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# Superior Court of California, County of Alameda
# Rene C. Davidson Alameda County Courthouse

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| Kumar<br>Plaintiff/Petitioner(s)<br>VS.<br>Safeway, Inc.<br>Defendant/Respondent(s)<br>(Abbreviated Title) | No. RG14726707<br>Order<br>Motion for Class Certification Granted |

The Motion for Class Certification filed for Rohini Kumar was set for hearing on 05/20/2016 at 11:00 AM in Department 21 before the Honorable Winifred Y. Smith. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of plaintiff Rohini Kumar ("Plaintiff") For Class Certification ("Motion") is ruled on as follows:

BACKGROUND:

Plaintiff filed the complaint in this case on May 20, 2014 ("Complaint"), asserting claims against Safeway, Inc. ("Defendant") on behalf of herself, the general public and those similarly situated, based on alleged representations made by Defendant in connection with its marketing and sale of olive oil. More specifically, Plaintiff alleges that the labels on Defendant's olive oil products state that they are "IMPORTED FROM ITALY" despite the fact that the olives from which they are made are neither grown nor pressed in Italy, and that they are of the "Extra Virgin" grade, despite the fact that they are not. Extra Virgin Olive Oil will be hereafter referred to as "EVOO."

Plaintiff's Complaint includes causes of action for (1) Violation of the Consumer Legal Remedies Act, California Civil Code sections 1750, et seq. ("CLRA"), (2) False Advertising, Business and Professions Code sections 17500, et seq. ("FAL"), (3) Breach of Contract, (4) Breach of the Covenant of Good Faith and Fair Dealing, (5) Fraud, Deceit and/or Misrepresentation, and (6) Unfair, Unlawful and Deceptive Trade Practices, Business and Professions Code sections 17200, et seq. ("UCL"), and is pled in proper form as a class action (California Rule of Court ["CRC"] 3.761.) However, the causes of action for breach of contract and breach of the covenant of good faith and fair dealing were dismissed at the demurrer stage. (See Order dated September 2, 2014.)

PROPOSED CLASSES:

Plaintiff now seeks an order certifying two classes, an EVOO Class, defined as "all California citizens who, between May 23, 2010 and the present, purchased, in California, any Safeway Select brand Extra Virgin Olive Oil products; and an Imported Class, defined as "all California citizens who, between January 1, 2012 and the present, purchased, in California, any of the following Safeway Select brand

products: Extra Virgin Olive Oil, Extra Light in Flavor Olive Oil, and Pure Olive Oil."

LEGAL STANDARDS:

Class actions in California are governed by Code of Civil Procedure §382, authorizing such suits "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Fireside Bank v. Sup. Ct. (2007) 40 Cal.4th 1069, 1078; City of San Jose v. Sup. Ct. (1974) 12 Cal.3d 447, 458.) "[T]he party advocating class treatment must demonstrate [a] the existence of an ascertainable and sufficiently numerous class, [b] a well-defined community of interest, and [c] substantial benefits from certification that render proceeding as a class superior to the alternatives." (Brinker Restaurant Corp. v. Sup. Ct. (2012) 53 Cal.4th 1004 at 1021 [citing Fireside Bank at 1089; Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435; and City of San Jose at 459].) The community of interest requirement embodies three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (Ibid.)

Ascertainability is achieved by defining a class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when the identification becomes necessary. (Bomershein v. Los Angeles Gay & Lesbian Center (2010) 184 Cal.App.4th 1471, 1483 [citing Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal.App.4th 908, 915].)

The test of typicality is whether the action is based on conduct which is not unique to the named plaintiffs, and whether the other putative class members have been injured by the same course of conduct. (Martinez v. Joe's Crab Shack Holdings (2014) 231 Cal.App.4th 362, 375.) The adequacy inquiry serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent, and often comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit. (Ibid.)

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants'" (Brinker v. Sup. Ct., supra, 53 Cal.5th at 1021 [citing Collins v. Rocha (1972) 7 Cal.3d 232, 238, and Sav-On Drug Stores, Inc. v. Sup. Ct. (2004) 34 Cal.4th 319, 326]), the answer to which "hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.'" (Ibid.) Class certification is, however, "essentially a procedural [question] that does not ask whether an action is legally or factually meritorious" (id, at 1023 [citing Sav-On at 326 and Linder at 439]), and "the focus in a certification dispute is on what type of questions - common or individual - are likely to arise in the action, rather than on the merits of the case." (Sav-On at 327.) Generally, "if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (Brinker at 1022 [citing Hicks v. Kaufman & Broad Home Corp., supra, 89 Cal.App.4th at 916].)

Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. (Linder at 435.) In addition, the trial court may assess the advantages of alternative procedures for handling the controversy (Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644, 660-662), and must address whether a class action is superior to available alternatives, including individual lawsuits. (Bufil v. Dollar Financial Group, Inc. (2008) 162 Cal.App.4th 1193, 1204.) The court is vested with discretion in weighing the concerns that affect class certification. (Sav-On at 336.) "[B]ecause group action also has the potential to create injustice, trial courts are required to 'carefully weigh respective benefits and burdens and to allow maintenance of the class-action only were substantial benefits accrue both to litigants and the courts.'" (Linder at 435.) It is, of course, plaintiff's burden to support each of the above factors with a factual showing. (Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 Cal.App.3d 462.)

With these standards in mind, the court turns to the issues presented.

SUMMARY OF PLAINTIFF'S ARGUMENTS:

Plaintiff asserts that both of the proposed classes are sufficiently numerous and ascertainable, in that the

classes are defined according to common characteristics sufficient to allow the members to identify themselves as having a right to recover based on the description. (Citing, inter alia, Aguirre v. Amscan Holdings, Inc. (2015) 234 Cal.App.4th 1290, 1305-1306.)

Plaintiff further asserts that common issues predominate over any individual issues because the focus for determining liability on all of Plaintiff's claims is on Defendant's uniform business practices. The most crucial common question is whether Defendant's uniform labels, which included the representations "extra virgin" and "Imported from Italy," were likely to deceive a reasonable consumer. Under the UCL, individualized proof of deception, reliance and injury by absent class members in not necessary. (Citing, inter alia, In re Tobacco II Cases (2009) 46 Cal.4th 298, 320.) Under the CLRA, an inference of reliance arises as to the entire class in the misrepresentation was uniform and material. (Citing, inter alia, In re Vioxx Class Cases (2009) 180 Cal.App.4th 116, 129; In re Steroid Hormone Products Cases (2010) 181 Cal.App. 4th 145, 156.)

Other common questions include whether the "Imported from Italy" representation violates the "country of origin" customs regulations and the FDA labeling regulations; whether Defendant's policies and procedures were ineffective to ensure that the oil it was selling as "extra virgin" was truly extra virgin, which includes the questions of whether the tests Defendant's suppliers used to determine if the oil was extra virgin complied with federal and state regulation and other industry specifications; and whether Defendant implemented appropriate policies to ensure that the oil remained "extra virgin" through the date of sale and best by date.

Plaintiff's theory of liability is that Defendant has not set out to sell true EVOO because its policies and procedures for testing, shipping and storing the oil are wholly inconsistent with how a product should be designed and sold.

Plaintiff asserts that her claims are typical of the claims of the Imported Class because she, like all putative class members, purchased a product that was advertised as being "Imported from Italy," and while she does not recall whether she purchased the "Extra Light in Flavor" or the regular "Olive Oil" sold by Defendant, those bottles contained the same representation. She further assert that her claims are typical of the claims of the EVOO Class, and that she and her counsel will fairly and adequately represent both classes.

Finally, Plaintiff argues that a class action is superior to any alternative. The only way to stop Defendant's false advertising is a public injunction, and class members have little incentive to sue individually.

PLAINTIFF'S EVIDENCE:

The centerpiece of Plaintiff's evidentiary presentation in support of the Motion is the Declaration of Rodney J. Mailer, PhD, self-described as "an expert in the field of oil chemistry and quality, particularly as they relate to the environment, cultivation, storage and handling of olive oil." The Mailer declaration, which includes copies of several laboratory reports regarding testing done on samples of Defendant's EVOO, is also the subject of a separate motion by Defendant to strike the declaration in its entirety.

Plaintiff has also submitted transcript excerpts from the depositions of Defendant's persons most knowledgeable ("PMK"), other of Defendant's management personnel, and Plaintiff; copies of photo images of labels from the front and back of various bottles of Defendant's olive oil; various documents produced by Defendant in discovery, including test results and communications with Defendant's suppliers; and various documents from the public domain regarding the quality and health benefits of the different varieties and grades of olive oil.

SUMMARY OF DEFENDANT'S OPPOSITION ARGUMENTS:

In opposition, Defendant argues first that class certification should be denied because the proposed classes are not ascertainable because there is no way to objectively identify them. The only existing records that could possibly identify some of the class members are Safeway's club card records, but those records are inaccurate and they do not capture all purchasers of the products. Self-identification is problematic. (Citing, inter alia, Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013). It would also be impossible to ascertain which class members purchased bottles with "Imported from Italy" on the label, since the labels have not always contained that phrase.

Defendant further argues that the proposed classes include individuals who suffered no damage because they received olive oil that was "extra virgin," and even if Plaintiff could prove that most or all of Defendant's olive oil is not extra virgin, she cannot demonstrate that class members consistently paid any price premium for this oil.

Next, Defendant argues that Plaintiff has failed to establish that common issues predominate, because she has presented no admissible proof that Defendant's EVOO will not maintain extra virgin quality through the "best before" date. Mailer's conclusions are pure assumption, with no factual basis and no ties to Defendant's actual practices, and fail to establish that Defendant's olive oil does not qualify as extra virgin. Defendant further argues that Plaintiff has not presented evidence to show that reasonable consumers have a common understanding of the term "extra virgin."

As to the "Imported from Italy" claims, Defendant argues that Plaintiff has submitted no evidence that consumers have a common understanding of the phrase "Imported from Italy," or that reasonable consumers interpret the phrase to mean that the oil is made solely from Italian olives. Nor has she shown that the average consumer relies on the phrase when deciding to buy the oil, or that it is even important to them. In Defendant's view, this means that that "Imported from Italy" representation is not material. (Citing, inter alia, Kosta v. Del Monte Foods, Inc., 308 F.R.D. 217, 230 (N.D. Cal. 2015).)

Defendant also argues that Plaintiff cannot use the Tariff Act and the Food, Drug and Cosmetic Act ("FDCA") as the basis for her UCL unlawful claim. The UCL cannot borrow violations of other laws when there is a specific bar to the action. (Citing, inter alia, Rose v. Bank of America (2013) 57 Cal.4th 390, 398; Buckman Co. v. Plaintiffs' Legal Committee (2001) 531 U.S. 341, 349 n.4.)

Defendant also asserts that proof of injury cannot be shown on a classwide basis because a) consumers purchase the products for varying reasons, some of which have nothing to do with the claims in this case, b) varying beliefs about the meaning of "Imported from Italy, c) some consumers purchased and received oil that was extra virgin, d) some class members have already received refunds, e) no consistent premium was paid for EVOO, and f) there is no discernible price differential associated with olive oil labeled "Imported from Italy."

Defendant argues that Plaintiff has no injury because she used Safeway olive oil to her own satisfaction for many years, so she has no standing and her claims are not typical. Plaintiff also testified that she could not be sure whether the labels on the bottles she purchases had the phrase "Imported from Italy" on them.

Defendant further argues that Plaintiff is not an adequate representative because she has a close relationship with class counsel, and that Plaintiff's counsel cannot adequately represent the class because they are percipient fact witnesses to the testing that Mailer relies on.

DEFENDANT'S EVIDENCE:

In support of its opposition, Defendant submits the Declaration of Lanfranco Conte, a professor of Food Chemistry retained by Defendant to respond to the Mailer declaration. Conte presents a detailed analysis and critique of the Mailer declaration and the underlying tests and other evidence, as contrasted to additional evidence provided by Defendant, including the detailed declarations of representatives of two of its olive oil suppliers.

Defendant has also submitted the Declaration of Keith R. Ugone, Ph.D, self-described as "an economist," who opines on "various economic and associated class certification issues..." Ugone's key conclusions are "that the claimed injury and claimed damages suffered by putative Class members (if any) as a result of the Challenged Claims cannot be evaluated reliably on a Class-wide basis" and "whether and to what extent putative class members were injured as a result of the Challenged Claims requires individualized inquiry..."

Defendant has also submitted transcript excerpts from the depositions of Plaintiff and Defendant's PMK, Anne Suplee; select portions of the transcript of a discovery related case management conference on July 29, 2015; a document containing climate data for Tracy, California; a presentation downloaded from the web site of the North American Olive Oil Association; and Plaintiff's club card records.

Defendant also requests judicial notice of an Omnibus Oder in a matter before the Superior Court Of The District Of Columbia Civil Division. Judicial notice is GRANTED, but only as to the existence of the subject record.

PORTIONS OF THE RECORD ARE SEALED:

Substantial portions of the briefing and the evidentiary record submitted by both sides were redacted at the time of filing, since they included information and documents that had been designated by Defendant as "Confidential" pursuant to the stipulated protective order entered in this case on October 20, 2014. Defendant's first attempts to obtaining sealing orders, however, were denied. (See Orders dated April 8, 2016.) After narrowing the scope of the information to be sealed to specific identification of its olive oil suppliers and direct communications between Defendant and those suppliers, Defendant obtained a sealing order on May 18, 2016, and publically accessible versions of all of the subject records reflecting the more narrow redactions were subsequently added to record.

DISCUSSION:

Plaintiff asserts that the proposed classes are sufficiently numerous, and Defendant does not argue otherwise. The court so finds.

Ascertainability -

The court concludes that the proposed classes are ascertainable. Defendant's reliance on Carrera v. Bayer Corp., supra, 727 F.3d 300 is misplaced. As Plaintiff correctly points out in her reply, the Third Circuit's test for ascertainability at the class certification stage "has been roundly criticized by district courts with the Ninth Circuit." (Aguirre v. Amscan Holdings, Inc. (2015) 234 Cal.App.4th 1290, 1305.) The court agrees with Plaintiff that ascertainability is sufficient established where, as here, the class is identified by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description. (Bartold v. Glendale Fed. Bank (2000) 81 Cal.App.4th 816, 828.)

Defendant's argument specific to the Imported Class that there may have been labels in circulation during the class period that did not include the "Imported from Italy" representation will not stand in the way of certification. The record reflects that the beginning date of the class period for this class, January 1, 2012, was chosen by Plaintiff based on the evidence that the labels that included the "Imported from Italy" representation were printed in July, 2011, and Defendant has not presented evidence that any significant number or bottles with the old label may have still been on store shelves after January 1, 2012, especially in light of the fact that the oils had a limited shelf life. Furthermore, in her reply Plaintiff agreed to end the Imported Class period on July 31, 2015, the date that Defendant claims to have removed "Imported from Italy" from its labels.

Defendant's further arguments regarding who may or may not have suffered damages conflate the question of ascertainability with commonality, and will be addressed below.

Community of Interest -

EVOO Class -

Defendant's arguments regarding the lack of commonality between putative members of the EVOO Class revolve primarily around its attacks on the admissibility of the Mailer declaration. In support of its separate motion to strike, Defendant submitted select transcript excerpts from the Mailer deposition, and Plaintiff submitted further transcript excerpts from the Mailer deposition with it opposition to that motion. The court has carefully reviewed all of the evidence submitted.

Plaintiff's theory of liability is that Defendant's policies and procedures are ineffective to ensure that the oil it represents as "extra virgin" is truly "extra virgin," and she expressly concedes that not every bottle that is labeled EVOO fails to live up to the extra virgin standard. Mailer's conclusions and opinions were framed in support of this theory. He expressed his conclusions based on his review of the results of several tests which indicated that samples of Defendant's EVOO repeatedly contained defects that prevent them from being properly classified as "extra virgin," he opined that Defendant does not take adequate steps in the procurement process to make sure that its EVOO actually contains extra virgin

olive oil, and he opined that Defendant lacks sufficient procedures to ensure that its EVOO does not degrade into inferior olive oil after bottling. To be sure, the declarations of Defendant's suppliers and its expert are to the contrary, but that does not matter in this context. The validity and evidentiary weight of Mailer's conclusions and opinions are clearly in the realm of merit determinations that are unnecessary and inappropriate at the class certification stage. (Linder, at 441.)

The court agrees with Plaintiff that Defendant's challenges to the evidentiary bases of Mailer's opinions depend on a misunderstanding or mischaracterization of those opinions, together with out-of-context quotes from the Mailer deposition, and that Defendant has failed to demonstrate that Mailer's opinions have no evidentiary basis, or to demonstrate that some of the evidence upon which Mailer's opinions rely, such as the tests performed by the Wagga Wagga Agricultural Institute ("WWAI"), is not of the type reasonably relied upon by experts. Defendant's considerations and arguments may go to the weight ultimately given to Mailer's opinions and the evidence upon which Mailer relied, but they do not render them inadmissible in this context. Nor has Defendant demonstrated that Mailer is not qualified to opine on the results of sensory testing reported by other experts. Accordingly, the Mailer declaration will not be stricken.

The court also rejects Defendant's attempt to discredit Mailer's opinions, as well as to assert that Plaintiff has not demonstrated a community of interest among the putative EVOO class, on the basis that the results of the testing relied on by Mailer are not statistically significant enough to claim that all bottles of Defendant's EVOO sold in California do not, in fact, contain extra virgin olive oil. Once again, this is a mischaracterization of Plaintiff's theory of liability.

Likewise, Defendant's argument that Plaintiff is required to demonstrate that class members have a common understanding of what "extra virgin" means is unsupported by the authorities cited, and is not well taken.

Imported Class -

Apart from its arguments regarding ascertainability, i.e., that some of the old labels may still have been on the shelves after the beginning of the class period, Defendant does not deny that the "Imported from Italy" representation was uniform across the products named in the Import Class definition. Defendant's only other argument against commonality is that there is no evidence demonstrating a common understanding of the meaning of the phrase, or that the average consumer relied on the phrase when deciding whether to purchase the oil. These arguments are not well taken. Under the UCL, relief is available without individualized proof of deception, reliance and injury (In re Tobacco II Cases, supra, 46 Cal.4th at 320), and under the CLRA and fraud claims reliance is presumed if the representation was material, and materiality is presumed if the misrepresentations is illegal. (Kwikset Corp. v. Sup. Ct. (2011) 51 Cal.4th 310, 329.) Unlike the terms that were at issue in the cases cited by Defendant, such as "natural" or "fresh" (e.g. Kosta v. Del Monte Foods, Inc., supra, 308 F.R.D. at 230), the phrase "Imported from Italy" implicates the representation of geographic origins reflected in FDCA regulations, and even if not illegal per se, the materiality of a misrepresentation is generally judged by a "reasonable man" standard, and is generally a question of fact, i.e., a merits determination. (In re Steroid Hormone Product Cases (2010) 181 Cal.App.4th 145, 157.)

Both Classes -

The court also rejects Defendant's argument that Plaintiff cannot use either the Tariff Act or the FDCA as a basis for the unlawful prong of her UCL claims. As pointed out by Plaintiff in her reply, these same arguments were raised and rejected by Judge Carvill at the pleading stage, and Defendant has offered nothing more at this juncture to cause this court to arrive at a different conclusion. More importantly, however, this issue is clearly amenable to resolution on a classwide basis, and it will not be resolved in this context.

Damages -

Defendant has expended considerable resources in support of its arguments regarding the economic aspect of the relief that Plaintiff seeks in this case, primarily in the form of the Ugone declaration. Some portions of Ugone's opinions and Defendant's arguments, i.e., the varying reasons for purchases varying beliefs about the meaning of the terms "Imported from Italy" and "extra virgin," are essentially reliance arguments, which the court has already addressed. And while Plaintiff does not deny that some class

members have already received refunds, and does not directly challenge Ugone's extensive analyses of prices paid and price differentials, these factors do not cause Plaintiff's claims in this case to fall outside of the settled law in California that if a defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. (Williams v. Sup. Ct. (2013) 221 Cal.App.4th 1353, 1365 [citing Brinker at 1022]; Daar at 709.)

Typicality and Adequacy -

Defendant's arguments regarding Plaintiff's lack of standing and lack of typicality are unpersuasive. Her testimony that she was not able to determine the quality of Defendant's EVOO by tasting it herself, and that she was unsure whether she had purchased any oil that had a specific label that did not say "Imported from Italy" on it, does not demonstrate that she was not injured by the alleged misrepresentations. The court also rejects Defendant's arguments regarding the adequacy of Plaintiff and of Plaintiff's counsel.

Superiority -

Finally, the court concludes that Plaintiff has established that a class action is the superior means by which to pursue Plaintiff's claims in this case. Indeed, the court agrees with Plaintiff that if her allegations regarding the falsity of the representations made on the olive oil labels are ultimately proven to be true, the appropriate injunctive relief remedy would not, as a practical matter, be obtainable in an individual action.

RULING:

Class certification is GRANTED. The following classes are hereby certified:

EVOO Class - All California citizens who, between May 23, 2010 and the date of notice to the class that a class has been certified, purchased, in California, any Safeway Select brand Extra Virgin Olive Oil products.

Imported Class - All California citizens who, between January 1, 2012 and July 31, 2015, purchased, in California, any of the following Safeway Select brand products: Extra Virgin Olive Oil, Extra Light in Flavor Olive Oil, and Pure Olive Oil."

Rohini Kumar is appointed as Class Representative. The firms of Gutride Safier LLP and Tycko & Zavareei LLP are appointed as Class Counsel.

Class Counsel shall comply with California Rule of Court 3.766(b) forthwith, and no later than June 3, 2016, after which the parties shall meet and confer in a good faith effort to arrive at a stipulation regarding time, manner, content and cost of notice. If the parties are unable to so stipulate, Class Counsel shall present all notice issues to the court by way of a noticed motion. Either a stipulation or a motion must be filed no later than June 24, 2016.

Dated: 05/24/2016

Facsimile

Judge Winifred Y. Smith

| SHORT TITLE: | CASE NUMBER: |
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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

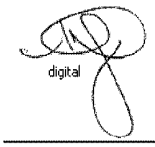
Case Number: RG14726707
Order After Hearing Re: of 05/24/2016

## DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 05/25/2016.

Chad Finke Executive Officer / Clerk of the Superior Court

By 


Deputy Clerk