interest with other class members,” and (2) the representative plaintiffs and their counsel will “prosecute the action vigorously on behalf of the class.” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Plaintiffs will fairly and adequately protect the interests of the members of the Class, because it is in their best interest to prosecute the claims alleged in the Complaint to obtain full compensation due to all members for the illegal conduct of which they complain. Plaintiffs do not have any conflicts, let alone an irreconcilable conflict, with other class members. Rather, Plaintiffs stand in the same shoes as all other members of the Class, seek the same relief as other class members, and have a common interest in obtaining all of the relief sought.

Plaintiffs’ counsel will also adequately protect the interests of the class. Counsel have successfully represented numerous plaintiff classes, involving a variety of claims, in state and federal courts throughout the country. Safier Decl., ¶ 4, Ex. A at 1-5, 12-17. Gutride Safier LLP has been involved (and appointed class counsel) in at least twenty-four class actions, including

several cases relating to food and product mislabeling; it also obtained many of the key Ninth Circuit precedents applicable in consumer cases. Safier Decl., Ex. A, at 1-2. Plaintiffs’ counsel has the necessary financial resources to vigorously litigate this action. Safier Decl., ¶ 6. The firm does not have any conflicts of interest with members of the class. *See id.* ¶ 7. This is more than sufficient to establish adequacy. *See, e.g., Astiana*, 291 F.R.D. at 503 (finding adequacy where “the interim co-lead counsel has experience in prosecuting consumer fraud and warranty class actions”); *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB OP, 2014 WL 1779243, at *12 (C.D. Cal. Jan. 13, 2014) (finding adequacy where class counsel was “an experienced class action firm that has participated in many cases similar to the present action and has the resources and intent to vigorously prosecute this action”).

B. The Class Satisfies the Requirements of Rule 23(b)(3).

Rule 23(b)(3) requires that “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 predominance inquiry asks “whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The focus is on the relationship between the common and individual issues.” *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011) (internal quotations and citation omitted)). Predominance does not require that all issues in the case be common. Rather, the common questions need only be “a significant aspect of the case . . . [that] can be resolved for all members of the class in a single adjudication.” *Mazza v.*, 666 F.3d at 589. Courts routinely find predominance in false labeling cases because, as discussed above, the answer to whether the label was false or misleading to reasonable consumers, and whether it was material “will be the same for the entire class.” *Korolshteyn*, 2017 WL 1020391, at *6. “These common questions are not only more significant than other questions at issue in [the] suit, they are the most significant questions in this lawsuit. Therefore, these questions predominate over any individual questions that may arise.” *Id.*; *see also, e.g., Mullins v. Premier Nutrition Corp.*, No. 13-CV-01271-RS, 2016 WL 1535057, at *6-7 (N.D. Cal. Apr. 15, 2016) (finding predominance

in false labeling action based on common questions regarding deception, materiality, and class wide proof of restitution); *Kumar*, 2016 WL 3844334, at *7-10 (same); *Pettit*, 2017 WL 3310692, at *2-4, 5 (same); *Hadley*, 324 F.Supp.3d at 1094-1103 (same); *Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, 326 F.R.D. 592, 611-614 (N.D. Cal. 2018) (same); *Post Foods*, 334 F.R.D. at 565 (same); *Ries*, 287 F.R.D. at 536-37 (same); *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) (holding that questions of materiality and the likelihood a representation will mislead a reasonable consumer predominate over individual issues). These same common issues predominate here.

1. Common questions predominate about whether Hain’s nutrient content claims were misleading.

Plaintiffs established above that the central questions in this case are common, i.e., whether the nutrient content claims on the Products’ labels are i) unlawful and ii) misleading based on the objective “reasonable consumer” standard, and will be answered by common proof. *See supra*, § II.A.2. With respect to this issue, “the predominance and commonality issues collapse.” *Pettit*, 2017 WL 3310692, at *5.

2. Common questions predominate on unlawfulness.

The UCL’s “unlawful” prong “borrows” predicate legal violations and treats them as independently actionable. *Wang v. Massey Chevrolet*, 97 Cal.App.4th 856, 871 (2002). The Class alleges the labels violated FDA and state regulations in at least two ways: (1) including nutrient content claims on products intended for children under two in violation of 21 C.F.R. § 101.13(b)(3) and California law and (2) including misleading nutrient claims that render the labels misbranded under 21 U.S.C. § 343, 21 C.F.R. § 101.13(i), and California law. Hain’s liability for such misbranding is a predominating common question because “proving the . . . ‘unlawful’ prong[] of the UCL . . . do[es] not depend upon any issues specific to individual consumers.” *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 242 (N.D. Cal. 2014). Rather, “[t]he label is either illegal or it is not,” and that determination will apply to all Class Members the same. *Ang v. Bimbo Bakeries USA, Inc.*, 2014 WL 1024182, at *8 (N.D. Cal. Mar. 13, 2014).

3. Common questions predominate on restitution and damages.

Plaintiffs seek restitution under the UCL, as well as damages under the CLRA and for fraud, presenting further predominant common questions.⁴ Pursuant to *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), Plaintiffs must show that damages are “capable of measurement” across the class and that her damages model “fits” her theory of liability. *Id.* at 1435. But Plaintiffs need not “actually calculate under that approach before liability is established.” *Brown v. Hain Celestial Grp., Inc.*, 2014 WL 6483216, at *19 (N.D. Cal. Nov. 18, 2014); *see McCrary*, 2014 WL 1779243, at *15 (certifying consumer class because plaintiff presented a viable damages model and “it is not necessary to show that his method will work with certainty at this time”). Moreover, variations in damages among class members is not a reason to deny certification. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986 (9th Cir. 2015) (“damage calculations alone cannot defeat class certification”) (citation omitted).

“It is well-established that the ‘price premium attributable to’ an alleged misrepresentation on product labeling or packaging is a valid measure of damages in a mislabeling case under the FAL, CLRA, and UCL” and therefore satisfies *Comcast. Hadley*, 324 F. Supp. 3d at 1104; *see also Zeiger v. WellPet LLC*, No. 3:17-cv-04056-WHO, 2021 U.S. Dist. LEXIS 37815, at *34 (N.D. Cal. Feb. 26, 2021) (same); *Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, at *11 (C.D. Cal. July 1, 2013) (same). Here, Plaintiffs’ survey and economics experts, Steve Gaskin and Colin Weir,⁵ propose a conjoint damages model to show that everyone in the class paid a price premium for the

⁴ Under the UCL, a court may grant restitution, *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App. 4th 663, 694 (2006); Cal. Bus. & Prof. Code §§ 17203, 17535, an equitable remedy whose purpose is “to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003); *see also Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 177 (2000). Restitution has two purposes: returning money unjustly taken from the class, and deterring the defendant from engaging in future violations. *See Colgan*, 135 Cal.App. 4th at 695. If restitution is awarded, it must be a “quantifiable sum,” and the award must be supported by substantial evidence. *Id.* at 698. Under the CLRA and fraud-based claims, a consumer may recover actual damages, punitive damages and attorney fees. Cal. Civ. Code § 1780(a)(1), (5), (d); *id.* § 3294(a). The CLRA also provides for statutory damages of \$5,000 for each act of false advertising to a person age 65 or older. Cal. Civ. Code §§ 1761(f)-(g), 1780(a)(4).

⁵ Numerous courts have also accepted Mr. Gaskin and Mr. Weir as survey and damages experts, respectively. Gaskin Decl., ¶ 14; Weir Decl., ¶ 2 and Ex. 1 attached thereto.

Products as a result of the nutrient content claims. Gaskin Decl., ¶ 12; Weir Decl., ¶¶ 11-12; *see also Hadley*, 324 F. Supp. 3d at 1103-1110 (approving a Gaskin and Weir-sponsored conjoint analysis to measure a labeling price premium). Conjoint analysis has been used for over 50 years by academic researchers, industry marketing departments, and government agencies to determine the price premium attributable to particular product attributes, such as label claims *Id.* Numerous courts have also approved of conjoint analysis as a methodology to determine the price attributable to specific product features such as a label claim. *See Bailey v. Rite Aid Corp.*, No. 4:18-cv-06926 YGR, 2021 U.S. Dist. LEXIS 81654, at *50 (N.D. Cal. Apr. 28, 2021) (finding conjoint by Steve Gaskin to comport with requirements of *Comcast* and sufficient to show damages are capable of measurement on a class-wide basis); *Hadley*, 324 F. Supp. 3d at 1103 (finding conjoint analysis sufficient); *Post Foods*, 334 F.R.D. at 575 (same); *see also, e.g., In re Lenovo Adware Litig.*, No. 15-MD-02624-RMW, 2016 WL 6277245, at *21 (N.D. Cal. Oct. 27, 2016) (same); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 944 (C.D. Cal. 2015), *aff'd sub nom. Briseno*, 844 F.3d 1121, and *aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017) (approving of methodology to determine class wide damages “attributable to ConAgra’s labeling of Wesson Oils as ‘100% Natural’ through the use of a conjoint analysis survey”).

The survey here, designed by Mr. Gaskin in consultation with Mr. Weir, accounted for the real-world marketplace for similar pouch products, and was based on actual, historical prices that occurred in the marketplace. Gaskin Decl. ¶ 25; Weir Decl. ¶ 44. Mr. Gaskin used actual competitor brands (identified by Hain), actual claims on those competitors’ labels, and actual price ranges for those competitors’ products. *Id.* ¶ 28-30. Following well-accepted techniques for conjoint surveys, respondents were shown a variety of similar baby food pouch products that varied according to the product attributes tested: Brand, labels, and price. Gaskin Decl. ¶ 28. Respondents chose their preferred product based on the displayed attributes, which were presented in sets of three products. *Id.* at ¶ 49. After each choice set, respondents were asked if they would actually purchase the product they stated they preferred. *Id.* ¶ 50. Mr. Gaskin was then able to take the preference data and feed it into a market simulator that employed Hierarchical Bayesian

regression to calculate the price premium that consumers paid as a result of the nutrient content claim on the label. *Id.* ¶¶ 52-55.

Mr. Gaskin and Mr. Weir already executed the survey and analysis for the following Products: plant-based protein pouches (SAC, Ex. A, Nos. 1-2), meat-based protein pouches (SAC, Ex. A, Nos. 3-4), and sesame street smoothie pouches (SAC, Ex. A, Nos. 5-10). The Conjoint analysis shows that for California consumers, the “4g protein per serving” claim commanded a 22.7% price premium, the “3g plant protein” claim commanded a 12.6% price premium, and the “Excellent source of Calcium, Vitamins C & D” claim commanded a 24.4% price premium. Applying those figures to the relevant Products results in class wide damages as follows:

Products	Damages
Beef Medley with Vegetables; Chicken Casserole	\$337,445.14
Veggie Red Lentil Bake; Four Bean Feast	\$183,746.16
Fruit Yogurt Smoothies: Peach Banana, Pear Mango, Apple Blueberry, Pineapple Orange Banana, Mixed Berry, Strawberry Banana	\$2,327,392.52

Weir Decl., Table 3.⁶ Although currently focused on one product category (i.e., pouches), the same

⁶ Even were the Court to conclude that there is no classwide method for determining the amount of monetary relief that should be repaid to the Class, it nonetheless still should certify the Class to seek injunctive relief under Rule 23(b)(2). An injunction is “the primary form of relief available under the UCL to protect consumers from unfair business practices.” *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 955 (2017). Rule 23(b)(2) permits certification where the defendant “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” and is available without the need to establish predominance. *Wal-Mart Stores, Inc.*, 564 U.S. at 362–63. Here Plaintiffs seek an injunction requiring the products remove the nutrient content claims.

Even if injunctive relief is unavailable, and even if common questions do not predominate because of damages issues, it would be appropriate to certify the class on liability issues only under Rule 23(b)(1) and (c)(4). A classwide finding of liability would greatly simplify any individual actions that might thereafter be brought for damages, whereas without such a finding, such suits would be too expensive to prosecute. Similar liability-only classes were certified in cases involving allegedly defectively designed washing machines, where class members might be entitled to different remedies depending on whether the defect manifested in their machine. *See In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 858-59 (6th Cir. 2013) *cert. denied*, 13-431, 2014 WL 684065 (U.S. Feb. 24, 2014) (finding certified class “will prevail or fail in unison” and classwide liability adjudication will be “more efficient” notwithstanding differences

survey design will be used to evaluate the price premium for all remaining Product categories. *See Bailey*, 2021 U.S. Dist. LEXIS 81654, at *41, n. 14.⁷

4. Common questions predominate on materiality.

Questions of materiality on the CLRA and fraud claims also predominate (materiality is not an element of the UCL or FAL claims). As with deception, “[q]uestions of materiality and reliance are determined based upon the reasonable consumer standard, not the subjective understandings of individual plaintiffs.” *Kumar*, 2016 WL 3844334, at *7; *see also Stearns*, 655 F.3d at 1022; *Occidental Land, Inc. v. Superior Court*, 18 Cal. 3d 355, 363 (1976) (for common-law fraud class, reliance can be proven on common basis by showing that misrepresentations were material). Because materiality is an objective standard common to all, and class wide reliance is inferred if the misrepresentations were material, this question predominates. *Cf. Hadley*, 324 F. Supp. 3d at 1115-16 (“because deception and materiality are objective questions, they are common questions.”) (citations omitted). Here, Plaintiffs will establish materiality through Hain’s own common evidence that shows that consumers paid a price premium for the claims, *e.g., Kumar*, 2016 WL 3844334, at *7 (“Materiality can be shown by a third party’s, or defendant’s own, market research showing the importance of such representations to purchasers.”), and the conjoint survey. *Reynolds Decl.*, Ex. 4 at 7; *id.*, Ex. 17 at 2; *Gaskin Decl.*, ¶ 62; *Weir Decl.* ¶ 13, 38.

Hain will likely argue that consumers had different motivations that led to their purchases, but this fails for several reasons. First, because the misrepresentation affected the retail price of the products, all class members paid the price premium and were economically injured regardless of their reasons for purchasing the product. *See Kumar*, 2016 WL 3844334, at *7 (noting that in a “price premium” case “materiality and reliance do not break down into individualized inquiries,

in damages); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013) *cert. denied*, 13-430, 2014 WL 684064 (U.S. Feb. 24, 2014) (holding *Comcast* does not impact cases where a liability only class is certified); *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1185-86 (N.D. Cal. Oct. 24, 2013) (certifying liability-only class).

⁷ “A plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are capable of determination on a class-wide basis with common proof. *See Hadley*, 324 F. Supp. 3d at 1103 (holding that proposed conjoint analysis that had not yet been executed was sufficient to show that damages can be calculated on a class-wide basis with common proof).

but can be determined on a classwide basis.”). Second, a plaintiff is not required to show that the challenged statement is the “sole or even the decisive cause” influencing class members’ decisions to buy the challenged products, only that it is a substantial factor. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 (2011); *see Brown*, 2014 WL 6483216, at *17 (certifying a class even though consumers “buy products all the time for more than one reason”); *Allen v. Hyland’s Inc.*, 300 F.R.D. 643, 668 (C.D. Cal. 2014) (rejecting evidence that consumers had different primary motivators for purchasing product and finding predominance). And finally, at best, any “argument about ‘consumers hav[ing] a variety of reasons for purchasing [the product] is ‘a merits dispute as to materiality,’ and is therefore a dispute ‘that can be resolved classwide,’ because, as discussed at length above, materiality is a ‘common question’ for purposes of Rule 23(b)(3).” *Hadley*, 324 F. Supp. 3d at 1117.

5. A class action is superior.

Rule 23(b)(3) enumerates four factors to consider on “superiority”: “(A) the interest of members of the class in individually controlling the prosecution ... of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by ... members of the class; (C) the desirability ... of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”

There is little to be gained by class members filing individual claims, because the amounts are only one to two dollars per purchase. Judicial resources would be conserved by concentrating the action in a single suit. Finally, the adjudication of class claims would not be significantly more burdensome than if the matter were prosecuted individually, while the prosecution of individual remedies could establish inconsistent standards of conduct for Defendants. “[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).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Class Certification.

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