1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| JOHN SANDOVAL, Plaintiff, v. PHARMACARE US, INC., Defendant. | CASE NO. 15-cv-0738-H-JLB **ORDER DENYING MOTION FOR CLASS CERTIFICATION AND CONSOLIDATION** [Doc. No. 39] |
| JONATHAN KANFER, Plaintiff, v. PHARMACARE US, INC., Defendant. | CASE NO. 15-cv-0120-H-JLB **ORDER DENYING MOTION FOR CLASS CERTIFICATION AND CONSOLIDATION** [Doc. No. 59] |

9
10
11
12
13
14
15
16
17
18
19
20 On April 11, 2016, Plaintiff John Sandoval filed a motion for class certification
21 and consolidation. (Case No. 15-cv-0738-H-JLB ("Sand.") Doc. No. 39.) Defendant
22 PharmaCare US, Inc. opposed the motion on May 2, 2016. (Sand. Doc. No. 45.)
23 Plaintiff replied on May 23, 2016. (Sand. Doc. No. 50.) Plaintiff Sandoval submitted
24 a supplemental declaration on June 2, 2016. (Sand. Doc. No. 54.) On May 9, 2016,
25 Plaintiff Jonathan Kanfer filed a motion for class certification and for consolidation.
26 (Case No. 15-cv-0120-H-JLB ("Kanf."), Doc. No. 59.) Defendant PharmaCare US,
27 Inc. opposed the motion on May 23, 2016. (Kanf. Doc. No. 65.) Plaintiff Kanfer
28 replied on May 27, 2016. (Kanf. Doc. No. 71.)

The Court held a motion hearing on June 6, 2016. (Sand. Doc. No. 55; Kanf. Doc. No. 72.) Gregory Weston, William Richards, and Skye Resendes appeared for Plaintiffs. Lawrence Butler and Aaron Belzer appeared for Defendant. For the reasons set forth below, the Court denies Plaintiffs' motions for class certification and for consolidation.

**BACKGROUND**

Plaintiffs seek to certify a nationwide class action on behalf of consumers who bought Defendant's product IntenseX. (Sand. Doc. No. 39; Kanf. Doc. No. 59-1 at 14.)[1] Defendant opposes class certification on numerous grounds, including a lack of common issues of fact and law. (Sand. Doc. No. 45; Kanf. Doc. No. 65.)

Plaintiff Sandoval filed his case on April 3, 2015. (Sand. Doc. No. 1.) He filed the operative first amended complaint ("FAC") on June 11, 2015. (Sand. Doc. No. 9.) According to his first amended complaint, Plaintiff Sandoval is a California resident who bought IntenseX in California. (Id. ¶¶ 19, 75.) Plaintiff Kanfer filed his case on January 20, 2015. (Kanf. Doc. No. 1.) He filed the operative first amended complaint on June 19, 2015. (Kanf. Doc. No. 31.) According to his first amended complaint, Plaintiff Kanfer is a Florida resident who bought IntenseX in Florida. (Id. ¶¶ 10, 62.)

Plaintiffs allege that the claims on the IntenseX label and website violate federal and California law, on the theories that IntenseX is an unapproved aphrodisiac drug and the claims are false or misleading. (Sand. FAC; Kanf. FAC.) Plaintiffs allege that they bought IntenseX because they sought a product that would enhance their sexual power and performance, but they did not experience the promised benefits and IntenseX is incapable of providing those benefits. (Sand. FAC ¶¶ 76–79; Kanf. FAC ¶¶ 63–66.)

On that basis, Plaintiffs allege violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.; False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 et seq.; Consumer Legal Remedies Act ("CLRA"),

---

[1] Docket citations refer to the page numbers assigned by the Court's CM/ECF system, rather than the page numbers of the original documents.

Cal. Civ. Code § 1770 et seq.; breach of express warranty; breach of the implied warranty of merchantability; and violation of the federal Magnuson-Moss Warranty Act. (Sand. FAC ¶¶ 99–146; Kanf. FAC ¶¶ 85–135.) This Court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

Plaintiffs request class certification under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. (Sand. Doc. No. 39 at 10; Kanf. Doc. No. 59-1 at 11.) Plaintiff Sandoval proposes a class defined as: "All persons in the United States (except officers, directors, and employees of Defendant) who purchased IntenseX for personal, family, or household use, and not for resale, since January 1, 2004." (Sand. Doc. No. 39 at 12–13.) Plaintiff Kanfer proposes a class defined as: "All persons in the United States (excluding officers, directors, and employees of Defendant) who purchased Defendant's IntenseX product, in all package sizes and iterations, for personal, family, or household use and not for resale from January 1, 2004." (Kanf. Doc. No. 59-1 at 14.) In the alternative, Plaintiff Kanfer requests certification of California and Florida classes. (Id. at 15.)

Defendant counters that class certification is not appropriate because there are no common issues of fact or law and individual issues predominate. (Sand. Doc. No. 45; Kanf. Doc. No. 65.) Defendant contends, among other things, that Plaintiffs cannot establish materiality, reliance, or damages on a classwide basis, there is no practical, reliable way to identify class members, and choice-of-law issues preclude certification of a nationwide class. (Id.)

**LEGAL STANDARD**

"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, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). To establish eligibility for this exception, the party seeking to maintain a class action must "affirmatively demonstrate his compliance with Rule 23." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks omitted). Rule 23 "does not set forth a

mere pleading standard." Id. (internal quotation marks omitted). Rather, the moving party must "satisfy through evidentiary proof" the requirements of Rule 23. Id.

"[T]he party seeking class certification . . . bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)." Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a) requires 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. Rule 23(b)(2) requires the court to find that the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that injunctive or declaratory relief is appropriate for the class as a whole. 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 class litigation is superior to other available methods for fairly and efficiently adjudicating the controversy.

The court must conduct a "rigorous analysis" to determine whether the Rule 23 requirements are met. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982). "What matters . . . is not the raising of common questions—even in droves—but, rather 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, 564 U.S. at 350 (emphasis and internal quotation marks omitted).

"The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id. at 351 (brackets and internal quotation marks omitted). At class certification, review of the merits should be limited to those aspects relevant to making the certification decision on an informed basis, but the court must consider the merits if they overlap with the

requirements of Rule 23. See Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011). "The district court is required to examine the merits of the underlying claim in this context, only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims." Id. at 983 n.8. If, after a rigorous analysis, the court is not fully satisfied that the Rule 23 requirements are met, it should refuse certification. See Falcon, 457 U.S. at 161.

## DISCUSSION

### A. Ascertainability

"Although there is no explicit requirement concerning the class definition in [Rule] 23, courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." Wolph v. Acer Am. Corp., 272 F.R.D. 477, 482 (N.D. Cal. 2011) (internal quotation marks omitted). "The class definition must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member." Id.

Plaintiffs assert that their proposed class is ascertainable because the definitions identify those who bought IntenseX during the class period. (Sand. Doc. No. 39 at 15; Kanf. Doc. No. 59-1 at 19.) Defendant contends that is not enough; class members will have to self-identify because Defendant sold the product through retailers, and potential class members likely did not keep their receipts. (Sand. Doc. No. 45 at 13–15; Kanf. Doc. No. 65 at 9 & n.5.)

As Plaintiffs point out, however, this issue exists in all class actions involving low-priced products sold through retail intermediaries. (Sand. Doc. No. 39 at 15; Kanf. Doc. No. 59-1 at 19.) "District courts in this circuit are split as to whether the inability to identify the specific members of a putative class of consumers of low priced products makes the class unascertainable." In re ConAgra Foods, Inc., 302 F.R.D. 537, 565 (C.D. Cal. 2014) (collecting cases). Finding such classes not ascertainable would "upend[] the policy at the very core of the class action mechanism." See id.

at 566 (internal quotation marks omitted). And "[t]here is no requirement that the identity of class members . . . be known at the time of certification." Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (internal quotation marks omitted). Accordingly, ascertainability is not fatal to class certification.

**B. Numerosity**

Rule 23(a)(1) requires the proposed class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticability does not mean impossibility, but only the difficulty or inconvenience of joining all members of the class." Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913–14 (9th Cir. 1964) (internal quotation marks omitted). Defendant does not dispute that the proposed class is sufficiently numerous, and the Court agrees that this requirement is satisfied.

**C. Commonality and Predominance**

Rule 23(a)(2) requires the court to find that there are questions of law or fact common to the class. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury," which "does not mean merely that they have all suffered a violation of the same provision of law." Wal-Mart Stores, 564 U.S. at 349–50 (internal quotation marks omitted). Rather, "the "claims must depend on a common contention," and the common contention "must be of such a nature that it is capable of class-wide resolution." Id. at 350. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over questions affecting individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In evaluating predominance and superiority, the court must consider: (1) the extent and nature of any pending litigation commenced by or against the class

involving the same issues; (2) the interest of individuals within the class in controlling their own litigation; (3) the convenience and desirability of concentrating the litigation in a particular forum; and (4) the manageability of a class action. See Fed. R. Civ. P. 23(b)(3)(A)–(D).

The predominance analysis under Rule 23(b)(3) is more rigorous than the commonality inquiry of Rule 23(a)(2), as it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). The analysis under Rule 23(b)(3) "presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2)," and instead "focuses on the relationship between the common and individual issues." Hanlon, 150 F.3d at 1022. Certification under Rule 23(b)(3) is proper when common questions present a significant portion of the case and can be resolved for all members of the class in a single adjudication. See id. Whether common issues predominate depends on the requirements of the underlying substantive law. See Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011).

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The FAL prohibits any "unfair, deceptive, untrue or misleading advertising." Id. § 17500. The CLRA similarly prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770.

For all three statutes, conduct is misleading if it is likely to deceive a "reasonable consumer." Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008). "'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003).

Generally, a false-labeling claim requires proof of "actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions." In re Tobacco II Cases, 46 Cal. 4th 298, 306 (2009). However, "a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material." Id. at 327. A representation is material if a reasonable person would find it important in choosing a course of action.[2] See id.

Plaintiffs assert that common issues predominate because whether Defendant's representations were deceptive can be resolved under the "reasonable consumer" standard, and they are entitled to a classwide presumption of deception, reliance, and injury based on the materiality of Defendant's representations. (Sand. Doc. No. 39 at 19–25; Kanf. Doc. No. 59-1 at 25–29.)

But an inference of reliance is not appropriate where, as here, it is "likely that many class members were never exposed to the allegedly misleading advertisements." Mazza v. Am. Honda Motor Co., 666 F.3d 581, 595 (9th Cir. 2012); see Davis-Miller v. Auto. Club of S. California, 201 Cal. App. 4th 106, 125 (2011) ("An inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class."). This is not a case like In re Tobacco II, where consumers were exposed to a widespread, long-term common marketing campaign.

Even if Plaintiffs have an inference under Tobacco II, Plaintiffs did not submit sufficient evidence that the representations were material to consumers, that any significant portion of consumers shared their understanding of the effects IntenseX would have, or that others similarly found the product lacking. "[I]f the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue

---

[2] Plaintiffs indicate that their warranty claims are subject to essentially the same standards and methods of proof as their UCL, FAL, and CLRA claims. (Sand. Doc. No. 39 at 21–24; Kanf. Doc. No. 59-1 at 27–28.) Plaintiffs' warranty claims suffer from the same difficulties as Plaintiffs' other claims.

is not subject to common proof, and the action is properly not certified as a class action." In re Vioxx Class Cases, 180 Cal. App. 4th 116, 129 (2009); see also Lavie, 105 Cal. App. 4th at 508 ("'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.").

Plaintiffs argue that they are entitled to a classwide presumption of injury because the product label and the website uniformly and falsely represented that IntenseX was an aphrodisiac, so that selling the product was per se illegal. But they did not present sufficient evidence that IntenseX is incapable of producing the promised effects. See Comcast, 133 S. Ct. at 1432 (Rule 23 "does not set forth a mere pleading standard."). And the regulation Plaintiffs rely on to argue that IntenseX is an unapproved aphrodisiac drug facially applies only to "Drug products containing active ingredients offered over-the-counter (OTC) for use as an aphrodisiac." 21 C.F.R. § 310.528. Over-the-counter drugs and supplements are subject to different regulatory schemes, this regulation does not appear to apply to supplements, and Plaintiffs did not offer any authority to the contrary.[3] As a result, Plaintiffs have not shown commonality and predominance as required by Rule 23.

**D. Typicality**

Rule 23(a)(3) requires the representative party to have claims or defenses that are typical of the claims or defenses of the class. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Wolin v. Jaguar Land Rover N.

[3] There are also unresolved difficulties involving the correct monetary remedy. The need to calculate individualized damages "cannot, by itself, defeat class certification." Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013). However, the class proponent must establish that "damages are capable of measurement on a classwide basis." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010) (internal quotation marks omitted). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020.

Plaintiffs testified at their depositions that they did not suffer from the sexual-health problems they claim IntenseX falsely claimed to improve. (Sand. Doc. No. 45-4 at 42:2–7; Sand. Doc. No. 45-5 at 23:22–24:14; Kanf. Doc. No. 69 at 38:17–25.) Plaintiffs also testified that they relied on the product label, not the alleged claims on the IntenseX website. (Sand. Doc. No. 45-4 at 89:9–90:18; Kanf. Doc. No. 69 at 40:5–16, 44:12–45:11.) Additionally, both Plaintiffs made their purchases recently, while the claims of a substantial portion of the proposed class are likely time-barred. (Sand. Doc. No. 45 at 15–16 & n.7.) Plaintiffs' claims are not reasonably co-extensive with the claims of the proposed class. The Court declines to attempt to reform the class definition to address these issues.

**E. Adequacy**

Rule 23(a)(4) requires the representative party to "fairly and adequately protect the interests of the class." Adequacy depends upon a two-part test: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003). In light of the other deficiencies with the proposed class, the Court need not address the issue of Plaintiffs' adequacy as class representatives.

**F. Nationwide Class**

Plaintiffs propose certifying a nationwide class under California law. (Sand. Doc. No. 50 at 14–16; Kanf. Doc. No. 71 at 11–22.) Defendant relies on Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012), to preclude a nationwide class. (Doc. No. 45 at 17–20.) The Court agrees with Defendant that a nationwide class is not proper under Mazza.

The class-action proponent bears the initial burden of showing that California has a sufficient aggregation of contacts to the claims of the putative class. See Mazza, 666 F.3d at 589. Such a showing is necessary to ensure that application of California law is constitutional. See Allstate Ins. Co. v. Hague, 449 U.S. 302, 310–13 (1981). "Once the class action proponent makes this showing, the burden shifts to the other side to demonstrate that foreign law, rather than California law, should apply to class claims." Mazza, 666 F.3d at 589 (internal quotation marks omitted).

"California law may only be used on a classwide basis if the interests of other states are not found to outweigh California's interest in having its law applied." Id. at 589–90. To determine whether the interests of other states outweigh California's interest, courts apply a three-step governmental interest test:

> First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different.
>
> Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists.
>
> Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state and then ultimately applies the law of the state whose interest would be more impaired if its law were not applied.

McCann v. Foster Wheeler LLC, 48 Cal. 4th 68, 87–88 (2010) (brackets and internal quotation marks omitted and line breaks added).

In Mazza, the Ninth Circuit reviewed the application of California consumer protection laws, specifically the UCL, FAL, and CLRA, to a nationwide class. See 666 F.3d at 587, 590. The court performed California's choice-of-law analysis and determined as follows: (1) there are material differences between California consumer protection laws and the laws of other states, including requirements of scienter, reliance, and available remedies, (2) foreign jurisdictions have a significant interest in regulating interactions between their citizens and corporations doing business within

their state, insofar as consumer protection laws affect a state's ability to attract industry, and (3) applying California law to those jurisdictions would significantly impair their "ability to calibrate liability to foster commerce," while "California's interest in applying its law to residents of foreign states 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.

Plaintiffs' claims involve application of similar consumer protection laws as Mazza, and Defendant identifies the same material differences in the laws that dissuaded the Ninth Circuit from applying California law to the claims of putative class members from other states. (Sand. Doc. No. 45 at 17–20; Kanf. Doc. No. 65 at 11–19.) Plaintiff argues that Mazza incorrectly applied California's choice-of-law analysis because California courts before and after Mazza have certified nationwide consumer classes under California law. See Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164 (2015); Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224 (2001); Clothesrigger, Inc. v. GTE Corp., 191 Cal. App. 3d 605 (1987). However, those cases did not apply Rule 23, and, like the district court in Mazza, they gave too little consideration to federalism and other states' interests. See Mazza, 666 F.3d at 593 ("This presents a mode of analysis that the Class Action Fairness Act was aimed at stopping."). Under Mazza, a nationwide class would not be proper here.

**G. Standing**

To satisfy the standing requirements of Article III, a plaintiff must show (1) an injury in fact that is concrete and particularized, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) redressable by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561.

/ / /

The Supreme Court recently reemphasized the importance of the Article III standing requirements, particularly the requirement of an injury that is both concrete and particularized. See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016). It wrote: "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." Id. at 1549.

Plaintiffs assert that they have standing because they relied on the label claims, the product did not perform as promised, and they lost money as a result. (Sand. Doc. No. 39 at 13; Kanf. Doc. No. 59-1 at 16.) Defendant counters that some class members lack standing because they were not dissatisfied, were not harmed, or have no viable claim. (Sand. Doc. No. 45 at 15–17 & n.8; Kanf. Doc. No. 65 at 9–11.) Defendant points out that the proposed class includes consumers (1) who bought similarly named products not distributed by Defendant,[4] (2) whose claims are time-barred, (3) who bought IntenseX because of the express label claims, received the benefits claimed, and are satisfied, (4) who bought IntenseX for reasons other than its advertising or labeling, (5) who suffered no injury because they would have paid the same for similar products, (6) who received a refund, and (7) who bought the product from Defendant's website and were never exposed to the alleged aphrodisiac/disease claims Plaintiffs rely on. (Id.)

The Ninth Circuit has been inconsistent about whether absent class members, as opposed to only the named plaintiff, must have standing. Compare Bates v. United Parcel Service, Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements. . . ."), with Mazza, 666 F.3d at 594 ("No class may be certified that contains members lacking Article III standing."). Other courts have noted: "To the extent that Tobacco II

[4] Plaintiff Kanfer's proposed class avoids this difficulty.

holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts." Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010) (applying California law).

The correct approach in this case is unclear, especially after Spokeo. Whether characterized as problems with overbreadth, commonality, typicality, or Article III standing, however, there is a substantial mismatch between Plaintiffs and the classes they propose to represent. The Court concludes that class certification is not proper to the extent that Plaintiffs raise claims and theories they do not have standing to raise, and to the extent that the class includes consumers who have no cognizable injury, including those who obtained full refunds. See Spokeo, 136 S. Ct. at 1549.

**H. Superiority**

Rule 23(b)(3) requires the court to find that class litigation is superior to other methods of adjudication. Plaintiff asserts that class litigation is superior because of the modest amount at stake for each consumer. (Doc. No. 39 at 25–26.) However, courts must also consider "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). Class litigation would not be superior here because common issues do not predominate. Additionally, there is the practical difficulty of identifying class members and distributing damages. "Courts are 'reluctant to permit actions to proceed' when there are 'formidable . . . difficulties distributing any ultimate recovery to the class members,' because such actions 'are not likely to benefit anyone but the lawyers who bring them.'" Algarin, 300 F.R.D. at 461 (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974)). Accordingly, the Court declines to certify a class under Rule 23(b)(3).

**I. Rule 23(b)(2)**

Rule 23(b)(2) requires the court to find that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate for the class as a whole." Certification

under Rule 23(b)(2) is appropriate "only where the primary relief sought is declaratory or injunctive." Ellis, 657 F.3d at 986. Monetary damages must be "merely incidental to the primary claim" for injunctive relief. Zinser, 253 F.3d at 1195.

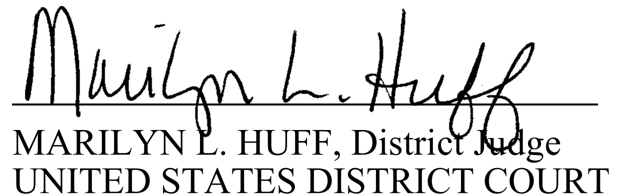
Plaintiffs seek injunctive relief, disgorgement, restitution, and damages. (Sand. FAC at 23–24; Kanf. FAC at 25.) Plaintiffs propose that each class member should receive a full refund of the purchase price. (Sand. Doc. No. 50 at 19; Kanf. Doc. No. 59-1 at 31.) But Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." Wal-Mart Stores, 564 U.S. at 360–61. And, given that Plaintiffs can no longer be deceived by the alleged false labeling, monetary relief is necessarily their primary concern. See Algarin, 300 F.R.D. at 459. As a result, certification of a class for injunctive relief under Rule 23(b)(2) is also not appropriate.[5]

## CONCLUSION

For the forgoing reasons, the Court denies the motion for class certification and consolidation. (Sand. Doc. No. 39; Kanf. Doc. No. 59.)

**IT IS SO ORDERED.**

DATED: June 10, 2016



MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

[5] Because the Court denies class certification, the Court also denies Plaintiffs' requests for consolidation without prejudice.