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October 05, 2020

No.:	20-80139
D.C. No.:	4:18-cv-06690-HSG
Short Title:	Kathleen Smith v. Keurig Green Mountain, Inc.

Dear Appellant/Counsel

This is to acknowledge receipt of your Petition for Permission to Appeal under Federal Rule of Civil Procedure 23(f).

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The file number and the title of your case should be shown in the upper right corner of your letter to the clerk's office. All correspondence should be directed to the above address pursuant to Circuit Rule 25-1.

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No. 20-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHLEEN SMITH,
on behalf of herself and all others similarly situated,
Plaintiff-Respondent,

v.

KEURIG GREEN MOUNTAIN, INC.,
Defendant-Petitioner.

On Petition for Permission to Appeal from the
United States District Court for the Northern District of California
The Honorable Haywood S. Gilliam, Jr. | Case No. 4:18-cv-06690-HSG

PETITION FOR PERMISSION TO APPEAL UNDER RULE 23(F)

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CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Petitioner Keurig Green Mountain, Inc., discloses that:

1. It is a wholly owned subsidiary of Keurig Dr Pepper Inc.
2. Keurig Dr Pepper Inc. is a publicly held corporation. Another publicly held corporation, Mondelez International, Inc., owns more than 10% of the shares of Keurig Dr. Pepper Inc.

Dated: October 5, 2020

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous, Jr.

Counsel for Defendant-Petitioner Keurig Green Mountain, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Rules

Regulations

INTRODUCTION

Federal Rule of Civil Procedure 23 "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Yet district courts in this Circuit increasingly certify expansive consumer class actions in which individualized issues of reliance, injury, and damages are swept under the rug through the use of presumptions and hypotheticals—not actual evidence of consumer harm. This case, in which the district court certified a sweeping class seeking both damages *and* injunctive relief, presents the Court with the right opportunity to address this trend and to resolve multiple unsettled questions of class-certification law.

The named plaintiff alleges that Keurig's K-Cup coffee pods are not recyclable, but that a label on their packaging misleads buyers into believing otherwise. The district court certified a class of *all* California buyers of recyclable K-Cup pods, even though it includes many uninjured buyers, such as those who read the label's qualifying language regarding recyclability, those who live in places where the pods *are* recyclable, and those who placed no importance on the representations. Although not one of these buyers could have suffered any actual injury-in-fact, and therefore lack Article III standing, they are nonetheless part of the certified class.

The district court compounded this problem by accepting an expert's purely conjectural damages model. The expert acknowledged he had not run his model with any actual evidence and that it might not show any injury to the class, but he claimed that he could show that Keurig customers paid a "price premium" for recyclable K-Cup pods—even though Keurig sold them for *exactly* the same price as earlier, non-recyclable versions—based on changes in *sales*. Accepting such an irrational, untested, and hypothetical model contravenes the Supreme Court's directives in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), and also is inconsistent with a string of unpublished authorities from this Court, the most recent of which is *Ward v. Apple Inc.*, 784 F. App'x 539 (9th Cir. 2019), holding that "a promise of a model to come" does not suffice. *Id.* at 541.

Nor did the plaintiff or the district court identify *any* mechanism for screening out the vast number of recyclable K-Cup pod buyers who could not possibly be injured. This Court should grant Rule 23(f) review to make clear that courts must identify a viable mechanism to ensure it will be possible to establish injury for all class members at trial, as Article III and this Court's cases demand. Without such a mechanism, unmanageable individualized issues inevitably will swamp any common questions, rendering certification improper under Rule 23. At the very least, a plaintiff at the class-certification stage must explain how uninjured class members will be excluded from the class at trial.

Review is also warranted because this Court should address the irreconcilable conflict between the district court's certification of an injunctive-relief class under Rule 23(b)(2) and *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020), which prohibited certification of an injunctive-relief class of *past* purchasers. Here, many class members cannot be harmed by the recyclability representations because, like the plaintiff herself, they already believe the representations to be false and cannot be deceived by them again.

The district court's approach, if applied by other courts, would lead to automatic certification of all damages and injunctive-relief class actions involving false-advertising claims. With reliance on labels counterfactually presumed, with a hypothetical method essentially assuming injury and damages, and with the mechanism for addressing the crucial question of Article III standing as to absent class members left unexamined, class certification "in practice" will *not* "exclude most claims." *Am. Express*, 570 U.S. at 234.

The Court should grant Rule 23(f) review.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1292(e), Federal Rule of Civil Procedure 23(f), and Federal Rule of Appellate Procedure 5. The district court granted class certification on September 21, 2020. The redacted version of the order is attached as Exhibit A. Dkt. 96. (The sealed version of the order is at Dkt. 97.)[1]

QUESTION PRESENTED

Is Rule 23(f) review warranted after a district court certified a sweeping damages and injunctive-relief class even though (a) the plaintiff has presented an untested damages model based on a speculative theory without attempting to exclude uninjured persons; (b) many class members are uninjured, and there is no viable mechanism for identifying those uninjured persons; and (c) many class members are not entitled to injunctive relief?

BACKGROUND

I. Keurig's Recyclable Coffee Pods

Keurig sells coffee brewing systems that utilize single-serving K-Cup coffee pods to brew individual cups of coffee. As part of an extensive corporate sustainability effort, which included millions of dollars of investments in improving America's recycling infrastructure, Keurig spent enormous sums redesigning its K-Cup pods to utilize highly recyclable polypropylene plastic (with a peelable lid)

[1] "Dkt." references are to N.D. Cal. No. 4:18-cv-06690-HSG.

that extensive testing has proved to be fully recyclable for use in other products. Dkt. 74-13 at 2-6. Keurig first introduced these recyclable pods in a pilot project in 2016 limited to four products. *Id*. at 8. The initial pilot-project packaging provided instructions for recycling and directed buyers to "check locally" to determine whether the pods were recyclable. *Id*. at 8-9. Keurig later revised its packaging for recyclable K-Cup pods to qualify the "recyclable" language with the statements "Not recyclable in all communities" or "Not yet recyclable in all communities." *Id.* at 9-11. These statements tracked the Federal Trade Commission's examples of non-deceptive recyclability labeling in its "Green Guides," 16 C.F.R. Part 260.

Though making K-Cup pods recyclable was a costly endeavor, Keurig charged the same price that it had been charging for standard K-Cup pods. Dkt. 74-9 at 2; Dkt. 74-13 at 2-3. Keurig did not advertise the recyclability of the new K-Cup pods, apart from mentioning it in one Costco circular and describing it on Keurig's website. Dkt. 74-13 at 12.

II. Plaintiff's Allegations and Class-Certification Motion

Plaintiff Kathleen Smith filed a putative class action against Keurig alleging that its recyclable K-Cup pods, though described as recyclable on their packaging, "cannot in fact be recycled." Dkt. 20 ¶ 1. According to Ms. Smith, all K-Cup pods are too small for most recycling facilities to process, and as a consequence end up in landfills. *Id.* ¶¶ 2, 22. Had she known as much, Ms. Smith alleged, she "would not

have purchased [recyclable K-Cup pods] and would have instead sought out single serve pods or other coffee products that are otherwise compostable, recyclable or reusable." *Id.* ¶ 4. Ms. Smith asserted claims against Keurig for breach of express warranty, violation of the California Consumers Legal Remedies Act, violation of the California Unfair Competition Law, and unjust enrichment. *Id.* ¶¶ 50-99.

Ms. Smith moved to certify a class of all people who bought recyclable K-Cup pods in California from June 2016 to the present. Dkt. 65 at 11. She submitted a declaration from an expert, Dr. Stephen Hamilton, to support her assertion that injury and damages could be proven on a classwide basis. *Id.* at 21-22. Dr. Hamilton did not attempt to calculate damages for the entire class or even for a single class member; instead, he set out six theoretical methods that he claimed *could* potentially be used to calculate damages, including four focused on Keurig's profits or costs. Dkt. 65-1 at 125-134. The other two methods involved a "price premium" supposedly paid by buyers. *Id.* at 134-45. Because Keurig sold recyclable K-Cup pods for the same price as the non-recyclable ones, however, a conventional "price premium" analysis would show that consumers suffered no damages. Dkt. 74-15 at 12. Dr. Hamilton therefore proposed deriving a "price premium" from potential increases over time in sales of recyclable K-Cup pods versus standard K-Cup pods as a result of the introduction of the recyclability labeling. Dkt. 65-1 at 134-37.

Although Dr. Hamilton described the data necessary to complete his analysis as "readily available," Dkt. 80-1 at 54, he did not obtain or analyze any such data. Nor did Dr. Hamilton propose any method of identifying and excluding uninjured buyers from the class, although he conceded that he would not know whether *any* class members suffered injury until after he "examin[ed] the data." *Id.* at 52.

III. The Class-Certification Order

The district court granted Ms. Smith's motion for class certification. The court rejected, among other things, Keurig's arguments that individualized issues of reliance and damages swamped common questions, precluding certification.

As for reliance, the court reasoned that "all the class members were exposed to Keurig's recyclability representations such that the reliance presumption applies to the class." Dkt. 96 at 9. Although the court acknowledged the clarifying language on Keurig's packaging, it emphasized that it "was in very fine print on two of the three labels," whereas Keurig's "representation of recyclability" was printed "in comparatively large, visible font." *Id.* at 12. The court also discounted Keurig's contention that some buyers could not have detrimentally relied on its recyclability representations because they lived in places where the pods *are* recyclable. *Id.* at 13.

As for damages, the district court agreed with Keurig that four of Dr. Hamilton's six damages theories are improper because "they look to Keurig's

gains, rather than the proposed class members' losses." Dkt. 96 at 14. But the district court endorsed one of the two remaining theories of harm by which Dr. Hamilton proposed to demonstrate whether and how much buyers overpaid for recyclable K-Cup pods. *Id.* at 16-17. (The court ignored the other, which Dr. Hamilton admitted in his reply declaration was an "unlikely" last resort. Dkt. 80-1 at 69.) In addressing Keurig's contention that the plaintiff's overcharge theory was inherently conjectural, the court dismissed Keurig's factual showing that (1) there was no evidence that recyclability claims affected sales and (2) Keurig charged the same price for its standard K-Cup pods and the recyclable K-Cup pods, concluding that consumers *could* have paid a price premium notwithstanding the constant price. Dkt. 96 at 16.

The district court also dismissed Keurig's objection that Dr. Hamilton "has not given any specific calculation and instead presents a 'wait-and-see' approach that has been rejected by the Ninth Circuit." Dkt. 96 at 17. The court purported to distinguish *Ward* on the ground that the expert there "proffered only 'theories of impact and damages,'" whereas Dr. Hamilton "details a hypothetical scenario showing how the model works," such that the model "is not purely theoretical." *Id.*

Finally, the district court rejected Keurig's contention that it should not certify an injunctive-relief class because the class would necessarily include buyers who would not suffer any future harm. The district court concluded that an order

enjoining Keurig from advertising pods as recyclable would benefit *all* class members because it would eliminate the impression that they are recyclable in a majority of communities. *Id.* at 18-19.

RELIEF SOUGHT

The Court should grant Rule 23(f) review and reverse the certification order.

STANDARD OF REVIEW

Rule 23(f) review is warranted when a certification order (1) "presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review," or (2) is "manifestly erroneous." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam).

REASONS FOR GRANTING REVIEW

I. The Court Should Grant Review Because Certification of the Damages Class Turned on a Theoretical Damages Model That Did Not Even Attempt to Identify and Exclude Uninjured Persons from the Class

Under the Supreme Court's decision in *Comcast*, a plaintiff seeking class certification cannot merely "provide[] only a promise of a [damages] model to come," but must present a "workable" method of determining damages *before* certification is granted. *Ward v. Apple Inc.*, 784 F. App'x 539, 540 (9th Cir. 2019). Rule 23(f) review is warranted here because the district court manifestly erred when it concluded that Ms. Smith satisfied this obligation. Her expert presented purely theoretical methods of calculating damages that he did not apply to any actual

evidence or data. Worse still, this damages methodology reflects no attempt to identify or exclude uninjured buyers.

A. The District Court Adopted an Impermissible Wait-and-See Approach When It Accepted Plaintiff's Theoretical and Untested Damages Model

In seeking class certification, Ms. Smith submitted an expert declaration advancing six general theories of measuring purported harm, without attempting to apply those theories to any actual evidence. The district court properly rejected four of the six loose descriptions of potential damages methodologies, including one premised on Keurig's revenue. Dkt. 96 at 14. Of the remaining two, the district court addressed only one, accepting it as sufficient because the expert "details a hypothetical scenario showing how the model works" and "points to specific evidence . . . needed in order to give a meaningful estimate of damages using the . . . model." *Id.* at 17.

The Supreme Court has prohibited such guesswork, rejecting the wait-and-see approach adopted by the district court here. As it held in *Comcast*, certifying a damages class without first engaging in a "rigorous analysis" of a proposed damages model "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." 569 U.S. at 35-36. This Court, too, has repeatedly held, but *only in unpublished decisions*, that certification is improper where plaintiffs have failed to demonstrate a workable damages model. *See Ward v. Apple Inc.*, 784 F. App'x 539 (9th Cir.

2019); *Zakaria v. Gerber Prods. Co.*, 755 F. App'x 623, 624 (9th Cir. 2018); *Doyle v. Chrysler Grp., LLC*, 663 F. App'x 576, 579 (9th Cir. 2016).

Ward, the most recent of those cases, is materially identical to this case. There, the plaintiffs' expert "asserted that he would be able to develop a model at some point in the future" and "did 'not expect to encounter any insurmountable difficulty in applying [his proposed] techniques to form an estimate of the harm to consumers.'" 784 F. App'x at 540. The Court held that this wait-and-see approach was "not enough" under *Comcast*. *Id.* Worse than relying on an "imperfect model," this Court said in *Ward*, the plaintiffs there "provided only a promise of a model to come." *Id.* at 541.

Had *Ward* been published, it would control this case. As in *Ward*, rather than identifying a workable damages model based on the actual evidence, Dr. Hamilton merely asserted that his proposed methodology would employ "widely accepted and feasible methodologies" to calculate damages. Dkt. 65-1 at 116. Dr. Hamilton stated that "the method [he] will use to calculate . . . monetary relief" will depend "on the nature of the documents and data ultimately made available to [him]." *Id.* at 125. He went on to explain that he had "not yet conducted" even a "preliminary calculation of damages" because he had "not yet been provided with appropriate data." *Id.* at 142. Although Ms. Smith blames Keurig for an absence of data, Dr. Hamilton explained that the required information is "readily available" from

third-party vendors (Dkt. 80-1 at 54), and those vendors are all subject to Rule 45 discovery. And, in any event, it was the obligation of Ms. Smith, as the party seeking class certification, to be "prepared to prove" that Rule 23 was satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Ms. Smith's failure to obtain the necessary evidence for Dr. Hamilton does not give him carte blanche to speculate about methodologies that *might* work.

As this Court explained in *Ward*, "a promise of a model to come," relying on "techniques standard among economists," is "not enough" under *Comcast*. 784 F. App'x at 540-41. The time has come for this Court to issue a published opinion along the lines of *Ward* and to make clear to district courts that a wait-and-see approach to damages models in class actions is improper.

B. Plaintiff's Damages Model Does Not Make Any Attempt to Identify or Exclude Uninjured Persons

Comcast rejected the proposition that "*any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be," because "[s]uch a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." 569 U.S. at 35-36. The requirement of a non-arbitrary damages model is especially important in cases like this one—in which much of the class is, according to unrebutted empirical evidence, uninjured and therefore not entitled to relief. *See infra* Part II.B. A proposed damages model that does not bother to account for uninjured class members, and would instead

impermissibly award them monetary relief, is the definition of an arbitrary model. Yet that is precisely what Dr. Hamilton has proposed. In similar circumstances, multiple circuits have granted Rule 23(f) petitions and issued published opinions rejecting this flawed approach. This Court should do the same.

For example, in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), the First Circuit reversed an order granting class certification because the plaintiffs' damages model estimated that one in ten class members suffered no harm, but failed to offer any proper way to identify those uninjured class members. *Id.* at 47. The district court in *Asacol* endorsed the plaintiffs' proposal to outsource the task of identifying uninjured persons to a claims administrator who would assess affidavits from class members after trial. *Id.* at 52. The First Circuit rejected that approach, reasoning that "[t]he fact that plaintiffs seek class certification" does not justify "jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act." *Id.* at 53. The court held that class certification was inappropriate because the plaintiffs could not identify any "documents or admissions that would support a finding that *all* class members suffered injury." *Id.* at 54 (emphasis added).

The D.C. Circuit, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019), followed *Asacol* in holding that class certification was inappropriate because a damages model showed "negative damages" for one of

every eight class members. *Id.* at 623-24, 627. The court noted that there was no "winnowing mechanism" that would allow for the identification of uninjured class members. *Id.* at 625. Trial therefore could not proceed on a class basis without violating the defendants' due-process right to contest whether any of the negative-damages class members suffered any harm. *Id.*

The hypothetical damages model offered by Ms. Smith in this case does far less to identify uninjured class members than the models rejected in *Asacol* and *Rail Freight*. In those cases, the experts presented models that at least *estimated* the number of uninjured class members; they simply had no way of identifying and excluding them. Here, Dr. Hamilton does not even *attempt* such an estimate because he has not done the work necessary to provide one. The result is that he says nothing about how uninjured class members would be identified and excluded from his damages model.

Dr. Hamilton speculates that—with the right data—he could "reliably test the hypothesis that consumers paid a price premium" for recyclable K-Cup pods. Dkt. 80-1 at 52. Not only is the very concept of a "price premium" illusory in this case (as Keurig charged the same price for recyclable and standard K-Cup pods), but Dr. Hamilton claims to be able to calculate only an *aggregate* damages figure for the entire class. Moreover, he failed to offer any means of identifying class members who would willingly pay more than his posited "but for" price, and therefore

suffered no injury. He also made no attempt to account for the vast majority of consumers who purchased recyclable K-Cup pods for reasons having nothing to do with recyclability. Worse still, Dr. Hamilton conceded that "[t]he magnitude of such a price premium" might not be "statistically different from zero," *id*., meaning that he has no idea if *any* class members were harmed.

In other words, Dr. Hamilton acknowledged that the damages model he proposed might not be workable and might not show any damages for any class members. Yet the district court nevertheless relied on his model to grant class certification. This is a far cry from the "rigorous analysis" that Rule 23(b)(3) demands, and is further reason to grant review.

II. The Court Should Also Grant Review Because the District Court Certified a Class Without Identifying Any Mechanism by Which All Class Members Can Establish Article III Standing at Trial

In opposing class certification, Keurig demonstrated that an overwhelming percentage of the proposed class could not have suffered any injury and therefore lack Article III standing to seek damages. The district court circumvented that problem by relying on a state-law presumption of reliance. But such presumptions will not suffice at trial to show that each class member suffered an *actual* injury sufficient to satisfy Article III, as this Court's case law demands. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1017 (9th Cir. 2020).

While it may not be necessary for a plaintiff to establish Article III standing for each unnamed class member at the certification stage, Keurig submits that it is improper to certify a damages class without first determining that it will be feasible at trial to screen out uninjured class members without extensive individualized inquiries. Yet the district court did exactly that when it tethered its predominance analysis to state-law presumptions, rather than to the federal issue of actual injury-in-fact.

This case presents the Court with the ideal opportunity to clarify that district courts must consider, as part of Rule 23(b)(3)'s predominance analysis, whether and how plaintiffs will be able to prove Article III standing for all class members at trial.

A. The Court Should Hold That Plaintiffs Seeking Class Certification Must, at the Time of Class Certification, Identify a Workable Mechanism for Excluding Uninjured Class Members

This Court recently made clear that "*every member* of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the final stage of a money damages suit." *Ramirez*, 951 F.3d at 1017 (emphasis added). But it has not yet clearly addressed how this requirement should be evaluated at the class-certification stage and, specifically, how Article III standing impacts Rule 23(b)(3)'s predominance requirement.

In *Ramirez*, the Court reiterated that it has "held that only the representative plaintiff need allege standing at the motion to dismiss and class certification stages."

951 F.3d at 1023. The Court nevertheless also sounded an important cautionary note about the need to consider, at the certification stage, how class-action plaintiffs will be able to prove that *every* class member has standing by the time of a final judgment: "although the standing inquiry in the early stages of a case focuses on the representative plaintiffs, district courts and parties should keep in mind that they will need a mechanism for identifying class members who lack standing at the damages phase." *Id.* at 1023 n.6.

This Court has not yet elaborated on exactly how the "mechanism" contemplated by *Ramirez* should impact the class-certification decision and, specifically, a district court's assessment of Rule 23(b)(3)'s predominance requirement. Clarity on this important, unsettled, and recurring issue is particularly critical because "'Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.'" *Ramirez*, 951 F.3d at 1023 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring)).

Given that there eventually must be some feasible way to screen out uninjured class members, district courts *at the very least* should be required to assess how plaintiffs intend to accomplish that task—including whether it will require unmanageable individualized inquiries—as part of the predominance analysis, just as courts do for all other issues that will be adjudicated at trial. The alternative is

certifying classes that will prove unmanageable at trial because individualized issues predominate, requiring belated decertification, or, worse, allowing absent class members to receive compensation without having suffered any injury, in violation of *Ramirez* and Article III.

B. This Case Illustrates the Danger of Proceeding to Trial Without a Mechanism for Screening out Uninjured Class Members

The class certified by the district court is vastly overboard, because it covers *all* buyers of recyclable K-Cup pods—including several categories of buyers who could not have suffered any injury. Uninjured buyers include:

- those who assigned little or no value to recyclability and bought recyclable K-Cup pods for other reasons—a category into which the vast majority of buyers fall;
- buyers who read and understood from the qualifying language on the packaging that the recyclable K-Cup pods are not recyclable everywhere, and chose to buy them anyway; and
- buyers who reside in communities that *do* recycle the pods, who received—consistent with Keurig's representations—pods they could recycle.

Neither Ms. Smith nor the district court identified any mechanism for separating these uninjured buyers from injured ones. The only way to do so, and to ensure compliance with *Ramirez*'s holding that Article III forbids a final judgment

awarding damages to class members who lack standing, is through a series of fact-intensive individualized inquiries that will swamp any common questions. That is precisely what Rule 23(b)(3)'s predominance requirement is designed to avoid—and why the district court ought to have denied the class-certification motion on the ground that Ms. Smith had not even attempted to explain how uninjured buyers could be identified and excluded from the class at trial.

Instead, the court brushed these serious problems aside. "Whether an individual class member's recycling facility happened to accept [recyclable K-Cup pods] is irrelevant," the court concluded, because Ms. Smith has "allege[d] a general theory that [they] are not recyclable in a substantial majority of communities." Dkt. 96 at 13. Though that accurately characterizes Ms. Smith's *liability* theory, it does not address the absence of *injury* to purchasers in communities that recycle the pods. *E.g.*, Dkt. 74-13 at 5-6; *see also* Dkt. 74-10 at 4. Anyone in such communities who bought recyclable K-Cup pods for their recyclability received exactly that.

The same is true of the district court's response to Keurig's objection that many class members did not rely on its recyclability representations, either because they were existing buyers who did not care about or rely on the representations, or because they read and understood the qualifying language on the packaging. The court suggested that few buyers relied on the qualifying language because it "was in very fine print." Dkt. 96 at 12. But there is no fine-print exception to Article III. If

buyers read and understood the qualifying language, even if it was in "fine print," they could not have been injured.

The district court nonetheless reasoned that reliance could be presumed because "all the class members were exposed" to Keurig's allegedly deceptive packaging. Dkt. 96 at 8-9. That conclusion is doubly wrong. It is wrong as a matter of California law, which sanctions a presumption of reliance only under the narrow circumstances of "an extensive and long-term advertising campaign," such as the one conducted by tobacco industry to deny the link between cigarette smoking and disease. *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009). Applying California law, this Court has explained that without such ubiquitous advertising, it is "unreasonable to assume" that all class members were exposed to allegedly misleading statements. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012). This case fits the usual *Mazza* mold, rather than the unusual *Tobacco II* mold, because there is no "decades-long campaign of deceptive advertising and misleading statements." *Tobacco II*, 46 Cal. 4th at 306; *see also Bahamas Surgery Ctr., LLC v. Kimberly-Clark Corp.*, 820 F. App'x 563, 563 (9th Cir. 2020) (reversing class-certification order where not all "class purchasers had seen [the] representations" at issue).

More importantly, the district court's presumption of reliance violates *federal constitutional* law. Even if federal courts may presume reliance as a matter of state

law, they may *not* presume injury-in-fact sufficient to confer Article III standing. The Eighth Circuit has squarely addressed this distinction between a presumption of reliance under California law and standing under Article III, holding that "to the extent that *Tobacco II* 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). The Supreme Court has similarly explained that "States cannot . . . issu[e] to private parties who otherwise lack standing a ticket to the federal courthouse." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

Because the district court identified no mechanism for screening out uninjured class members—and instead relied on presumptions of reliance to certify a class containing *all* purchasers of recyclable K-Cup pods—its class-certification decision runs the risk of impermissibly enlarging the substantive rights of absent class members, *see, e.g.*, *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("treating unsubstantiated claims of class members collectively significantly alters substantive rights," which "is clearly prohibited by the [Rules] Enabling Act"), and impermissibly expanding the jurisdiction of the federal courts, *see* Fed. R. Civ. P. 82 (Federal Rules of Civil Procedure cannot "extend . . . the jurisdiction of the district courts"). Given these serious consequences, this Court should grant review

to make clear that district courts need to devote greater scrutiny—at the class-certification stage—to the question of how Article III standing will be proven at trial for all class members.

III. Review Should Also Be Granted Because the Class Certified Under Rule 23(b)(2) Includes Buyers Not Entitled to Injunctive Relief

A class may be certified under "Rule 23(b)(2) . . . *only* when a single injunction or declaratory judgment would provide relief to *each* member of the class." *Dukes*, 564 U.S. at 360 (emphases added). Applying this rule, the Second Circuit recently held that "a class may *not* be certified under Rule 23(b)(2) if *any* class member's injury is not remediable by the injunctive or declaratory relief sought." *Barilla*, 964 F.3d at 146.

Barilla involved a class much like the one here—a group of past purchasers of consumer packaged goods seeking injunctive relief for allegedly deceptive labeling. The plaintiff in *Barilla* alleged that the defendant's pasta boxes were misleadingly under-filled, giving buyers less pasta than they expected. 964 F.3d at 144. The Second Circuit rejected a class settlement remedying the purported deception because it "would not provide a remedy to all members of the class." *Id.* at 147. Past buyers, the court explained, can generally seek only damages, as they "have, at most, alleged a past harm." *Id.* Such buyers "are not bound to purchase a product again—meaning that once they become aware they have been deceived, that will often be the last time they will buy that item." *Id*. Even if consumers buy the

product again, "they will be doing so with exactly the level of information that they claim they were owed from the beginning." *Id*. at 148.

The district court in this case committed precisely the same error as the district court in *Barilla*—certifying an injunctive-relief class of past purchasers even though few, if any, class members could claim entitlement to injunctive relief. Indeed, Ms. Smith herself testified to her belief that recyclable K-Cup pods are not recyclable because they are "just too darn small," and that they will not become recyclable unless Keurig makes them larger (an impossibility if the pods are to fit in the millions of existing Keurig brewers). Dkt. 74-18 at 38-41.

Ms. Smith's allegation that the size of K-Cup pods renders them unrecyclable distinguishes this case from *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018), in which this Court held that a past purchaser may, under some circumstances, have standing to seek injunctive relief. The plaintiff in that case wished to buy more flushable wipes from the defendant, but would not be able to tell if the defendant had redesigned the wipes to be truly flushable. *Id.* at 971-72. Ms. Smith and the class members here, by contrast, are fully aware of the dimensions of K-Cup pods, which must remain the same size to fit in Keurig brewers. And, because Ms. Smith alleges that the size of K-Cup pods is what determines their recyclability, she does not need injunctive relief to help her assess whether or not they will be recyclable in the future.

Davidson is distinguishable for another reason: It was decided on a motion to dismiss, not a motion for class certification. The Court therefore had no opportunity to reach the issue in *Barilla*: the propriety of *certifying* an injunctive-relief class containing past purchasers who will not suffer any further harm from the defendant's alleged deception. The Court should grant review to reach that question, which *Davidson* did not resolve, and join the Second Circuit in rejecting the certification of such injunctive-relief classes. Doing so will also potentially allow this Court to clarify the meaning and scope of *Davidson*, which district courts in this Circuit—including the court below—have erroneously read as *always* conferring standing on past purchasers to pursue injunctive relief as long as they recite the magic words that they would like to purchase the product again in the future. *See, e.g.*, *Maeda v. Pinnacle Foods Inc*., 390 F. Supp. 3d 1231, 1260-61 (D. Haw. 2019); *Branca v. Bai Brands, LLC*, 2019 WL 1082562, at *13 (S.D. Cal. Mar. 7, 2019); *Wisdom v. Easton Diamond Sports, LLC*, 2019 WL 580670, at *3 (C.D. Cal. Feb. 11, 2019).

CONCLUSION

The Court should grant review under Rule 23(f).

Dated: October 5, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous, Jr.

Counsel for Defendant-Petitioner Keurig Green Mountain, Inc.

CERTIFICATE OF COMPLIANCE

This petition complies with the word limit of Rule 5(c)(1) of the Federal Rules of Appellate Procedure and Circuit Rules 5-2(b) and 32-3(2), as it contains 5,584 words, excluding the portions exempted by Rules 5(b)(1)(E) and 32(f).

The petition complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman font.

Dated: October 5, 2020

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Theodore J. Boutrous, Jr.

Counsel for Defendant-Petitioner Keurig Green Mountain, Inc.

CERTIFICATE OF SERVICE

I certify that on October 5, 2020, I electronically filed the foregoing Petition of Defendants for Permission to Appeal under Rule 23(f) from Order Granting Class Certification with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that on the same day, I served the foregoing document by e-mail and by commercial carrier for next-day delivery upon the following:

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Dated: October 5, 2020

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Counsel for Defendant-Petitioner Keurig Green Mountain, Inc.

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATHLEEN SMITH,

Plaintiff,

v.

KEURIG GREEN MOUNTAIN, INC.,

Defendant.

Case No. 18-cv-06690-HSG

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERITIFCATION

REDACTED VERSION

Re: Dkt. No. 64, 65, 74, 79

Pending before the Court are Plaintiff's motion for class certification and related administrative motions to seal. For the reasons detailed below, the Court **GRANTS** Plaintiff's motion to certify and **GRANTS** the parties' related motions to seal.

I. BACKGROUND

On September 28, 2018, Plaintiff Kathleen Smith filed this putative class action against Keurig Green Mountain, Inc. ("Keurig") in Alameda County Superior Court. *See* Dkt. No. 1-2, Ex. B. Keurig removed the action to federal court. Dkt. No. 1. Keurig sells various single-serve plastic coffee pods ("K-Cups" or "Pods"), some of which Keurig markets and sells as "recyclable" (the "Products"). Dkt. No. 20 ¶¶ 1–2. Plaintiff is a California resident who purchased the Products "in reliance on [Keurig]'s false representations that the [Pods] are recyclable," when Plaintiff alleges that they are not in fact recyclable because (a) less than 60% (or a "substantial majority") of facilities will accept the Products, (b) the Products' size prevents them from being properly sorted by recycling programs, and (c) there is a lack of end markets to recycle the Products. *Id.* ¶¶ 2, 37–38. Plaintiff alleges the following claims: (1) breach of express warranty, (2) violation of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.* ("CLRA"), (3) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL") based on fraudulent acts and practices (4) violation of the UCL based on

commission of unlawful acts, (5) violation of the UCL based on unfair acts and practices, and (6) unjust enrichment. *See id.* ¶¶ 50–99.

The Court denied Keurig's motion to dismiss on June 28, 2019. *See* Dkt. No. 50. As detailed in its Order, the Court held that Plaintiff had standing to and sufficiently alleged injury-in-fact, causation, and redressability. *Id.* at 4–6. The Court further rejected Keurig's argument that there was no risk of future deception of Plaintiff, distinguishing *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018).

Plaintiff now moves for class certification. *See* Dkt. No. 64-5 ("Mot."), 74-2 ("Opp."), 79-5 ("Reply").

II. LEGAL STANDARD

Federal Rule of Civil Procedure ("Rule") 23 governs class actions, including the issue of class certification. Class certification is a two-step process. To warrant class certification, a plaintiff "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.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) ("A party seeking class certification must affirmatively demonstrate [her] compliance with the Rule.").

Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012).

If the four prerequisites of Rule 23(a) are met, a court also must find that the plaintiff "satisf[ies] through evidentiary proof" one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Plaintiffs assert that they meet the requirements of both Rule 23(b)(2) and 23(b)(3). *See* Mot. at 17–23, 24. Rule 23(b)(2) provides for certification where "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). Rule 23(b)(3), in turn, applies where there is both "predominance" and "superiority," meaning "questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3).

The Court's "class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim.'" *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 465–66 (2013) (citing *Dukes*, 564 U.S. 350–51). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage," and "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1194–95; *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) ("[A] district court *must* consider the merits if they overlap with the Rule 23(a) requirements."). The issue to be decided in a certification motion is whether the case should be "conducted by and on behalf of the individual named parties only" or as a class. *See Dukes*, 564 U.S. at 348.

III. ANALYSIS

Plaintiff moves to certify a class of "All persons who purchased the Products for personal, family or household purposes in California (either directly or through an agent) from June 8, 2016 through the present." Mot. at 11. Plaintiff seeks certification of all six claims for relief. *Id.* at 10. In response, Defendant asserts that (1) Plaintiff fails to meet the requirements of Rule 23(a), (2) Plaintiff fails to meet the requirements of Rule 23(b)(3), and (3) Plaintiff fails to meet the requirements of Rule 23(b)(2) because Plaintiff lacks standing and the proposed relief is not indivisible, and (4) the class definition is overbroad. *See* Opp. The Court addresses each argument in turn.

A. Rule 23(a)

As noted above, under Rule 23(a) the class must satisfy the requirements of numerosity,

commonality, typicality, and adequacy of representation. *Mazza*, 666 F.3d at 588. Keurig argues that Plaintiff cannot satisfy the typicality and adequacy requirements.[1]

i. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed R. Civ. P. 23(a)(3). "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." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation omitted). Under the "permissive standards" of Rule 23(a)(3), the claims need only be "reasonably co-extensive with those of absent class members," rather than "substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). In other words, typicality is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quotation omitted).

Keurig contends that Plaintiff fails to show that her claims are typical of the claims of the class because "there are defenses unique to" her individual claims. Mot. at 8. Specifically, Keurig argues that Plaintiff had not "read the recycling label on the boxes of [the Products] that she purchased online," had never "seen the revised labels on Laughing Man boxes or the revised labels on all [P]roducts produced after 2017," could not "say whether the recycling agency in her community recycles [Pods]," and cannot "claim to have been deceived in any way by Keurig, because she concede[d] that she [did not] even know how she learned about recyclable K-Cup pods." *Id.* at 9 (citing Dkt. No. 74-18 ("Smith Depo.") at 62–64). But these details do not establish that Plaintiff is susceptible to unique defenses.

Contrary to Keurig's characterization of Plaintiff's deposition testimony, Plaintiff did not testify that she did not read the recyclability labels. She testified instead that she did not see the "Check Locally" asterisk on the "Peel, Empty, Recycle" label until after the suit was filed. *See*

[1] Keurig does not contest that Plaintiff satisfies the numerosity and commonality requirements. *See* Mot. at 8 n.8.

Dkt. No. 79-6, Ex. 6 at 58:17–19, 66:8-10 (clarifying that Plaintiff did not see the "check locally" label). She also testified that she was aware of Keurig's representations that the Products were recyclable, including the "Peel, Empty, Recycle" representation. *See* Dkt. No. 64-6, Ex. 4 at 2 (noting awareness of the "Recycle," "Peel, Empty, Recycle," and "Have your cup and recycle it, too" labels).[2] What matters is that Plaintiff was aware of Keurig's representations that the Products were recyclable and "purchased the Products numerous times over the past couple of years directly from the Defendant's website believing that the recycling claims on the Product's packaging and on the Defendant's website were true." Dkt. No. 64-6, Ex. 4 at 2. The fact that Plaintiff did not notice the qualification to Keurig's recyclability representation does not show that her claims are not typical.

Additionally, Plaintiff's unawareness of whether her local recycling agency accepts the Pods does not make her claim atypical. Plaintiff's theory is that even if the Products made from Polypropylene (#5) plastic are collected in over 60% of U.S. communities, the Products are still not recyclable due to their size, which prevents accurate sorting or separation, and the lack of end markets to recycle them. Mot. at 2 (citing 16 C.F.R. § 260.12(a) ("It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item."). Whether Plaintiff's particular community recycling facilities accept the Products does not affect her typicality, given the claims' focus on recyclability requirements beyond just collection. For the same reason, that Plaintiff did not see the labels with updated qualifications after 2017 does not make her atypical. Keurig still represented that the Pods were recyclable even after it redesigned the label to include a qualification that the Products were "not

[2] Thus, Keurig's cited cases in which the plaintiff did not view any of the allegedly deceptive labels or advertisements are inapposite. *See Aberdeen v. Toyota Motor Sales, U.S.A.*, No. CV-08-1690-PSG, 2009 WL 7715964, at *6 (C.D. Cal. June 23, 2009), *rev'd in part on other grounds*, 422 F. App'x 617 (9th Cir. 2011) (finding plaintiff not typical of the class "[b]ecause Plaintiff did not view any of Toyota's allegedly deceptive advertisements prior to purchasing his Prius"); *Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, No. 3:12-CV-04000-SC, 2015 WL 6638929, at *11 (N.D. Cal. Oct. 30, 2015) (similarly noting that named plaintiff who did not read the terms and conditions at issue did not satisfy the typicality requirement).

recycled in all communities." Dkt. No. 74-14 ("Oxender Decl.") at ¶¶ 24–25. Plaintiff's theory that the other requirements were not met would still render the representation deceptive, even for the redesigned labels.[3]

Finally, Keurig fails to detail how Plaintiff's inability to remember how she learned of the Products' alleged recyclability exposes her to any unique defenses, and the Court sees no reason why this would be the case. In light of her testimony that she relied on Keurig's representations on the Products' packaging and website, the Court finds that Plaintiff meets the typicality requirement.

ii. Adequacy

Rule 23(a)(4) requires that the "representative parties will fairly and adequately represent the interests of the class." In assessing adequacy, the Court must address two legal questions: (1) whether the named plaintiffs and their counsel have any conflicts of interest with other putative class members, and (2) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the proposed class. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). This inquiry "tend[s] to merge" with the commonality and typicality criteria. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982).

Keurig similarly contends that Plaintiff fails to meet the adequacy requirement because Plaintiff "never read" the labels and "never checked locally to see if she could recycle" the Pods. Opp. at 10. For the same reasons noted above, Keurig's arguments fail. Plaintiff may not have read the specific qualifications to the recyclability representation or checked whether her local recycling center accepted the Products, but the class claims concern whether the Pods Keurig claims are recyclable actually can be recycled under the Federal Trade Commission's ("FTC") guidance. As the Court stated in a previous order, the FTC's Guides for the Use of Environmental Marketing Claims ("Green Guides") state that "if a product is rendered non-recyclable because of

[3] Unlike *Wiener v. Dannon Co.*, 255 F.R.D. 658, 666 (C.D. Cal. 2009), cited by Keurig, this case does not involve "a variety of products," and thus does not raise the prospect that "a named plaintiff that purchased a different product than that purchased by unnamed plaintiffs" does not meet the typicality requirement. The redesigned label did not create a separate product, and as explained above, Plaintiff's misrepresentation theory encompasses the later labels, as it is the fundamental ability to recycle the Products that is at issue in this case.

its size or components—even if the product's composite materials are recyclable—then labeling the product as recyclable would constitute deceptive marketing." Dkt. No. 50 at 8 (citing 16 C.F.R. § 260.12(d)). The Green Guides also provide that a marketer may make an unqualified recyclability claim only "[w]hen recycling facilities are available to a substantial majority of consumers or communities where the item is sold." 16 C.F.R. § 260.12(b)(1). Defendant's arguments do not affect Plaintiff's adequacy to represent the proposed class.

B. Rule 23(b)(3)

Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Keurig contends that Plaintiff fails to meet both the predominance and superiority requirements. Opp. at 11–21.

i. Predominance

"The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks omitted). The Supreme Court has defined an individual question as "one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id.* (citation and internal quotation marks omitted) (alterations in original). This "inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (citation and internal quotation marks omitted). The Supreme Court has made clear that Rule 23(b)(3)'s predominance requirement is "even more demanding" than the commonality requirement of Rule 23(a). *See Comcast*, 569 U.S. at 34 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)).

a. Reliance

Keurig first argues that there is a lack of classwide reliance on the recyclability statements,

precluding a finding of predominance in this case. Opp. at 11–13. Keurig's Chief Sustainability Officer, Monique Oxender, points to commissioned and internal consumer surveys finding that [redacted] and that recyclability [redacted] *See* Oxender Decl. at ¶¶ 27–28. Ms. Oxender further says that [redacted] *Id.* at ¶ 29. Given these findings, Keurig argues that "the overwhelming majority of members of the proposed class did not read the labeling on [Pod's] boxes and that only a small minority could plausibly claim to have based their purchase decisions on recyclability." Opp. at 11. Additionally, Keurig argues that "absent individualized inquiry, there is no practical way of determining whether a purchase was a putative class member's purchase made in reliance on a recyclability representation." *Id.*

Plaintiff responds first by noting that the majority of her claims do not require a showing of reliance by the proposed class members on recyclability representations. *See* Reply at 6 (arguing that reliance is only an element for Plaintiff's CLRA claim). The Court agrees that Plaintiff's breach of warranty claim does not require proof of reliance. *See In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 3d 888, 915 (N.D. Cal. 2018) ("Because California's express warranty statute conforms to the UCC, the California Court of Appeal has held that a buyer need not show reliance because the California statute "creates a presumption that the seller's affirmations go to the basis of the bargain.") (quoting *Weinstat v. Dentsply Int'l, Inc.*, 103 Cal. Rptr. 3d 614, 626 (Cal. Ct. App. 2010)).

The Court also agrees that proof of reliance by the proposed class is not required to establish a UCL claim. Instead, a plaintiff must prove that he or she suffered injury "as a result of" the defendant's conduct. Cal. Bus. & Prof. Code § 17204. "The California Supreme Court interpreted this statute to mean that named plaintiffs, but not absent ones, must show proof of 'actual reliance' at the certification stage." *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020) (quoting *In re Tobacco II Cases*, 328, 207 P.3d 20, 40 (Cal. 2009)). This presumption of reliance by the absent class members "will not arise in every UCL case." *Id.* at

631. Instead, "[i]n the absence of [some] kind of massive advertising campaign . . . the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading." *Mazza*, 666 F.3d at 581. Here, Keurig included representations that the Products were recyclable on the packaging itself, as well as on its website. *See* Oxender Decl. at ¶¶ 17–26 (showing the recycling language included on Pods' packaging and noting "the content on Keurig's website"). Based on this evidence, the Court finds that all the class members were exposed to Keurig's recyclability representations such that the reliance presumption applies to the class as defined (i.e., purchasers of the Products in California). When the Products were first available, they were only offered for sale on Keurig's website. *Id.* at ¶ 16 ("None of these packages w[ere] available for retail purchase except through keurig.com."). Thereafter, the recycling representations were also always included on the Products' packaging. Since Plaintiff has provided evidence that she relied on those recyclability representations and the reliance presumption applies, individualized inquiries regarding absent class members' reliance on the representations do not preclude a finding of predominance for the UCL claims.

Under California law, "[w]hen a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). To establish a quasi-contract claim, "[t]he fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it." *Doe I v. Wal–Mart Stores, Inc.*, 572 F.3d 677, 684 (9th Cir. 2009). Here, Plaintiff claims that Keurig unjustly retained the revenues derived from class members' purchase of the Products, even though they falsely represented that the Products were recyclable. *See* Dkt. No. 20 at ¶¶ 95–97. Plaintiff's unjust enrichment claim, then, is derivative of her UCL claims. Inquiries regarding unjustness are typically individualized. *See* 1 McLaughlin on Class Actions § 5:60 (11th ed.) ("The majority view is that unjust enrichment claims usually are not amenable to class treatment because the claim requires evaluation of the individual circumstances of each claimant to determine whether a benefit was conferred on defendant and whether the circumstances surrounding each transaction would make it inequitable

for the Defendant to fail to return the benefit to each claimant"). But the Court finds the inquiry presented here—whether Keurig was unjustly enriched by the proposed class members' purchase of the Products given its allegedly false representations regarding recyclability—raises the same legal issues as to all class members. Accordingly, predominance is also met for the unjust enrichment claim.

Finally, the parties agree that the CLRA requires Plaintiff to establish classwide reliance on the alleged misrepresentations. Keurig relies on *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1024 (9th Cir. 2011), to argue that there "are myriad reasons that someone who was not misled . . . might [still] have chosen" to purchase the Products. Given Plaintiff's broad class definition, Keurig argues that consumers may have purchased the Products for reasons other than the recyclability representations, precluding a finding of predominance.

Plaintiff responds that she may rely on an inference of reliance under the CLRA because recyclability is material to reasonable consumers. *See* Reply at 8. Generally, the Ninth Circuit has held that "[i]f the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." *Stearns*, 655 F.3d at 1022 (quoting *In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 95 (Cal. Ct. App. 2009)). The question becomes whether "a reasonable man would attach importance to [Keurig's recyclability representations'] in determining his choice of action in the transaction in question." *Id.* (quoting *Steroid Hormone Prod. Cases*, 104 Cal. Rptr. 3d 329, 338 (Cal. Ct. App. 2010), *as modified on denial of reh'g* (Feb. 8, 2010)). "If the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified." *Id.* (quoting *Vioxx*, 103 Cal. Rptr. 3d at 95).

As Plaintiff notes, "materiality is generally a question of fact," and is not evaluated on an individualized basis, but instead is assessed under a reasonable consumer standard. *See In re Tobacco II Cases*, 46 Cal. 4th at 327; *see also Kwikset Corp. v. Superior Court*, 246 P.3d 877, 892 (Cal. 2011). Plaintiff also points to the California Legislature's passage of the California Environmental Marketing Claims Act ("EMCA") as support for her materiality claim. The EMCA makes it "unlawful for any person to make any untruthful, deceptive, or misleading

environmental marketing claim, whether explicit or implied," and the term "environmental marketing claim . . . include[s] any claim contained in the [Green Guides] published by the [FTC]." Cal. Bus. & Prof. Code § 17580.5(a). The California Supreme Court has recognized that statutory recognition of materiality is highly persuasive. *See Kwikset*, 246 P.3d at 890 (observing that the California Legislature's "specific[] outlawing" of the alleged deceptive representation "recognized the materiality of this representation"). While the EMCA does not specifically reference recyclability, the Green Guides, as noted above, impose specific criteria for a product to be marketed as recyclable. Accordingly, the Court finds that the inference of reliance is appropriate in this case.

Keurig's citation at the hearing to *Ortega v. Nat. Balance, Inc.*, 300 F.R.D. 422, 429 (C.D. Cal. 2014), does not change this outcome. *Ortega* did not involve any legislative recognition of materiality. Instead, the *Ortega* court found that "the statements alleged to be misrepresentations are not 'so obviously unimportant' that the Court should decide that question" at the class certification stage. 300 F.R.D. at 429. Similarly here, even if the Court were to dig deeper into the consumer surveys as Keurig urges, Plaintiff's claims are "sufficient such that materiality can and should be determined by a jury." *Id.* Accordingly, issues of reliance do not weigh against a finding of predominance for any claims.[4]

b. Change in Labels / Community Recycling Centers

Keurig also points to the change in the Products' labels over time to argue that the qualifications to its recyclability claims were not consistent over time and may have resulted in

[4] For the same reasons, the Court finds unpersuasive Keurig's argument that the class definition is overbroad. Keurig contends that the class definition is overbroad because it "necessarily includes persons who bought [Pods] in circumstances where they (1) did not see or review any of the four different packaging statements that plaintiff claims are misleading, (2) did see them, but the [Pods] are in fact capable of being recycled in their community, or (3) like most, made their purchasing decisions for reasons having nothing whatsoever to do with the recyclability of the [Pods]." Opp. at 24. Keurig's claims as to the first and third circumstances simply reiterate its argument regarding reliance, which the Court already analyzed and found unpersuasive. The Court further rejects Defendant's second argument because Plaintiff's theory of the case is that the Products are not recyclable in the substantial majority of communities. So differences in whether the Products are recyclable in specific location do not render Keurig's class definition overbroad.]

different representations to different class members. Opp. at 14–16. Specifically, Keurig describes three categories of labels: (1) labels on the initial four pilot project blends qualified the recyclability representation by directing consumers to "Check Locally" prior to 2019; (2) labels on Laughing Man boxes sold between December 2017 and Summer 2019 included the qualification "Check Locally" and noted that the Products were "not yet recycled in all communities"; and (3) all Products sold beginning in Summer 2019 again directed consumers to "Check Locally," and noted that the Products were "not recycled in all communities." *Id.* at 14.

The Court does not find that the label changes preclude a finding of predominance. "Check Locally" was included on all three labels and thus does not defeat predominance. The qualifier that the Products were "not yet recycled in all communities" was in very fine print on two of the three labels. *See* Dkt. No. 64-6 ("Hirsh Decl."), Ex. 8. Importantly, Plaintiff argues that both qualifiers were insufficient to adequately inform a reasonable consumer such that Keurig's recyclable claim was still misleading. Reply at 10. While a recyclable claim may be permitted if recycling facilities are available to less than a substantial majority, the claim must include the percentage of communities that have access to such facilities, and where "[t]he lower the level of access to an appropriate facility is, the more strongly the marketing should emphasize the limited availability of recycling for the product." 16 C.F.R. § 260.12(b)(2). Qualifiers such as "Recyclable where facilities exist" or "Check to see if recycling facilities exist in your area" are still deceptive under Plaintiff's theory "because they do not adequately disclose the limited availability of recycling program." *Id.* at § 260.12(d). All of Keurig's qualifiers are subject to these same standards, and whether they are sufficient (or insufficient) can be established through common proof.

Importantly, Keurig's representation that the Products were recyclable was in comparatively large, visible font on all of its packaging. *See* Hirsh Decl., Exs. 6–8. It is this representation of recyclability that presents the predominant question at issue in this case: whether Keurig's representation that the Products are recyclable was misleading to consumers. The slight variations in the label may add another question regarding the sufficiency of the qualification, but they do not change the basic question.

Similarly, the Court rejects Keurig's argument that the varying capabilities of materials recovery facilities at recycling centers would present individual inquiries such that common issues would not predominate. As explained above, Plaintiff's class claims allege a general theory that the Products are not recyclable in a substantial majority of communities such that the representation is misleading. Whether an individual class member's recycling facility happened to accept the Products is irrelevant. This common question can be addressed through classwide proof, and individualized inquiries into the collection capabilities at each class member's community recycling centers do not override the common issues.

c. Damages

With respect to the monetary relief sought by a putative class, predominance requires that "damages are capable of measurement on a classwide basis, in the sense 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) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)). While a proffered model purporting to serve as evidence of damages "need not be exact" at the class certification stage, it "must be consistent with [the plaintiff's] liability case." *Comcast*, 569 U.S. at 35 (citations and internal quotation marks omitted). Keurig argues that individualized inquiries concerning damages preclude finding that class issues predominate in this case. Opp. at 17–20.

Plaintiff relies on her damages expert, Stephen F. Hamilton, Ph.D, to support her position that there are "accepted and feasible methodologies for calculating the forms of monetary relief alleged in this case, using available data from [Keurig] and third parties." Dkt. No. 64-6, Ex. 3 ("Hamilton Decl.") at ¶ 17. The Court begins by noting that Plaintiff does little in her brief to develop the damages analysis of her expert and instead simply cites large swaths of his declaration. *See* Mot. at 21–22 (citing Hamilton Decl. at ¶¶ 44–53, 54–98). As described by Dr. Hamilton, Plaintiff offers varying methods for calculating restitution and monetary damages in this case.

First, recognizing that the Products had some value to consumers despite the alleged misrepresentations, Dr. Hamilton presents three primary methods for calculating restitution or

unjust gains: net sales, gross margin, and operating income. *Id.* at ¶¶ 47–49, 53. Dr. Hamilton's proposed net sales model represents the revenues obtained by Keurig from the sale of the Products ("after deducting adjustments such as returns, rebates, or discounts") and "is consistent with the notion that [Keurig] should not be able to retain any sales revenue received through selling falsely labeled [Keurig] products." *Id.* at ¶ 45. The proposed gross margin model is calculated by subtracting the cost of goods sold from the revenues. *Id.* Finally, the operating income model "represents the profits retained by [Keurig], after deducting operating expenses," and "is consistent with the notion that members of the proposed Class received a product with a value equal to the average overall cost of producing the product." *Id.*

The problem with all of the proposed models is that they look to Keurig's gains, rather than the proposed class members' losses. Although Dr. Hamilton carefully does not refer to "all profit" or "purchase price" when discussing the models,[5] the "net sales" model would award a higher value than all profits gained by Keurig since costs are not subtracted. The "gross margin" model calculates a value equal to all profits (generally calculated by subtracting the cost of goods sold from their price). The "operating income" model essentially starts with Keurig's profits then subtracts some additional expenses. "The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received, not the full purchase price or all profits." *Trazo v. Nestlé USA, Inc.*, 113 F. Supp. 3d 1047, 1052 (N.D. Cal. 2015) (internal citation omitted). Plaintiff's proposed models are most accurately described as nonrestitutionary disgorgement, which is an improper method of calculating restitution as a matter of law. *See Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 944 (Cal. 2003) (differentiating restitutionary disgorgement from nonrestitutionary disgorgement, which is the "surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice") (internal citation omitted); *see also Ang v. Bimbo Bakeries USA, Inc.*, No.

[5] However, when referring to the models in his reply, Dr. Hamilton does refer to the "gross profit" model instead of the "gross margin," and "net profit before tax" model instead of the "operating income" model. *See* Dkt. No. 79-6, Ex. 3 ("Hamilton Reply") at ¶ 75.

13-cv-01196-HSG, 2018 WL 4181896, at *14 (N.D. Cal. Aug. 31, 2018). Although Plaintiff tries to distinguish this case because the funds would be given to purchasers instead of a third party, that distinction is immaterial because the funds do not represent losses suffered by the proposed class: they simply measure Keurig's gains, calculated different ways. After recognizing that the products have value to the proposed class, the proposed models fail to use that value to appropriately calculate restitution on a classwide basis.

Plaintiff's arguments to the contrary are unpersuasive. Plaintiff quotes *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 449 (Cal. 1979), to argue that the purpose of UCL restitution is "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." Mot. at 21–22. However, as the California courts have since explained, *Fletcher* concerned a bank's unfair business practice of overcharging interest, which "did not confer any benefit on consumers." *In re Tobacco Cases II*, 192 Cal. Rptr. 3d 881, 897 (Cal. Ct. App. 2015). Because there was no benefit to consumers, the *Fletcher* court permitted a full refund restitution model, focused solely on ill-gotten gains. *Id.* at 896–97. Here, there plainly was a benefit conferred on consumers, as Plaintiff concedes. Thus, using calculations focused solely on Keurig's profits or costs, untethered from some difference in consumer value between a Pod that was recyclable and the allegedly unrecyclable Pods received by the proposed class, does not provide a restitutionary remedy.

Plaintiff's expert also proposes damages methods "to calculate consumer overcharge using metrics on increased sales for the Challenged Products as a result of the recyclable claims," given that Keurig did not charge a higher price for the Products compared to non-recyclable Pods. *Id.* at ¶ 55. These methods include (1) the attributed cost method, which "measures the difference in the cost per unit for producing a [Keurig] product in a recyclable cup relative to a conventional cup"; (2) the price premium method using either (a) the induced demand method, which uses a regression framework "to measure the market demand response of introducing a recyclable packaging claim on the product label, allowing tests to be conducted on whether a product sold in a recyclable container indeed attracts significantly greater sales than a comparable product absent the recyclable claim," or (b) the difference-in-difference method, which similarly measures market

demand but also allows the "control [of] other changes in product attributes that can potentially affect price"; and (3) conjoint analysis, which "is focused on directly measuring consumers' willingness to pay for the product attribute of interest by eliciting the value of products with and without the recyclable packaging representations" through consumer surveys. *Id.* at ¶¶ 57, 59, 63, 74, 82.

Keurig first argues that the attributed cost method is not an adequate damages model because the cost of producing a recyclable K-Cup is completely unrelated to the value consumers place on recyclability. Opp. at 20. As noted above, the Court agrees that utilizing a cost model does not bear any relation to any incremental value realized by consumers.

Keurig next argues that Plaintiff cannot "measure the 'value' of the recyclability attribute by measuring increased sales, because there is no evidence that it affected sales." Opp. at 19. Specifically, Keurig contends that because there is no price difference between the Products and non-recyclable K-Cups, Plaintiff's damages proposals are entirely conjectural. *Id.* at 19–20. However, "[t]he fact that the price of the product did not change after the representation does not establish that there is no triable issue as to whether Plaintiffs paid a price premium." *Schneider v. Chipotle Mexican Grill, Inc.*, 328 F.R.D. 520, 531 (N.D. Cal. 2018); *see also McCrary v. Elations Co. LLC*, No. 13-cv-0242-JGB (SPX), 2014 WL 12589137, at *9 (C.D. Cal. Dec. 2, 2014) ("A price premium may exist even though" the product "was sold at the same price" with and without the alleged misrepresentation). As Plaintiff's expert explains through an example:

> For example, a 24-count package of GMCR Dark Magic coffee pods was first shipped under the recyclable claim during the week of June 13, 2019. Prior to the week of June 13, 2019, [Keurig] sold this same product absent the recyclable packaging claims, allowing econometric analysis to be conducted to measure the change in value resulting from the recyclable claim without the need to control for other variables.

Hamilton Decl. at ¶ 78. Significantly, there is no indication that the underlying products changed, except for the recyclability claim. The methodology to calculate a price premium in this manner thus represents a plausible method to calculate damages consistent with Plaintiff's liability case. Such a method appropriately accounts for some consumer value obtained from the Products and focuses narrowly on determining what price premium, if any, resulted from the recyclability claim.

Keurig argues that Plaintiff's expert has not given any specific calculation and instead presents a "wait-and-see" approach that has been rejected by the Ninth Circuit. Opp. at 18 (citing *Ward v. Apple Inc.*, 784 F. App'x 539 (9th Cir. 2019)). The expert declaration in *Ward* proffered only "theories of impact and damages" using "common methodology and data." *Ward v. Apple Inc.*, 12-cv-05404-YGR, 2018 WL 934544, at *3 (N.D. Cal. Feb. 16, 2018). Here, by contrast, Plaintiff proposes a model that is consistent with the specific nuances of Plaintiff's theory in this case, accounting for factors including time for shelf conversion and multiple product attributes valued by consumers. Additionally, Plaintiff's expert, like Keurig's expert, details a hypothetical scenario showing how the model works (even though the experts predictably disagree on whether the solution is appropriate on a classwide basis). *See* David Decl. at ¶¶ 47–50; Hamilton Reply at ¶¶ 48–49. Finally, Plaintiff's expert points to specific evidence—daily or weekly retail scanner sales volume data—needed in order to give a meaningful estimate of damages using the induced demand regression model. Hamilton Decl. at ¶ 81; Hamilton Reply at ¶¶ 36–40. Unlike *Ward*, the proposed model is not purely theoretical, but can be applied concretely (as demonstrated by both experts) once the appropriate data is obtained.

Accordingly, the Court finds that Plaintiff presents a plausible damages model, and thus meets the last requirement to establish predominace.

ii. Superiority

The superiority requirement tests whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Court considers four non-exclusive factors: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Id.* "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d. 1227, 1235 (9th Cir. 1996).

Plaintiff satisfies the superiority requirement. Keurig's arguments regarding this requirement largely mirror its predominance arguments. Pointing to the fourth factor, Keurig argues that individualized inquiries "are central to the question of liability." Opp. at 20–21. For the same reasons discussed above, Plaintiff's theory of the case—that the Products are not recyclable in a substantial majority of communities where they are sold—allows her to submit proof on a classwide basis and obviates any manageability concerns.

C. Rule (b)(2)

"Rule 23(b)(2) applies only when a single injunction . . . would provide relief to each member of the class." *Dukes*, 564 U.S. at 360. The "key" to finding a class certifiable under Rule 23(b)(2) "is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined . . . only as to all of the class members or as to none of them." *Id.* (citation and internal quotation marks omitted) (emphasis added). Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction . . . against the defendant," or "to an individualized award of monetary damages." *Id.* at 360–61 (emphasis in original).

Keurig argues that Plaintiff lacks standing to seek injunctive relief because Keurig has added qualifying language that comports with the FTC's recommendations and Plaintiff is now fully informed regarding the Products' recyclability (or unrecyclability) such that she cannot be injured in the future. Opp. at 22–23. Importantly, Plaintiff's theory of the case is that the Products are not recyclable under the FTC's criteria, and that the qualifying language does not cure Keurig's inaccurate and misleading representations of recyclability. The qualifying language thus does not strip Plaintiff of standing to seek injunctive relief. Similarly, as the Court found in its order denying Defendant's motion to dismiss, Keurig's reliance on *Davidson* is misplaced. 889 F.3d at 969. Because "Keurig could plausibly make recyclable Pods without changing their size: MRFs could evolve to be able to capture small plastics such as Pods, such that all Keurig would need to do is make it easier to clean out the Pods and remove their foil lids," the Court again holds that Plaintiff has standing to seek injunctive relief. Dkt. No. 50 at 6–7.

Next, Keurig argues that the proposed injunctive relief is not indivisible and that Rule

23(b)(2) does not apply in this case. Keurig argues, echoing the themes of several of its prior arguments, that injunctive relief "cannot be granted to those consumers who live in communities that do not recycle [the Products] (*i.e.*, those who are allegedly harmed) and those who live in communities that do (*i.e.*, those who cannot be harmed)." Opp. at 23 (emphasis in original). Again, Keurig fails to take Plaintiff's theory of this case into account. It is not individual community recycling facilities' ability to collect the Products that is at issue. Instead, Plaintiff alleges that the Products are not recyclable in a substantial majority of communities in which they are sold such that Keurig's representation is misleading. The proposed injunctive relief—an order to enjoin Keurig from advertising their products as recyclable—may be granted and provide relief for all proposed class members. Plaintiff thus satisfies the requirements of Rule 23(b)(2).

IV. MOTIONS TO FILE UNDER SEAL

Courts generally apply a "compelling reasons" standard when considering motions to seal documents. *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010) (quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). "This standard derives from the common law right 'to inspect and copy public records and documents, including judicial records and documents.'" *Id.* (quoting *Kamakana*, 447 F.3d at 1178). "[A] strong presumption in favor of access is the starting point." *Kamakana*, 447 F.3d at 1178 (quotations omitted). To overcome this strong presumption, the party seeking to seal a judicial record attached to a dispositive motion must "articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process" and "significant public events." *Id.* at 1178–79 (quotations omitted).

Records attached to nondispositive motions must meet the lower "good cause" standard of Rule 26(c) of the Federal Rules of Civil Procedure, as such records "are often unrelated, or only tangentially related, to the underlying cause of action." *Id.* at 1179–80 (quotation omitted). This requires a "particularized showing" that "specific prejudice or harm will result" if the information is disclosed. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002); *see also* Fed. R. Civ. P. 26(c). "Broad allegations of harm, unsubstantiated by specific

examples of articulated reasoning" will not suffice. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (quotation omitted).

Because the parties move to file documents related to a nondispositive motion, the Court will apply the lower good cause standard. The Court finds that the parties have provided good cause for sealing portions of the various documents listed below because they contain confidential business and proprietary information relating to the operations of Defendant Keurig. *See Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2012 WL 6115623 (N.D. Cal. Dec. 10, 2012); *see also Agency Solutions.Com, LLC v. TriZetto Group, Inc.*, 819 F. Supp. 2d 1001, 1017 (E.D. Cal. 2011); *Linex Techs., Inc. v. Hewlett-Packard Co.*, No. 13-cv-0159-CW, 2014 WL 6901744 (N.D. Cal. Dec. 8, 2014). Specifically, the parties have identified portions of the unredacted version of the parties' briefs and exhibits as containing confidential and proprietary business information. The parties also narrowly tailor their requests to only cover the portions of the briefs and exhibits that refer directly to confidential business operations or strategy. Accordingly, the Court finds good cause to **GRANT** the motions to seal. Dkt. Nos. 64, 74, 79.

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V. CONCLUSION

The Court finds that all the requirements of Federal Rule of Civil Procedure 23(a) and Rule 23(b)(3) have been met in this case. Accordingly, the Court **GRANTS** Plaintiff's motion for class certification and certifies the following class for Plaintiff's UCL, CLRA, Breach of Express Warranty, and Unjust Enrichment claims:

> All persons who purchased the Products for personal, family or household purposes in California (either directly or through an agent) from June 8, 2016 through the present.

The Court appoints Plaintiff Kathleen Smith as Class representative and Lexington Law Group as Class Counsel in this action. The Court also **SETS** a further case management conference on October 13, 2020, at 2:00 p.m. The parties shall meet and confer and submit a joint case management statement by October 8, 2020. The joint statement should include a proposed case schedule through trial, as well as a brief discussion of any outstanding issues to resolve before trial.

Finally, the Court **GRANTS** the parties' administrative motions to seal, finding good cause to do so. Dkt. Nos. 64, 74, 79.

IT IS SO ORDERED.

Dated: 9/21/2020

HAYWOOD S. GILLIAM, JR.
United States District Judge