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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THAMAR SANTISTEBAN CORTINA, ANDREW J. PARK, and JILLIANN PEREZ, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

GOYA FOODS, INC.,

Defendant.

Case No. 3:14-cv-00169-L-NLS

DEFENDANT GOYA FOODS, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[Filed concurrently with Decl. of Paul B. La Scala, Decl. of Joseph Perez, and Request for Judicial Notice]

Judge: Hon. M. James Lorenz
Date: February 16, 2016

First Amended Consolidated Complaint filed on July 25, 2014

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I. INTRODUCTION

This is a lawyer-driven lawsuit led by a professional plaintiff (Thamar Cortina), who is on her fifth purported class action in the past four years. Maneuvering their way to class certification, Plaintiffs' allegations, amended allegations, discovery responses, and testimony have morphed from three causes of action focused on one product (Malta Goya) to nine causes of action concerning three products (Malta Goya, Sangria, and Ginger Beer). Plaintiffs' alleged purchases of these products are questionable at best. No class of consumers in California is clamoring for the relief sought by Plaintiffs and their counsel. The FDA's position has been and continues to be that there are no immediate or short-term dangers presented by 4-MEI at the levels expected from the use of caramel coloring in foods and beverages.

Plaintiffs seek to certify claims based only on Goya's alleged failure to include a Proposition 65 ("Prop 65") warning on product labels. (ECF No. 83.) For the reasons stated in Goya's motion for summary judgment (ECF No. 84), however, Plaintiffs' Prop 65 claims are barred by res judicata. And even if their claims are not barred, which they are, class certification should be denied for the following reasons:

- Plaintiffs' claims are not common or typical of the purported class because their purchases of the products are questionable, the relief they seek is inconsistent with the relief sought in their operative complaint, and their practice of not reviewing product labels conflicts with a class action based on a lack of warnings.
- Plaintiffs are not adequate class representatives because (1) Ms. Cortina has prematurely exited each of the other four class actions in which she was a named plaintiff; (2) plaintiff Andrew Park has vanished from the litigation; and (3) plaintiff Jilliann Perez is not aligned with Ms. Cortina on how the case should proceed.
- As defined by Plaintiffs, the class encompasses product purchasers who have not been injured. And Plaintiffs' motion contains no reliable method to determine who the actual class members are.

- Plaintiffs have not demonstrated predominance and superiority under Fed. R. Civ. P. 23(b)(3) because their requested relief is not appropriate under their claims and, in any event, cannot be measured on a class-wide basis.

Defendant Goya Foods, Inc., respectfully requests, therefore, that Plaintiffs' motion for class certification be denied.

II. FACTUAL RECORD

A. Goya Distributed But Did Not Produce The Products At Issue.

Goya distributes – but does not manufacture – Malta Goya, Sangria, and Ginger Beer. (Decl. of Joseph Perez In Supp. of Goya's Mot. For Summ. J. ¶ 2, ECF No. 84-24.) Goya sells these products to distributors and retailers, who then sell to consumers, and does not have accurate information regarding actual retail prices paid by consumers. (*Id.* ¶ 3.) Throughout its history, Goya has always sold Malta Goya and Sangria in bottles – not in cans. (Decl. of Joseph Perez ("Perez Decl.") ¶ 2.)

B. 4-MEI Became Subject to Prop 65's Requirements In January 2012.

Prop 65 (Cal. Health & Safety Code § 25249.5) was passed by California voters in 1986 to require companies that expose consumers to certain probable carcinogens at certain levels to provide a general warning. Cal. Health & Safety Code § 25249.6. On January 7, 2011, 4-methylimidazole (4-MEI) was added to Prop 65's list of probable carcinogens that may require a warning. (First Am. Consolidated Compl. ("FACC") ¶ 89, ECF No. 27.) 4-MEI is a by-product from the manufacture of caramel coloring. (Goya's Req. for Judicial Notice in Supp. of Mot. For Summ. J. ("MSJ RJN") Ex. 7 [FDA Question and Answers on Caramel Coloring and 4-MeI], ECF No. 84-9.) All caramel coloring, regardless of the level of 4-MEI, are "generally recognized as safe." 21 C.F.R. § 182.1235. The FDA has stated it has "no reason to believe that there is any immediate or short-term danger presented by 4-MEI at the levels expected in food from the use of caramel coloring in food." (MSJ RJN Ex. 7 ["FDA Question and Answers on Caramel Coloring and 4-MEI"], ECF No. 84-7.)

On January 7, 2012, 4-MEI became subject to Prop 65's warning requirements. Cal. Code Regs., tit. 27, § 27001(c); Cal. Health & Safety Code §§ 25249.8, 25249.10(b). These requirements do not apply when exposure of 4-MEI is at or below 29 micrograms per day. Cal. Code Regs. § 25705(b)(1). The exposure level is determined by estimating a consumer's lifetime exposure using data from national databases that show the actual consumption patterns of people. Cal. Health & Safety Code § 25249.10(c), Cal. Code Regs., tit. 27, §25721(d)(4); *see generally Envtl. Law Found. v. Beech-Nut Corp*., 235 Cal. App. 4th 307, 321 (2015) ("The appropriate time frame is calculated on a microgram-per-day basis.").

C. The Consumer Reports Article, The Original Complaints, And Plaintiffs' Prop 65 Notices Were Limited To Malta Goya.

On January 23, 2014, Consumer Reports published an article stating that Malta Goya contained more than 300 micrograms of 4-MEI in a 12-ounce serving. (FACC ¶¶ 17-18.) It did not identify the exposure level of 4-MEI in Malta Goya consumers on a daily basis. It also did not discuss Sangria or Ginger Beer.

Ms. Cortina learned about the Consumer Reports article when the Law Office of Jack Fitzgerald ("Fitzgerald") gave it to her. (Decl. of Paul B. La Scala ("La Scala Decl."), Ex. A [Oct. 6, 2015 Dep. Tr. of Thamar Cortina ("Cortina Dep.") at 69:12-72:14.) Fitzgerald had been representing Ms. Cortina in another class action. (Cortina Dep. at 257:24-260:15.)

On January 23, 2014, Ms. Cortina filed her complaint, which included causes of action based on the fraudulent prong of the Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17200 et seq.), the False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 et seq.), and the Consumers Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 et seq.). She alleged Goya "deceptively omits that Malta Goya beverages contain . . . 4-MEI." (Cortina Compl. ¶ 1, ECF No. 1.) On March 11, 2014, Andrew Park filed a copycat action, *Park v. Goya Foods, Inc.*, No. 3:14-cv-1356-L-NLS. (MSJ RJN Ex. 5 [Park Compl.], ECF No. 84-7.) On March 14, 2014, Jilliann

Perez filed another copycat action, *Perez v. Goya Foods, Inc.*, No. 3:14-cv-1358-L-NLS.[1] (MSJ RJN Ex. 6 [Perez Compl.], ECF No. 84-8.) None of Plaintiffs' original complaints contained any allegations about Sangria or Ginger Beer.

On February 10, 2014, Fitzgerald (on behalf of Ms. Cortina) served Goya with a Prop 65 notice of intent "to file a citizen enforcement lawsuit against Goya Foods." (Decl. of Naoki S. Kaneko In Supp. of Goya's Mot. For Summ. J. ("Kaneko MSJ Decl."), Ex. B [Cortina 60-Day Notice], ECF No. 84-12.) The notice identifies Malta Goya only and states manufacturers must "warn consumers about exposure to amounts of [4-MEI] greater than 29 micrograms per day." (*Id.*) Ms. Perez filed a similar notice identifying Malta Goya only on April 3, 2014. (Kaneko MSJ Decl., Ex. C [Perez 60-Day Notice], ECF No. 84-13.) Mr. Park did not serve a Prop 65 notice. (Kaneko MSJ Decl. ¶ 6, ECF No. 84-10.)

D. Accepting Plaintiffs' Allegations, The Court Mostly Denied Goya's Motion To Dismiss And Motion To Strike Plaintiffs' FACC.

Plaintiffs' FACC includes nine causes of action: (1) violation of the UCL (fraudulent prong); (2) violation of the FAL; (3) violation of the CLRA; (4) intentional misrepresentation; (5) negligent misrepresentation; (6) unjust enrichment; (7) breach of express warranty; (8) violation of Prop 65; and (9) violation of the UCL (unlawful prong). Because Goya previously argued Plaintiffs' original complaints were based on underlying Prop 65 claims (ECF No. 7), Plaintiffs specified that the FACC's first seven causes of action are "not predicated on the violation of Prop 65 but, rather [are] based on Goya's failure to disclose Goya's 4-MEI content, which duty arose separately from, and independently of, [Prop] 65." (FACC ¶¶ 46, 52, 57, 66, 74, 79, 86 [emphasis added].) The eighth and ninth causes of actions are the only claims premised on Prop 65. (*Id.* ¶¶ 87-98.)

[1] The *Park* and *Perez* actions were originally filed in the Central District of California before they were transferred to this Court. (MSJ RJN Ex. 5 [Park Compl.], ECF No. 84-7; MSJ RJN Ex. 6 [Perez Compl.], ECF No. 84-8.)

Unlike Plaintiffs' original complaints, the FACC was expanded to include Sangria and Ginger Beer. (*Id.* ¶ 1.) Plaintiffs define the purported class as: "all persons in California who purchased [from January 23, 2010 to January 23, 2014] primarily for personal, family, or household use, and not for resale, Malta Goya, Goya Sangria, or Goya Ginger Beer." (*Id.* ¶ 32.)

Goya filed a motion to dismiss and to strike portions of the FACC on several grounds. (ECF No. 31.) The Court denied Goya's motion as to all causes of action, except the breach of express warranty claim, which was dismissed with prejudice. (Order at 25-26, ECF No. 42.) It accepted Plaintiffs' disclaimer that their first seven causes of action are independent of Prop 65. (*Id.* at 9.)

In addition, the Court denied Goya's motion to strike all allegations concerning Sangria and Ginger Beer. It accepted at the pleadings stage Plaintiffs' allegations that all three beverages are substantially similar because they "contained high levels of 4-MEI" and Goya "deceptively omits that the Goya beverages contain very high levels [and] amounts of 4-MEI.'" (*Id.* at 28-30.) It also accepted Plaintiffs' admission that they did not purchase Sangria or Ginger Beer and agreed to "revisit this issue at the class certification stage in determining whether a class can be certified and, if so, the 'contours of that class.'" (*Id.* at 29.)

E. The Parties Have Completed Class Certification Discovery.

The Court ordered class certification discovery to be completed by October 19, 2015. (ECF No. 48.) Plaintiffs served one set of document requests and deposed one Goya witness. (La Scala Decl. ¶ 2; Kaneko MSJ Decl., Ex. D [Oct. 19, 2015 Dep. Tr. of Joseph Perez, ECF No. 84-14].)

1. Ms. Cortina's litigation background and purchasing history

In addition to this case, Ms. Cortina has been (or is) a class representative in four other cases. In January 2012, a complaint was filed and dismissed on Ms. Cortina's behalf in the District Court of Massachusetts, *Cortina v. Welch Foods, Inc.*, No. 1:12-cv-10070 (D. Mass.). (Request for Judicial Notice in Supp. of Goya's

Opp'n ("Opp. RJN") Ex. 1 [Welch *Compl.*], Ex. 2 [Welch Notice of Voluntary Dismissal].) But Ms. Cortina testified she did not know a complaint had even been filed on her behalf. (Cortina Dep. at 287:15-25.)

Ms. Cortina is represented by Fitzgerald in another class action pending in this district, *Cortina v. Wal-Mart Stores, Inc.,* No. 13-cv-02054 (S.D. Cal.). (Cortina Dep. at 260:8-11; Opp. RJN Ex. 3 [Wal-Mart Compl.].) She is seeking a dismissal and is willing to dismiss with prejudice to avoid the imposition of attorneys' fees. (Opp. RJN Ex. 4 [Motion to Voluntarily Dismiss].) Defense counsel in that case has requested sanctions against Ms. Cortina and Fitzgerald, along with an order deeming Fitzgerald inadequate class counsel. (Opp. RJN Ex. 5 [Motion for Sanctions].)

Two weeks before filing her complaint in this case, Ms. Cortina filed another suit that was removed from state court to this district, *Cortina v. Novartis Consumer Health,* No. 3:14-cv-00069 (S.D. Cal. Jan. 10, 2014). (Opp. RJN Ex. 6 [Novartis Compl.].) She has not spoken with her lawyer in that case for more than one year. (Cortina Dep. at 262:8-20.) Unbeknownst to her, the action was dismissed. (*Id.*; Opp. RJN Ex. 7 [Notice of Voluntary Dismissal].)

On January 23, 2014, the same day Ms. Cortina filed her initial complaint in this case, she also filed a similar action, *Cortina v. Pepsico, Inc*., No. 3:14-cv-00168 (S.D. Cal.). (Opp. RJN Ex. 8 [Pepsico Compl.) The allegations in both complaints are nearly identical, including references to Malta Goya as canned soft drinks. (*Compare id*., *with* Cortina Compl. ¶¶ 14, 15; *see also* Perez Decl. ¶ 2 [Malta Goya never sold in cans.) Ms. Cortina's case against Pepsico was transferred to the Northern District of California, where it was consolidated with other similar actions. (Opp. RJN Ex. 9 [Transfer Order].) Ms. Cortina is no longer a named plaintiff in that case. (Opp. RJN Ex. 10 [Am. Compl.].)

Although Ms. Cortina pleaded that she has purchased Malta Goya since 2007 or 2008 (FACC ¶ 27), she testified she has purchased – and enjoyed – Malta Goya since at least 1999 (Cortina Dep. at 64:5-9, 87:1-5, 111:5-8). She also pleaded that she

purchased 10-12 cans or bottles of Malta Goya once per month. (Cortina Compl. ¶ 15; FACC ¶ 27; *but see* Perez Decl. ¶ 2 [Malta Goya never sold in cans].) But in her deposition, she testified she may have purchased Malta Goya more than twenty times during the class period and does not know whether she purchased single bottles or six-packs. (*Id.* at 117:9-118:19.) She testified she was mistaken in referring to Malta Goya as canned soft drinks in her original complaint because she had confused her purchases of other Goya products (e.g., juices, coconut water, etc.) with her purchases of Malta Goya. (*Id.* at 196:16-197:16.)

According to her original complaint (¶ 15) and the FACC (¶ 27), Ms. Cortina purchased Malta Goya only, a fact she confirmed in Plaintiffs' Opposition to Goya's Motion to Dismiss (ECF No. 34 at 23:21). But she testified she also purchased Sangria more than fifty times during the class period, which would be more than her purchases of Malta Goya. (Cortina Dep. at 128:24-129:4, 209:15-17.) Other than one location, she could not remember where she bought Sangria or how much she bought per transaction. (*Id.* at 129:11-131:8.) Ms. Cortina did not buy Ginger Beer. (*Id.* at 38:1-8.) She does not know what Ginger Beer is and has no basis to compare it to Malta Goya or Sangria. (*Id.* at 37:21-38:8, 205:16-208:13.)

Ms. Cortina cannot say how much she spent on Malta Goya or Sangria. (Cortina Dep. at 141:4-8.) She estimates she paid between $1-3 for a 12-ounce bottle of Malta Goya; between $4-5 for a six-pack of 7-ounce bottles of Malta Goya; and less than $1 for single 7-ounce bottles of Malta Goya. (*Id.* at 122:16-124:18.) While she does not know if Sangria is sold in 7- or 12-ounce bottles, she estimates she paid from $1.00 to $3.00. (*Id.* at 132:14-16.) She did not keep receipts for any of her purchases. (*Id.* at 56:2-4, 138:9-11.) She did not pay the same price for each purchase. (*Id.* at 135:11-20.)

Ms. Cortina does not recall the first time she read the ingredients list for Malta Goya (probably 2014). She does not know if she ever read the ingredients list for

Goya Sangria. She probably never read the ingredients list for Ginger Beer. (Cortina Dep. at 68:25-69:19, 87:23-25, 237:1-12.)

Ms. Cortina believes that a Prop 65 warning is not enough and that Goya should disclose 4-MEI by name on its products. (Cortina Dep. at 200:23-201:22.)

2. Mr. Park has not participated in this litigation.

Mr. Park did not respond to Goya's written discovery and failed to appear for his deposition. (Kaneko MSJ Decl. ¶ 16, Ex. M [Reporter's Decl. of Nonappearance], ECF No. 84-23.) On September 9, 2015, his counsel (Glancy, Prongay & Murray, LLP) filed a motion for leave to withdraw, stating that they have lost contact with Mr. Park and that he is not an adequate class representative. (ECF No. 56.)

3. Ms. Perez's purchasing history and litigation goals

Ms. Perez drank Malta Goya only. She did not purchase or consume Sangria or Ginger Beer. (La Scala Decl., Ex. B [Oct. 12, 2015 Dep. Tr. of Jilliann Perez] ("Perez Dep.") at 37:9-18.) According to her interrogatory responses, Ms. Perez "made approximately three purchases of multi-packs of Goya Beverages [from January 2010 to January 2014], each purchase was of a six-pack of 7 ounce of Malta flavored Goya beverages." (La Scala Decl., Ex. C [Perez Original Special Interrogatory Responses.) At her deposition, she provided amended responses and testified her prior responses were inaccurate and that she purchased about thirty six-packs of 7-ounce Malta Goya during the class period. (Perez Dep. at 16:20-17:15, 110:6-112:12.)

In her original complaint, Ms. Perez alleged she purchased Malta Goya "from Porto's Bakery in Burbank many times over the past years." (MSJ RJN Ex. 6 [Perez Compl. ¶ 1], ECF No. 84-8.) This was also a mistake. Ms. Perez testified she confused "Ironbeer," a Cuban soda similar to Sprite that she purchased between five and ten times (*id.* at 130:22-134:8, 136:5-137:7), with Malta Goya, which she first tried in 2008 and bought in six-packs every other month from January 2010 to January 2014 (*id.* at 118:119:5). Ms. Perez estimates she spent approximately $6 to $7 per

six-pack of 7-ounce bottles. (*Id.* at 153:3-7.) She does not have any receipts documenting her purchases. (*Id.* at 69:23-70:1.)

Ms. Perez enjoyed drinking Malta Goya. (*Id.* at 119:16-20.) She did not pay attention to the Malta Goya label when she purchased the product. (*Id.* at 187:5-11.) Her reasons for drinking Malta Goya were not based on advertising, marketing, or labeling. (*Id.* at 154:11-155:10; 187:5-188:13.)

Unlike Ms. Cortina, Ms. Perez does not seek to require Goya to disclose 4-MEI specifically because it is her opinion no one knows what 4-MEI is. (*Id.* at 33:4-17, 80:1-20, 200:7-11.)

III. PLAINTIFFS' PROP 65 CLAIMS ARE BARRED UNDER RES JUDICATA AND CANNOT BE CERTIFIED.

Plaintiffs have limited the scope of their class certification motion to "claims relating to the omission of the Prop 65 warning." (ECF No. 83-1, at 3 n.2; *see also id.* at 19 ["Determination of whether Goya violated Prop 65 is an essential element of every claim plaintiffs seek to certify…."].) They state in the FACC that their first seven causes of action are "not predicated on the violation of Prop 65 but, rather [are] based on Goya's failure to disclose Goya's 4-MEI content, which duty arose separately from, and independently of, [Prop] 65." (FACC ¶¶ 46, 52, 57, 66, 74, 79, 86 [emphasis added].) Plaintiffs seek, therefore, to certify only their eighth cause of action for violation of Prop 65 and their ninth cause of action for violation of the UCL under the unlawful prong. (FACC ¶¶ 87-98.)

Plaintiffs' motion should be denied because they are barred from litigating their Prop 65 claims. As explained in Goya's motion for summary judgment (ECF No. 84), Plaintiffs' Prop 65 cause of action is barred under the doctrine of res judicata. A final judgment in another Prop 65 case (*Chase*), which was brought on behalf of the citizens of California and based on the same allegations in Plaintiffs' eighth cause of action, has been entered against Goya. (*See* ECF No. 84-1, at 9-11 (citing *Consumer Advocacy Grp. v. ExxonMobil Corp.*, 168 Cal. App. 4th 675 (2008).)

Plaintiffs also cannot proceed with their ninth cause of action under the UCL unlawful prong because it is based on the same violation of Prop 65. *See People of California v. Kinder Morgan Energy Partners, L.P.,* 569 F. Supp. 2d 1073 (S.D. Cal 2008). In *Kinder Morgan*, the plaintiffs sued the defendants for contaminating groundwater that the City of San Diego planned to develop as a future source of drinking water. *Id*. at 1079. The district court dismissed the plaintiffs' Prop 65 claim because Prop 65 does not protect "potentially suitable" sources of drinking water. *Id*. at 1089. It also dismissed the plaintiffs' UCL claim based on a violation of Prop 65. "[B]ecause the Court has dismissed Plaintiffs' Prop 65 claim, the seventh cause of action [for violation of Prop 65] is unavailable as an UCL predicate offense." *Id*. at 1091; *see also Consumer Def. Grp. v. Rental Hous. Indus. Members*, 137 Cal. App. 4th 1185, 1220 (2006) (UCL claim "predicated on Proposition 65 warning violations must be dismissed if the underlying Prop 65 claim is dismissed").

Here, because the Court should dismiss Plaintiffs' eighth cause of action for violation of Prop 65 as barred under res judicata, Plaintiffs should not be permitted to use that barred claim as a predicate offense for their UCL cause of action under the unlawful prong. Plaintiffs also cannot use the *Chase* consent judgment as evidence of a Prop 65 violation. The consent judgment is not based on any findings that Goya violated Prop 65. (MSJ RJN Ex. 3 [Pls.' Notice of Am. Ex. 1 to Mot. for Court Approval and Entry of Consent J., Ex. B ¶ 1.8], ECF No. 84-5.)

In sum, Plaintiffs seek to certify claims that are barred under the doctrine of res judicata. Their motion should be denied.

IV. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF SATISFYING THE PREREQUISITES UNDER RULE 23(A).

Rule 23(a) mandates that Plaintiffs demonstrate numerosity, commonality, typicality, and adequacy of representation in order to maintain a class. Plaintiffs have not demonstrated commonality or typicality under Rules 23(a)(2) and (3). And their ability to adequately represent a class under Rule 23(a)(4) is doubtful.

A. Plaintiffs' Claims Are Not Common Or Typical.

The claims of a class representative must be typical of the claims of the proposed class. Fed. R. Civ. P. 23(a)(3). Although a class representative's claims need not be identical with those of the entire class, the representative must be part of the class and possess the same interest and suffer the same injury as class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Because "[t]he commonality and typicality requirements of Rule 23(a) tend to merge" (*id*. at 157-58 n.13), these prerequisites will be addressed concurrently.

Plaintiffs allege, "Every class member suffered damages because each paid money for the Products not knowing, due to Goya's failure to comply with Prop 65, that they contain a dangerous carcinogen." (ECF No. 83-1, at 8.) But Plaintiffs' deposition testimony and the allegations in their FACC demonstrate that their claims, the relief they seek, and their purchasing behaviors are not common or typical of the purported class.

To begin with, Plaintiffs' claims are not common or typical because they did not purchase all of the products at issue. It is doubtful Plaintiffs ever purchased Ginger Beer or Sangria. Ms. Cortina testified she did not buy Ginger Beer, she does not know what Ginger Beer is, and she cannot compare Ginger Beer to Malta Goya or Sangria. (Cortina Dep. at 37:21-38:8, 205:16-208:13.) She did not allege she purchased Sangria in her original complaint. (FACC ¶ 27.) She did not include Sangria in her Prop 65 notice. (Kaneko MSJ Decl., Ex. B [Cortina 60-Day Notice], ECF No. 84-12.) And she admitted in opposition to Goya's motion to dismiss the FACC that she never purchased Sangria. (ECF No. 34, at 23:21.) More than a year after her admission, however, Ms. Cortina testified she purchased Sangria more than 50 times. (Cortina Dep. at 128:24-129:4.) But that contradicts her testimony that she purchased Malta Goya more than Sangria. (*Id.* at 209:15-17.)

Ms. Perez testified she did not purchase or drink Ginger Beer or Sangria. (Perez Dep. at 37:9-18.) She also did not identify those beverages in her Prop 65

notice. (Kaneko MSJ Decl., Ex. C [Perez 60-Day Notice], ECF No. 84-13.) And Mr. Park, who failed to serve a Prop 65 notice, alleged only that he purchased Malta Goya. (MSJ RJN Ex. 5 [Park Compl.], ECF No. 84-7; Kaneko MSJ Decl. ¶ 6.) Moreover, none of the plaintiffs have receipts for any of their alleged purchases. (Cortina Dep. at 56:2-4, 138:9-11; Perez Dep. at 69:23-70:1.)

The Court denied Goya's motion to strike allegations concerning Ginger Beer and Sangria based on Plaintiffs' contention that all three products are "'substantially similar.'" (ECF No. 42, at 25-26.)[2] It acknowledged Plaintiffs' admission that none of them purchased Ginger Beer and Sangria but accepted their claim that all three beverages "'contained high levels of 4-MEI'" and that Goya deceptively omitted that these beverages contained high levels of 4-MEI. (*Id*. at 29-30.)

Class certification discovery is now closed. (ECF No. 48.) Plaintiffs have cited no evidence in their motion for class certification demonstrating Ginger Beer and Sangria are substantially similar to Malta Goya. Moreover, the undisputed evidence is that the level of 4-MEI in Ginger Beer has at all times been "way below the [Prop 65] threshold." (Kaneko MSJ Decl., Ex. D [Goya Dep. at 24:25-25:13], ECF No. 84-14.) The Court should now find that Plaintiffs' claims are not sufficiently similar to those of putative class members who purchased Ginger Beer or Sangria.

In addition, the relief sought by Plaintiffs is not common or typical. Ms. Cortina and Ms. Perez disagree on whether Goya should disclose 4-MEI on its labels or provide a Prop 65 warning. Ms. Cortina testified that a Prop 65 warning is not enough and that Goya should disclose 4-MEI by name. (Cortina Dep. at 200:23-201:22.) Her position is at odds with the position taken in Plaintiffs' class

[2] The Court did not make a finding whether Plaintiffs lack standing to pursue claims on beverages they did not buy. Instead, the Court deferred the issue to class certification under an assessment of typicality. (ECF No. 42, at 29.) While Goya maintains that this is also an issue of standing, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("a plaintiff must demonstrate standing for each claims he seeks to press"), it will address the issue under a Rule 23(a)(3) analysis.

certification motion. (ECF No. 83-1, at 3 n.2.) It also conflicts with Ms. Perez's position that Goya should not disclose 4-MEI specifically because no one knows what 4-MEI is. (Perez Dep. at 33:4-17, 80:1-20, 200:7-11.)

Finally, Plaintiffs' decision to purchase Malta Goya without first reviewing the labels renders them unfit to represent a putative class of purchasers who purportedly would not have purchased Goya beverages labeled with a Prop 65 warning. Ms. Cortina testified that although she first purchased Malta Goya in 1999, she probably did not look at the labelled ingredients until 2014. (Cortina Dep. at 68:25-69:19, 87:23-25.) She does not remember ever reading the Sangria ingredient list and "probably never did" read the Ginger Beer ingredient list. (Cortina Dep. at 237:1-12.) In response to a question whether consumers read ingredients on a product label, Ms. Cortina conceded, "Every person is different." (*Id.* at 238:4-9.)

Ms. Perez testified she rarely reads the labels on products she buys. (Perez Dep. at 191:4-8.) She admitted she did not pay attention to the Malta Goya label. (*Id.* at 187:5-11.) And, like Ms. Cortina, Ms. Perez conceded that consumers differ on whether they view product labels. (*Id.* at 192:14-17.)

Despite the introductory argument of their class certification motion (ECF No. 83-1, at 3), labels do **not** matter – at least as far as Plaintiffs are concerned. Their claims are not common or typical because the putative class's legal theory (i.e., Prop 65) is inconsistent with Plaintiffs' purchasing practices. They are not members of the class they purport to represent. *See Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962).

B. Plaintiffs Will Not Fairly And Adequately Represent The Purported Class.

A class representative may be deemed inadequate for failing to prosecute a claim diligently. *See Hesse v. Sprint Corp.*, 598 F. 3d 581, 589 (9th Cir. 2010); *see also Hanton v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (Plaintiffs' counsel must "prosecute the action vigorously on behalf of the class").

1. Ms. Cortina is a professional plaintiff with a dismal record of dropping the ball.

In the past four years, Ms. Cortina has been a class representative in four other cases. And in each case, her involvement yielded nothing for the purported class:

- *Cortina v. Welch Foods, Inc.*, 1:12-cv-10070 (D. Mass. Jan. 11, 2012) – voluntarily dismissed. (Opp. RJN Ex. 2.) Ms. Cortina was not even aware the case had been filed. (Cortina Dep. at 287:15-25.)
- *Cortina v. Wal-Mart Stores, Inc.*, No. 13-cv-02054 (S.D. Cal. Sep. 3, 2013) – dismissal pending. Ms. Cortina offered to dismiss with prejudice to avoid an award of attorneys' fees. (Opp. RJN Ex. 4.) Ms. Cortina and Fitzgerald are the subject of a sanctions motion, including a request that Fitzgerald be deemed inadequate class counsel. (Opp. RJN Ex. 5.)
- *Cortina v. Novartis Consumer Health*, 3:14-cv-00069 (S.D. Cal. Jan. 10, 2014) – dismissed. (Opp. RJN Ex. 7.) Ms. Cortina has not spoken to her counsel in a year and was unaware of the dismissal. (Cortina Dep. at 261:13-262:20.)
- *Cortina v. Pepsico, Inc.*, No. 3:14-cv-00168 (S.D. Cal. Jan. 23, 2014, ECF No. 1.) – transferred to Northern District of California and consolidated with other similar actions. (Opp. RJN Ex. 9.) Ms. Cortina is no longer a named plaintiff, and Fitzgerald is no longer class counsel. (Opp. RJN Ex. 10.)

In sum, Ms. Cortina has proven she is incapable of monitoring her cases or her counsel's conduct. She cannot handle the responsibilities of a class representative.

2. Mr. Park has disappeared.

Mr. Park is not an adequate class representative. His counsel (Glancy Prongay & Murray, LLP) filed a motion to withdraw on September 9, 2015. (ECF No. 56.) As explained in the motion, Mr. Park failed to respond to Goya's written discovery requests and has lost communication with his counsel. (*Id.* at 4.) He also failed to appear at this deposition. (Kaneko MSJ Decl. ¶ 16, Ex. M [Reporter's Declaration of

Nonappearance], ECF No. 84-23.) His interests "have become unaligned with those of the putative class." (ECF No. 56, at 4.) And his counsel "no longer believes [he] is an adequate class representative." (*Id.*)

With Mr. Park having disappeared, the Glancy firm has not demonstrated why it should be class counsel. It has no incentive to prosecute this action vigorously.

3. Ms. Perez's interests are not aligned with the interests of Ms. Cortina and putative class members.

Class certification is inappropriate if fundamental conflicts of interest are determined to exist among the proposed class members. "It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Proc. § 1768, at 326 (2d ed. 1986). A conflict is "fundamental" when it affects the specific issues in controversy. *Id.* at 326-27; *see also Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp. L.P.*, 247 F.R.D. 156, 177 (C.D. Cal. 2007) ("[M]ost courts share the view that 'a class cannot be certified when its members have opposing interests . . . .'") (citation omitted).

As noted above (Section V.A), Ms. Perez demonstrates clear opposing interests between her and Ms. Cortina. Ms. Perez testified that most consumers would not understand or place any significance to the disclosure of 4-MEI in Goya's beverages. (Perez Dep. at 33:4-17, 80:1-20, 200:7-11.) Instead, she wants Goya to notify consumers that the subject products may contain a potential carcinogen, consistent with Prop 65. (*Id.*) On the other hand, Ms. Cortina believes that a Prop 65 warning would be insufficient and that Goya should be required to explicitly disclose the presence of 4-MEI on its labels. (Cortina Dep. at 200:23-201:22.) If the named plaintiffs cannot agree on the form of relief, it should not be presumed that their interests will align with those of the class.

The conflict between the class representatives and the class members is further highlighted in Plaintiffs' Motion and the claims they seek to certify (and those they do not). Plaintiffs seek certification for only two out of their nine alleged causes of action – i.e., their Prop 65 and derivative UCL unlawful claims. (ECF No. 83-1, at 3 n.2) As to Plaintiffs' remaining claims, which are "not predicated on the violation of [Prop] 65" (FACC ¶¶ 46, 52, 57, 66, 74, 79, 86, 98), Plaintiffs' motion for class certification ignores them.

In sum, the interests of Plaintiffs and the purported class are incongruent. Plaintiffs are not adequate class representatives. And other than brochures generally describing their experience (ECF Nos. 83-10, 83-11, & 83-12), Plaintiffs' counsel have provided no information to support a finding under Rule 23(a)(4) & (g).

V. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PROOF THAT THIS ACTION SHOULD BE CERTIFIED UNDER RULE 23(B)(3).

Plaintiffs have failed to satisfy Rule 23(b)(3), which requires the Court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

A. The Ascertainability Requirement Cannot Be Satisfied Because The Class Definition Is Overbroad And Is Not Administratively Feasible.

Although not explicitly required by Rule 23, a class must be adequately defined and ascertainable before a class may be certified. A class is not ascertainable unless its membership can be established by objective and verifiable criteria. *Jones v. ConAgra Foods, Inc.*, No. C12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, at *30-44, 2014 WL 2702726, at *8-12 (N.D. Cal. June 13, 2014); *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1076, 1089-90 (N.D. Cal. 2011) ("Without an objective, reliable way to ascertain class membership, the class quickly would become unmanageable, and the preclusive effect of final judgment would be easy to evade."); *see also* Manual for Complex Litigation, Fourth § 21.222 at 270-71 (2004) (class membership must be

ascertainable so that class members receive the best notice practicable and have an opportunity to opt out). The class "must be sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member." *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 440 (N.D. Cal. 2014).

Here, Plaintiffs define the class as "all persons in California who purchased . . . primarily for personal, family, or household use, and not for resale, Malta Goya, Goya Sangria, and Goya Ginger Beer [from January 23, 2010 to January 23, 2014]." (FACC ¶ 32; ECF No. 83-1, at 2.) This definition fails to meet the ascertainability requirement for two reasons.

First, the proposed class is too broad. It includes consumers who have not been injured. *See Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 455 (S.D. Cal. 2014) ("Because the proposed class includes these 'uninjured' purchasers, the class is impermissibly overbroad and thus unascertainable.")[3] Plaintiffs seek to recover for violations of Prop 65 based on the inclusion of 4-MEI in Malta Goya, Sangria, and Ginger Beer from January 23, 2010 to January 23, 2014. But, as Plaintiffs concede in their opposition to Goya's Motion for Summary Judgment (ECF No. 83-1, at 2 n.2), the addition of 4-MEI to Prop 65's list did not become effective until January 7, 2012. Cal. Code Regs., tit. 27, § 27001(c); Cal. Health & Safety Code §§ 25249.8, 25249.10(b). Accordingly, Goya could not have violated Prop 65 before January 7, 2012. Half of Plaintiffs' proposed four-year class period covers purchases when Prop 65 did not apply to the subject products.

In addition, the class is overbroad because it includes purchasers of Ginger Beer and Sangria. As noted above in section II.F, the undisputed evidence is that Ginger Beer did not exceed the threshold limit of 4-MEI under Prop 65. (Kaneko MSJ Decl., Ex. D [Goya Dep. at 22:21-25:13; 35:13-36:18.) And Plaintiffs have offered no evidence that the inclusion of 4-MEI in Sangria (or even Malta Goya for that matter)

[3] This argument also is a challenge to the proposed class members' standing. *See Algarin,* 300 F.R.D. at 454.

exceeds the threshold limit under Prop 65. That Malta Goya tested above 29 micrograms per 12-ounce serving does not demonstrate a violation of Prop 65. The exposure level is per day – not per serving. *See Envtl. Law Found. v. Beech-Nut Nutrition Corp*., 235 Cal. App. 7th 307, 321 (2015.) ("The appropriate time frame is calculated on a microgram-*per-day* basis." (emphasis added)). The class is not ascertainable because it includes uninjured consumers.

Second, Plaintiffs have failed to provide a reliable method of identifying the class members. *See Algarin*, 300 F.R.D. at 455. Goya recognizes that the law in the Ninth Circuit is unsettled on whether class members can "self-identify" (i.e., provide no documentary proof of purchase). *Compare Algarin*, at 456 (S.D. Ca. 2014); *and In re Clorox*, 301 F.R.D. at 440 (N.D. Cal. 2014) ("Affidavits from consumers alone are insufficient"), *with Lilly v. Jamba Juice*, 308 F.R.D. 231 (N.D. Cal. 2014); *and In re Conagra Foods*, 302 F.R.D. 537 (C.D. Cal. 2014); *and Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013). But many courts have recognized this presents serious problems that may preclude class certification, especially where low-priced items can be mistaken with similar products by the same manufacturer or a competitor and where receipts are often discarded. *See, e.g., Jones*, 2014 U.S. Dist. LEXIS 81292, at *62, 2014 WL 2702726, at *16 (individualized purchasing inquiries predominated over common ones); *Sethavanish v. ZonePerfect Nutrition Co*., No. 12-2907-SC, 2014 U.S. Dist. LEXIS 18600, at *13-18, 2014 WL 580696, at *4-6 (N.D. Cal. Feb. 13, 2014); *In re POM Wonderful LLC*, 2014 U.S. Dist. LEXIS 40415, at *24, 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014)(class unascertainable because "[f]ew, if any, consumers are likely to have retained receipts during the class period" and "there is no way to reliably determine who purchased Defendant's [juice] products or when they did so.").

The pleadings and testimony of Plaintiffs illustrate the unmanageability of administering a class fund to individuals who must accurately – and honestly – identify themselves as having a right to recover. Ms. Cortina has had trouble

distinguishing Malta Goya from other Goya products that are not part of the class definition. She erroneously alleged that Malta Goya came in cans (rather than bottles) because she was "buying a lot of cans from Goya, different flavors like pineapple, you know, or juices" and this confused her. (Cortina Dep. at 196:16-197:16; *see* Perez Decl. ¶ 2 [Malta Goya never sold in cans].)

Ms. Cortina alleged in her pleadings that she purchased 10-12 cans/bottles of Malta Goya per month beginning in 2007 or 2008. (Cortina Compl. ¶15; FACC ¶ 27.) But in her deposition, she claimed to have purchased Malta Goya since 1999, hesitated to estimate the number of times she purchased Malta Goya, and could not answer whether she bought single bottles or six-packs of Malta Goya. (*Id.* at 64:5, 87:1-5,117:6-23, 118:10-19.). While she estimated she paid between $1.00 and $3.00 for a 12-ounce bottle of Malta Goya, between $4.00 and $5.00 for a 6-pack of 7-ounce bottles, and less than $1.00 for a 7-ounce bottle, (*id.* at 122:16-124:18), she admitted that the prices varied among stores, that she did not keep her receipts, and that without receipts, she could not accurately estimate how much she spent on Malta Goya. (*Id.* at 56:2-4, 135:4-7, 138:9-11, 141:4-8.)

As discussed in section II.E.1, Ms. Cortina also had difficulty remembering whether she bought Sangria. According to her opposition to Goya's motion to dismiss the FACC, Ms. Cortina never purchased Sangria. (ECF No. 34 at 23:21.) But over one year later, she was able to recall at her deposition that she purchased Sangria more than fifty times during the class period. (Cortina Dep. at 128:10-129:10.) Even then, Ms. Cortina provided vague testimony as to her purchases of Sangria. (*Id.* at 56:2-4, 129:11-131:8, 132:14-16, 138:12-141:8, 151:12-19.)

Ms. Perez has similarly contradicted herself at various times. In her original complaint, she claims she purchased Malta Goya "from Porto's Bakery in Burbank many times over the past years. (MSJ RJN Ex. 6 [Perez Compl. ¶ 1], ECF No. 84-8.) But in the FACC, Porto's is not mentioned at all. Ms. Perez confused "Ironbeer," which she purchased between five and ten times (Perez Dep. at 130:22-134:8, 136:5-

137:7), with Malta Goya, which she allegedly purchased in six-packs every other month from January 2010 to January 2014 (*id.* at 118:119:5). But Goya does not sell Iron Beer, and according to Ms. Perez, Iron Beer tastes like "Sprite" and is not as dark as Malta Goya. (*Id.* at 132:21-133:5.) Ms. Perez also provided different estimates of how much Malta Goya she purchased (*id.* at 110:6-112:12, 118:24-119:15), and like Ms. Cortina, she did not keep her receipts. (*Id.* at 69:23-70:1.) Goya submits that self-identification makes Plaintiffs' claims incapable of certification.

Even if self-identification, by itself, is a sufficient objective criterion to determine class membership, "Plaintiffs have failed to show how it is '*administratively feasible* to determine whether a particular person is a class member.'" *Algarin*, 300 F.R.D. at 455 (quoting *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 378 (N.D. Cal. 2010)). Plaintiffs have not provided a protocol to determine whether a class member purchased one of the subject products during the class period. Neither Plaintiffs nor Goya has a consumer list or any other method for verifying true members of the proposed class (Perez Decl. ¶ 3). *See Algarin,* at 456.

In sum, the overbreadth of the class definition coupled with the administrative infeasibility of discerning the actual class members render the proposed class unascertainable and inappropriate for certification.

B. Class Treatment Is Not A Superior Method For Fairly And Efficiently Adjudicating This Matter.

Rule 23(b)(3) requires a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The Ninth Circuit has explained that the superiority requirement tests whether "class wide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (district court abused its discretion "by not adequately considering the predominance requirement before certifying the class."). Plaintiffs have not passed this test.

1. A class action is not superior to adjudicating this case because a Prop 65 action must be brought in the public interest.

Plaintiffs gain nothing for the putative class by seeking to certify their Prop 65 claim. By law, enforcement of an alleged Prop 65 violation must be brought by a prosecutor or "by a person in the public interest." Cal. Health & Safety Code § 25249.7(c) & (d). "Citizens bringing such suits need not plead a private injury and instead are deemed to sue in the public interest." *Nat'l Paint & Coatings Assn. v. State of California*, 58 Cal. App. 4th 753, 757 (1997) (quoting Cal. Health & Safety Code § 25249.7(d)). "Proposition 65 merely confers a private enforcement right on a plaintiff to seek redress for an injury to the public interest." *Envtl. Research Ctr. v. Heartland Prods.*, 29 F. Supp. 3d 1281, 1283 (2014).

Here, the proposed class is limited to "all persons in California." (FACC ¶ 32.) If the Court allows Plaintiffs to pursue their Prop 65 claim, the putative class members will receive the same benefits under Prop 65 regardless of whether a class is certified. Applying the Rule 23(b)(3) factors, (A) the putative class members have no interest in individually controlling separate actions because Prop 65 actions are brought in the public interest; (B) a Prop 65 enforcement action, which benefits the purported class here, has already been concluded in the *Chase* matter; (C) a federal class action based on state law is not desirable when compared to a Prop 65 action brought in the public interest in state court (i.e., *Chase*); and (D) converting a Prop 65 enforcement into a class action will not reduce litigation costs or promote greater efficiency.

In sum, Plaintiffs should not be permitted to litigate their Prop 65 claim at all because it is barred by res judicata. But if the Court allows them to proceed, which it should not, the Prop 65 claim need not be certified.

2. Plaintiffs have not demonstrated that restitution is capable of measurement on a class wide basis.

Plaintiffs' argue their "theory of damages" in this case is about restitution. (ECF NO. 83-1, at 16.) But according to the Supreme Court, Plaintiffs must

demonstrate that the "restitution" they seek can be calculated on a class-wide basis through a model that is not speculative or unreasonable. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013). Here, Plaintiffs have made no effort to show how restitution can be measured on a class wide basis.[4]

Plaintiffs claim they can equate "restitution" with "the full amount received by Goya as a result of its sale of the Products." (ECF No. 83-1 at 16; *but see* Cortina Dep. 282:25-283:8 [Ms. Cortina wants the class to recover their purchase price].) Plaintiffs are wrong. Their proposed theory correlates with "non-restitutionary disgorgement," which is not available under the UCL. *In re Tobacco II Cases*, 240 Cal. App. 4th 779, 800 (2015). While restitution is available under the UCL, that theory focuses on the loss to the consumer. *Id*. This invites two questions; neither of which Plaintiffs bothered to address substantively in their class certification motion.

First, what was the price paid by the class for the subject products? Along with their uncertain testimony regarding how much of the products they purchased, Plaintiffs do not know the prices they paid. For example, while Ms. Cortina testified she paid between $4 and $5 for one six-pack of 7-ounce Malta Goya (Cortina Dep. at 122:16-124:18), Ms. Perez claims she paid between $6 and $7 for the same six-pack. (Perez Dep. at 153:3-7.) And they have no receipts to substantiate their alleged purchases. (Cortina Dep. at 141:4-8.)

Because Goya only sells these products to distributors and retailers in California who then sell to consumers (Decl. of Joseph Perez In Supp. of Goya's Mot. For Summ. J. ¶ 3, ECF No. 84-24), it does not have accurate information regarding actual retail prices paid by consumers. (*Id.*) And as Ms. Cortina testified, product prices varied between stores during the class period. (Cortina Dep. at 135:4-7.)

[4] Plaintiffs claim entitlement to restitution under their UCL, CLRA, and unjust enrichment claims. But as explained in section III, Plaintiffs' certification motion is limited to their Prop 65 and UCL (unlawful prong) causes of action.

Second, did the class members derive some value from the beverages despite the absence of a Prop 65 warning, and if so, how can that value be quantified in comparison to the price paid? Plaintiffs assert in their class certification motion that the class members would not have purchased the beverages with a Prop 65 warning and that the beverages were worth nothing to the class. (ECF No. 83-1 at 16.) But that contradicts their pleadings and deposition testimony.

For example, the FACC states: "Plaintiffs and members of the putative class would not have purchased the Goya beverages, or **would have only been willing to pay less for them**, if they knew the beverages contained a substance known to be a carcinogen and believed to be dangerous at the levels actually present in the beverages." (FACC ¶ 30 (emphasis added).) They also testified they did not know if other consumers would have purchased the beverages for less money if they knew the beverages contained a substance known to be a carcinogen. (Cortina Dep. at 212:10-213:15; Perez Dep. at 96:7-97:11.) And Plaintiffs admitted that they derived some value from the beverages because they enjoyed drinking them. (Cortina Dep. at 87:1-5, 111:5-8; Perez Dep. at 119:16-20.) Plaintiffs have offered no testimony or other evidence (e.g., consumer survey) to assist the Court in answering this question.

In sum, Plaintiffs seek a monetary recovery that is not legally available to them. While restitution is an available remedy, Plaintiffs have not explained how restitution can be calculated in a nonspeculative and reasonable way. And even if the total price paid by the class during the class period could be calculated, determining the value of those beverages for each California consumer would be a manageability nightmare.

C. Common Questions Do Not Predominate Over Individual Questions Affecting The Class.

For certification under Rule 23(b)(3), common issues of law and fact must predominate over individual issues. In evaluating predominance, a court reviews the substantive elements of the plaintiff's cause of action and analyzes the proof needed for the various elements. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 609,

623 (1997) (recognizing that "[c]ommonality is subsumed under . . . the more stringent" and "far more demanding" Rule 23(b)(3) predominance requirement). The Supreme Court explained that "the predominance criterion is far more demanding" than Rule 23(a)'s commonality requirement. *Id.* at 623-24. And the Ninth Circuit held that where the principal issues in a case require "separate adjudication of each class member's individual claim [], a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst., Inc*., 253 F.3d 1180, 1189 (9th Cir. 2001).

As discussed above, individual questions affecting the class include the members' varied purchasing decisions and the conflicting positions on what, if anything, Goya should have included on its product labels. These individual issues predominate over common questions of fact or law, which should be fatal to Plaintiffs' motion. *See, e.g., Hodes v. Van's Int'l. Foods, Inc*., No. CV 09-01530 RGK (FFMx), 2009 U.S. Dist. LEXIS 72193, at *10-14, 2009 WL 2424214, at *3-5 (C.D. Cal. July 23, 2009) (individual issues regarding purchasing decisions of tens of thousands potential class members meant common issues did not predominate); *Mahfood v. QVC, Inc*., No. SACV 06-0659-AG (ANx) 2008 U.S. Dist. LEXIS 105229, at *12-14, 2008 WL 5381088, at *4-5 (C.D. Cal. Sept. 22, 2008) (class certification rejected because there was no evidence of a single, uniform misrepresentation that deceived each proposed class member in the same way).

In addition, individual issues invade any determination regarding the amount of restitution, if any, owed to each class member. To date, no consumers (other than Plaintiffs) have ever sought a refund from Goya related to 4-MEI or failing to include a Prop 65 warning on its labels. (Goya Dep. 104:10-22) Many purchasers of Goya's products were presumably pleased with the products and consumed them. Full restitution to these consumers would do more than return them to the status quo. They would receive a windfall: their drinks and their money back.

As discussed above, moreover, any "damages" model would have to address the rule that UCL-based restitution is limited to the difference between what was paid and

the value of what was received. *In re POM Wonderful*, No. 10-02199 DDP (RZx), 2014 U.S. Dist. LEXIS 40415, at *11-13, 2014 WL 1225184, at *2-3 (C.D. Cal. Mar. 25, 2014). Individual damages (or restitution) issues undermine the alleged predominance of common issues. *See Stiller v. Costco Wholesale Corp*., 298 F.R.D. 611, 627 & n.10 (S.D. Cal. 2014) (individualized damages issues defeat predominance); *Hodes v. Van's Int'l. Foods, Inc*., *supra*, 2009 U.S. Dist. LEXIS 72193, at *10-14, 2009 WL 2424214, at *3-5 (same). For this reason also, Plaintiffs' motion should be denied.

VI. CONCLUSION

For all of the above reasons, Goya respectfully submits that the Court should deny Plaintiffs' motion for class certification. The claims they seek to certify are barred under the doctrine of res judicata. And, in any event, they have not met their burden of proving the prerequisites in Rule 23(a) and overcoming the procedural safeguards of Rule 23(b)(3).

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Respectfully submitted,

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