IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE: SIMPLY ORANGE ORANGE JUICE MARKETING AND SALES PRACTICES LITIGATION	MDL No. 2361
This Document Relates To: ALL CASES	Master Case No. 4:12-md-02361-FJG

ORDER

Pending before the Court is Plaintiffs' Motion for Class Certification (Doc. No. 280). For the reasons stated below, the motion is granted in part, and the Court certifies an issues class pursuant to Fed. R. Civ. P. 23(c)(4).

I. Background

Plaintiffs in this action assert that defendant, The Coca-Cola Company ("Coca-Cola"), sells millions of containers of Simply Orange, Minute Maid Pure Squeezed, and Minute Maid Pure Premium (the "orange juice products") to consumers each year throughout the seven states at issue in this matter. Plaintiffs assert that defendant has failed to disclose its use of added flavors in these products, consisted with federal labeling regulations. Plaintiffs further assert that defendant omits the proper disclosures regarding added flavors, so that consumers are deceived into paying a price premium for these products. Named Plaintiffs are consumers from seven states (Alabama, California, Florida, Illinois, Missouri, New Jersey, and New York) who seek to certify a class. Each Named Plaintiff purchased one or more of the orange juice products between March 10, 2006 and the present and based their purchasing decisions, at least in part, on Coca-Cola's representations (on product labels and advertising) omitting any disclosure of any added flavors. Plaintiffs move to certify classes of purchasers of the

orange juice products under (i) Rule 23(b)(3) for damages and relief, and (ii) Rule 23(b)(2) for injunctive relief. Plaintiffs alternatively seek certification under Rule 23(c)(4) on the issue of whether the added flavoring substances are "flavors" requiring disclosure and whether Coca-Cola's omissions are unlawful.

Defendant denies that it adds flavoring which must be disclosed under the federal regulations, as the add-backs it uses are 100% made-from-the-orange products. Defendant further argues that both Simply Orange and Minute Maid Pure Squeezed ("MMPS") do not consistently use add-backs year round.[1] Defendant argues this means tens of thousands of consumers suffered no injury and lack Article III standing. Defendant also argues that only 1 in 25 consumers care about the add backs, according to its survey expert, and therefore plaintiffs cannot demonstrate reliance on a class-wide basis. Defendant further argues the class is not ascertainable, and individual questions predominate over class issues. Finally, defendant argues that plaintiffs' proposed damages model is faulty under the Comcast v. Behrend framework. In reply, plaintiffs suggest that they meet class certification requirements, as (1) common questions, such as whether defendant violated federal law and unlawfully profited from class members, will predominate; (2) plaintiffs' claims are typical because they depend on defendants' common policies; (3) the proposed classes are ascertainable; and (4) their damages theory is consistent with their theory of liability.

In the present motion, plaintiffs seek Rule 23 certification of three classes: (1) all purchasers of Simply Orange orange juice in Alabama, California, Florida, Illinois, Missouri, New Jersey, and New York during the class periods defined in note 2, below (hereinafter "Class Periods")[2]; (2) all purchasers of Minute Maid Premium from

[1] Minute Maid Premium uses add-back year round, as it is a made from concentrate product.

concentrate orange juice in Alabama from March 10, 2008 to the present; and (3) all purchasers of Minute Maid Pure Squeezed Never From Concentrate orange juice in Alabama from January 1, 2011 to the present.

In the alternative, Plaintiffs move to certify the following three Classes: (1)(i)Plaintiffs, (ii) purchasers of Simply Orange orange juice with proof of purchase during the Class Periods; or (iii) purchasers of Simply Orange orange juice who purchased through specified channels (namely, "member-only" retailers Costco Wholesale, Sam's Club, or BJ's Wholesale Club) or using a retailer loyalty card during the Class Periods; (2)(i) Plaintiff Albert J. Veal; (ii) purchasers of Minute Maid Premium from concentrate orange juice in Alabama from March 10, 2008 to the present with proof of purchase; (iii) purchasers of Minute Maid Premium From Concentrate orange juice in Alabama from March 10, 2008 to the Present who purchased through specified channels (namely, "member-only" retailers Costco Wholesale, Sam's Club, or BJ's Wholesale Club) or using a retailer loyalty card; and (3)(i) Plaintiff Albert J. Veal; (ii) purchasers of Minute Maid Pure Squeezed Never From Concentrate Orange Juice in

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[2] Consistent with applicable state law, the class periods are as follows:

• **March 10, 2006 to the present**: New Jersey unjust enrichment claim and New York unjust enrichment claim.

• **March 10, 2007 to the present:** Missouri breach of express warranty claim, Mo. Rev. Stat. § 400-2-313.1(a); Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq*.; Illinois unjust enrichment claim; and Missouri unjust enrichment claim.

• **March 10, 2008 to the present**: Alabama breach of contract claim; California Unfair Competition Law § 17200 *et*. *seq*.; California Breach of Express Warranty, Cal. Com. Code § 2313; Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq*.; Illinois Breach of Express Warranty, Ill.810 ILCS 5/2-313; New Jersey breach of express warranty, N.J. Stat. Ann. § 12A-313; and New Jersey implied warranty claim.

• **March 10, 2009 to the present:** California Consumer Legal Remedies, California Civil Code § 1750 et seq.; California False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq.; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq.; and New York General Business Law §§ 349, 350.

Alabama from January 1, 2011 to the present with proof of purchase; and (3) purchasers of Minute Maid Pure Squeezed Never From Concentrate Orange Juice in Alabama from January 1, 2011 to the present who purchased through specified channels (namely, "member-only" retailers Costco Wholesale, Sam's Club, or BJ's Wholesale Club) or using a retailer loyalty card.[3]

For each of the classes, Plaintiffs seek certification under Rule 23(b)(2) and (b)(3), or in the alternative, for certification of an issue class under Rule 23(c)(4). Plaintiffs also seek appointment of the named Plaintiffs as representatives of their respective classes and appointment of Norman E. Siegel as Liaison Class Counsel and Stephen A. Weiss, James E. Cecchi, and Kim Richman as Class Counsel under Rule 23(g).

II. Standard

Under Federal Rule of Civil Procedure Rule 23(a), the Court considers the following prerequisites and certifies 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.

Additionally, the Court considers whether one of the three Rule 23(b) requirements justify certification. Here, plaintiffs move for certification under Fed. R. Civ. P. 23(b)(2) and 23(b)(3). Under Rule 23(b)(2), a class action may be maintained if "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." Under Rule 23(b)(3), a class may be maintained if:

[3] Excluded from either class definition are the Court and its officers, employees, and relatives; The Coca-Cola Company and its subsidiaries, officers, directors, employees, contractors, and agents; and governmental entities.

"the court finds 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." Plaintiffs also argue, in the alternative, for certification under Rule 23(c)(4), which provides: "Where appropriate, an action may be brought or maintained as a class action with respect to particular issues."

"The decision whether or not to certify a class is not a reflection of the merits of the case." Casey v. Coventry HealthCare of Kansas, Inc., No. 08-0201-CV-W-DGK, 2010 WL 3636140, at *2 (W.D. Mo. Sept. 10, 2010). However, the Supreme Court has explained that a class should not be certified until the district court concludes, "after a rigorous analysis," that the four prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—are met. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338. 350-51 (2011).

III. Analysis

A. Standing

Initially in its opposition, defendant argues that plaintiffs' proposed classes contain members who lack standing, and argue that the Eighth Circuit has held that such classes cannot be certified. Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010). Rather, defendant argues, "*each* member" of a proposed class "*must* have standing and show an injury in fact." Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013) (emphasis added). Defendant argues that its own inconsistent and un-labelled use of add-backs means that certain consumers purchased orange juice not containing add-backs, and those consumers were not injured. See Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1031 (8th Cir. 2014) (involving "100% Kosher" hot dogs which may have been tainted; a case in which the allegations did not establish that

all or even most of the products were not kosher, and likely most of the packages of hot dogs were prepared in accordance with minimum kosher standards).

The Court, however, finds Wallace to be distinguishable from the facts in the present case. For one, even under defendant's theory, Minute Maid Premium purchasers all have standing to sue, as every container of Minute Maid Premium contains add-backs. Furthermore, the facts as pled in Wallace did not establish that most of the hot dogs were not kosher. Here, the discovery to-date provides that approximately 70 percent of the time, purchasers of Simply Orange and MMPS would be receiving drinks that included add-back; for certain years, nearly every container sold included add-back. Given the alleged purchasing practices of the Named Plaintiffs, who each assert that they are regular purchasers of juice throughout the year (at least, up until the year in which they each filed their suits), the Court agrees with Named Plaintiffs that they would have undoubtedly purchased juice containing add-backs. Moreover, recent Supreme Court decisions have shown that Article III standing does not need to be shown for every potential class member; instead, Article III standing requires that the "named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'" Spokeo v. Robins, 136 S. Ct. 1540, 1547 n.6 (2016) (citation omitted). Furthermore, plaintiffs argue that defendant has mis-stated their theory of the case, which is that the labels on Simply Orange and MMPS are unreliable as to whether flavors have been added to the orange juice, causing plaintiffs and other putative class members to pay a price premium for these products.

Upon considering the parties' arguments, the Court finds that plaintiffs have sufficiently demonstrated Article III standing.

B. Ascertainability

Courts are also asked to determine ascertainability, that is, whether the class "is capable of definition," Vietnam Veterans Against the War v. Benecke, 63 F.R.D. 675, 679 (W.D. Mo. 1974), and therefore "readily identifiable." EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014). However, "[t]he ascertainability inquiry is narrow," and "only requires the plaintiff to show that class members can be identified." Byrd v. Aaron's, Inc., 784 F.3d 154, 165 (3rd Cir. 2015). In other words, the class definitions must be drafted such that "membership is ascertainable by some objective standard." Huyer v. Wells Fargo & Co., 295 F.R.D. 332, 336 (S.D. Iowa 2010). In this Circuit, the ascertainability determination is not a threshold inquiry. Rather, it is simply one part of a court's rigorous analysis of the Rule 23 requirements. Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016) ("[T]his court has not addressed ascertainability as a separate, preliminary requirement.").

Plaintiffs argue the classes are ascertainable. Each of the proposed classes includes "all purchasers" of the specified products within the specified statutes of limitation under each state's laws. Plaintiffs note that in a case such as this, where the object of the suit is a low-value consumer product, lack of proofs of purchase will necessitate the use of self-identification of class members through affidavits.[4] Plaintiffs

[4] Plaintiffs list the following cases from outside this jurisdiction (but which are from the jurisdiction of certain named plaintiffs) in support of this proposition: Steigerwald v. BHH, LLC, No. 1:15 CV 741, 2016 WL 695424, *4-5 (Feb. 22, 2016) (accepting self-identification for ascertaining membership where no subjective criteria involved); Belfiore v. Procter & Gamble Co., 311 F.R.D. 29, 66-67 (E.D.N.Y.) (relying on affidavits because it was unlikely that consumers "will retain receipts for low cost items such as [flushable] wipes"), reconsideration denied, 140 F. Supp. 3d 241 (2015); Krueger v. Wyeth, Inc., 310 F.R.D. 468, 476 (S.D. Cal. 2015); Allen v. Similasan Corp., 306 F.R.D. 635, 643 (S.D. Cal. 2015); Otto v. Abbott Labs. Inc., No. 5:12-cv-01411, 2015 WL 9698992, at *2-3 (C.D. Cal. Sept. 29, 2015); Morales v. Kraft Foods Grp., Inc., No. 14-

argue that in this case, where only three products are at issue and all three were labelled in the same way throughout the class periods, plaintiffs should be able to self-identify based on the "simple, objective criterion of whether consumers purchased one of the orange juice products at issue during the time periods specified in Plaintiffs' Motion for Class Certification." Doc. No. 281, pp. 31-32. In the alternative, plaintiffs suggest that another means of identifying consumers who did not retain proof of purchase would be to obtain information from merchants and other third parties from customer loyalty cards.[5]

Defendant, on the other hand, argues that the proposed classes are not ascertainable. Defendant argues that inconsistent use of add-back defeats ascertainability. However, the Court finds that plaintiffs have sufficiently asserted at this time that they may be injured through a price premium charged by defendant, and moreover, depending on purchase practices, odds are that most class members have purchased an orange juice product containing add-back. (For those consumers in the proposed Minute Maid Premium class, all consumers have purchased a product containing add-back.) Defendant also argues that self-identification is not a workable means of identifying class members, noting that no court in this Circuit has ever accepted self-identification as a means of identifying members of a proposed class. However, this Court is sympathetic to plaintiffs' argument that in low-value consumer

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cv-04387, 2015 WL 10786035, at *12 (C.D. Cal. June 23, 2015); McCrary v. Elations Co., 13-cv-00242, 2014 WL 1779243, at *7 (C.D. Cal. Jan. 13, 2014).

[5] The Court is concerned about the workability of this plan, particularly considering the length of time this case has already been pending. In particular, there is no indication that plaintiffs have contacted any of the relevant third parties to obtain such information in this case to-date. Moreover, there may be privacy concerns with opening up such data to plaintiffs. Furthermore, such a class would be under-inclusive of people who did not use customer loyalty or frequent shopper cards, or people who purchased from retailers who do not keep such records. Therefore, the Court will deny plaintiffs' alternative request.

goods cases, there may be no better means of identifying members of a class in circumstances such as these. As noted by the First Circuit, if unrebutted consumer testimony "would be sufficient to establish injury in an individual suit, it follows that similar testimony in the form of an affidavit or declaration would be sufficient in a class action. There cannot be a more stringent burden of proof in class actions than in individual actions." In re Nexium Antitrust Litig., 777 F.3d 9, 20 (1st Cir. 2015).

Accordingly, the Court finds plaintiffs' proposed classes to be ascertainable. The Court next turns to the Rule 23 elements.

C. Federal Rule of Civil Procedure 23(a)

1. Numerosity.

Rule 23(a)(1) requires that the proposed class be "the class is so numerous that joinder of all members is impracticable." Plaintiffs argue that numerosity is unquestionably satisfied here, as the proposed classes comprise millions of consumers. Defendant does not oppose plaintiffs' suggestion. Therefore, the Court finds that numerosity has been met.

2. Commonality.

Rule 23(a)(2) is satisfied where there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Plaintiffs must show that there are common questions with "common answers apt to drive the resolution of the litigation" for the proposed class as a whole. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (quotation omitted). The class claims "must depend on a common contention" which is "of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve the issue that is central to the validity of each one of the claims in one stroke." O'Shaughnessy v. Cypress Media, L.L.C., No. 4:13-CV-0947-DGK, 2015 WL 4197789, at *6 (W.D. Mo. July 13, 2015) (citing Dukes, 564 U.S. at

350). "Even a single question of law or fact common to the members of the class will satisfy the commonality requirement." Dukes, 564 U.S. at 369.

Here, plaintiffs argue there are material issues common to the members of each proposed class that can be resolved "in one stroke": "whether the orange juice products contain added flavors not permitted by federal law; whether the orange juice products omit disclosure of added flavors as required by federal labeling laws; whether the orange juice products conformed to the representations on the labels of the products; whether the orange juice products omitted material information from the products' labels; whether defendant warranted that the orange juice products would conform to the label representations; whether defendant breached these warranties; whether defendant violated state consumer protection laws; whether defendant violated the implied warranty of merchantability; whether defendant breached a contract with consumers; and whether defendant was unjustly enriched. See Doc. No. 23, ¶ 166. As noted by plaintiff, these questions focus on defendant's conduct, meaning that the questions will be resolved through common proof, and without class certification, each individual class member would be forced to separately litigate the same issues of law and fact.

Defendant objects, noting that the Eighth Circuit recently clarified that "merely advancing a question stated broadly enough to cover all class members is not sufficient" to demonstrate commonality because "any competently crafted class complaint literally raises common 'questions.'" Ebert v. Gen. Mills, Inc., 823 F.3d 472, 478 (8th Cir. 2016) (citing Wal-Mart, 564 U.S. at 349) (alteration omitted). Rather, plaintiffs must demonstrate the class members have suffered the same injury. Wal-Mart, 564 U.S. at 350. Defendant argues, again, that many class members purchased containers of orange juice without add-back who suffered no injury, and therefore, because class

members did not all "suffer[] the same injury," the requirement of commonality is not met. As noted previously, however, plaintiffs have sufficiently put forth an argument that defendant's labels are not trustworthy due to their failure to label the use of add-back, and that plaintiffs have thereby paid a price premium. (And, of course, defendant's argument does not apply to purchasers of Minute Maid Premium.)

Defendant also argues commonality is not present because certain of plaintiffs' questions, such as "whether defendant violated state consumer protection laws"; "whether defendant violated the implied warranty of merchantability"; and "whether defendant breached a contract with consumers" cannot be resolved through common proof, and instead individual inquiries into each putative class members as to reliance, materiality, and/or causation will be needed, and therefore such issues defeat commonality.

The Court also has concerns as to whether plaintiffs will be able to provide common proof as to reliance, materiality, and/or causation, as detailed in defendant's response. However, as the Court intends to certify an issues class, the Court notes that several of plaintiffs' issues are susceptible to common proof: whether the orange juice products contain added flavors not permitted by federal law; whether the orange juice products omit disclosure of added flavors as required by federal labeling laws; whether the orange juice products conformed to the representations on the labels of the products; whether the orange juice products omitted material information from the products' labels; whether defendant warranted that the orange juice products would conform to the label representations; and whether defendant breached these warranties. Accordingly, the Court finds that commonality has been met as to the issues identified immediately above.

3. Typicality

Rule 23(a)(3) requires that the claims of the representative parties be typical of the claims of the class. In other words, class representatives should have the same interests and seek a remedy for the same injuries as other class members. See East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). It is "not necessary to first find that all putative class members share identical claims." Jones v. NovaStar Financial, Inc., 257 F.R.D. 181, 187 (W.D. Mo. 2009). Instead, the "typicality 'requirement is generally considered to be satisfied if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal procedure or remedial theory.'" Jones, 257 F.R.D. at 187 (citing Paxton v. Union Nat. Bank, 688 F.2d 552, 562-63 (8th Cir. 1982)).

Plaintiffs assert that their claims "emanate from the same legal theory or offense as the claims of the class." Doran v. Missouri Dept. of Social Services, 251 F.R.D. 401, 405 (W.D. Mo. 2008). Plaintiffs assert that their claims are exactly the same as those of the class members, that each member has been injured in the same manner, and that each plaintiffs' interest is co-extensive with those of the proposed classes.

Defendant argues that each of the plaintiffs testified that they had a range of reasons for purchasing the orange juice products that had nothing to do with the labelling of the products, which defendant states alone defeats typicality. Further, defendant argues that the consumer surveys in the record demonstrate that the plaintiffs' concerns are not typical of orange juice purchasers, noting that defense expert Dr. Stewart's report concluded that more than 80% of respondents would purchase Simply Orange whether or not it contained a statement about added flavoring. Defendant also argues that plaintiffs' expert Gaskin's survey demonstrates that respondents are indifferent to the presence of add-backs in orange juice.

In reply, plaintiffs note the typicality requirement is not an onerous one and is satisfied where the plaintiffs' claims are "reasonably coextensive"; it does not require "a class representative to have claims . . . identical to all other class members." Labrier v. State Farm & Cas. Co., 315 F.R.D. 503, 515 (W.D. Mo. 2016) appeal pending, No. 16-3562 (8th Cir. argued Jan. 11, 2017). Here, the Court agrees with plaintiffs that typicality is satisfied, as plaintiffs' claims arise from the same course of conduct by defendant Coca-Cola. Further, plaintiffs testified that they each purchased orange juice because they believed it lacked added flavoring. With respect to the survey evidence, the Court is not convinced that the survey evidence demonstrates that plaintiffs are not typical of the class they seek to represent.

Accordingly, the Court finds the typicality requirement is met.

4. Adequacy.

Rule 23(a)(4) requires that the putative class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The rule has two components: "whether (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." Paxton v. Union Nat. Bank, 688 F.2d 552, 562-63 (8th Cir. 1982). Defendant does not specifically question plaintiffs' adequacy, nor does defendant oppose appointment of class counsel as recommended by plaintiffs. Therefore, the Court finds that plaintiffs have met the adequacy requirement, both as to counsel and as to class representatives. Pursuant to Fed. R. Civ. P. 23(g), the Court appoints Norman E. Siegel as Liaison Class Counsel and Stephen A. Weiss, James E. Cecchi, and Kim Richman as Class Counsel under Rule 23(g). Paul Wieczorek, Cheryl D'Aloia, John Albert Veal, Jr., Randall Davis, Kirk Yee, Jeremy M. Dasaro, and Carole Sovocool, are appointed class representatives.

D. Federal Rule of Civil Procedure 23(b)(2)

Rule 23(b)(2) provides for class certification when the defendant "has refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief." Fed. R. Civ. P. 23(b)(2). Plaintiffs assert that defendant's uniform labelling applies generally to all class members, and that given the merits of the plaintiffs' case, injunctive relief in the form of a prohibition on defendant's allegedly false and deceptive orange juice labels.

In response, defendant argues that an injunctive class is impermissible in that (a) the class is not "cohesive" enough, and has too many individualized issues, Avritt, 615 F.3d at 1034–36 (denying injunctive-only class in light of individualized issues); and (b) the Named Plaintiffs lack Article III standing to pursue injunctive relief, as none of them have alleged they intend to purchase defendant's orange juice in the future. See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 239 (2d Cir. 2016) (finding standing lacking where plaintiff "failed to allege that he intends . . . to buy any [of the defective] products" again). The Court finds the second of these issues persuasive; further, as discussed by defendants, the Named Plaintiffs, under their theory of the case, are already on notice of defendant's practices, and are aware that they may be receiving juice containing add-back. Frankle v. Best Buy Stores, L.P., 609 F. Supp. 2d 841, 848 (D. Minn. 2009).

As the Court finds that named plaintiffs lack Article III standing to pursue claims for injunctive relief, plaintiffs' motion to certify the class under Rule 23(b)(2) is **DENIED.**

E. Federal Rule of Civil Procedure 23(b)(3) & 23(c)(4).

In this matter, plaintiffs also seek certification under Fed. R. Civ. P. 23(b)(3), which authorizes certification when "[t]he court finds 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." The matters pertinent to such findings include: "(A) the class members' interest in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Id.

1. Predominance

The predominance requirement is satisfied if "there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine such class member's individual position." In re Potash Antitrust Litig., 159 F.R.D. 682, 693 (D. Minn. 1995). See also Blades v. Monsanto Co., 400 F.3d 562, 569 (8th Cir. 2005)(finding the Court looks at whether some elements of claims and defenses can be proven on a systematic, class-wide basis). However, where "[l]iability determinations would be individualized and fact-intensive, . . . class certification under Rule 23(b)(3) is improper." Walker v. Bankers Life & Cas. Co., No. 06-C-6906, 2008 WL 2883614, at * 10 (N.D. Ill. July 28, 2008)(citation omitted).

> The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (internal citations and quotation marks omitted). Common issues under Rule 23(b)(3) are those as to which

the same evidence will suffice for each class member to make out a prima facie case. See id.

Here, the Court finds that there are central issues in the action that are common to the class, such as: whether the orange juice products contain added flavors not permitted by federal law; whether the orange juice products omit disclosure of added flavors as required by federal labeling laws; whether the orange juice products conformed to the representations on the labels of the products; whether the orange juice products omitted material information from the products' labels; whether defendant warranted that the orange juice products would conform to the label representations; and whether defendant breached these warranties. See above in relation to commonality analysis. The Court, however, is not convinced that plaintiffs have shown that common issues predominate with respect to certain elements of plaintiffs' underlying state law claims (such as requirements to prove, or at least allow a rebuttable presumption on, the elements of reliance, materiality, and/or causation). Furthermore, the Court is not convinced that damages in this matter can be established through common evidence, as defendant has provided considerable evidence that plaintiffs' proposed damages model is flawed, as the Gaskin survey, as it stands, does not track plaintiffs' theory of the case, and instead measures consumers preference for juice with "added flavoring," vs. no "added flavoring," even though under current FDA regulations some amount of added flavoring (made from orange components) to restore the natural attributes of orange juice is permissible. Furthermore, the court agrees that the wording of the "Added Flavorings" attribute in the Gaskin survey was biased, and suggested that the add-backs are artificial. Furthermore, Dr. Dubé's willingness-to-pay model for damages measures only "demand-side" factors related to consumers' subjective preferences, and does not measure supply-side factors, such as cost of the

underlying goods, competition, and strategic pricing. And Dr. Dubé has suggested that a Bertrand-Nash equation could account for both supply-side and demand-side factors; however, he has not tested such a formula within his expert report. Thus, the Court finds that plaintiffs have not established that certain liability issues or damages issues could be determined through class-wide proof sufficient to satisfy Rule 23(b)(3)'s predominance requirement.

The Court, however, does not end its inquiry here.

> Turning to the application of Rule 23(c)(4), the theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis may be secured even though other issues in the case may need to be litigated separately by each class member. Accordingly, some courts have concluded that even if only one common issue can be identified as appropriate for class treatment, that is enough to justify the application of the provision as long as the other Rule 23 requirements are met. Courts have applied subdivision (c)(4)(A) to allow a partial class action to go forward, leaving questions of reliance, damages, and other issues to be adjudicated on an individual basis.

§ 1790 Partial Class Actions and Subclasses, Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1790 (3d ed.) (citations omitted).

Notably, a case from this district recognized many years ago that Rule 23(c)(4) may be used in situations where common questions do not predominate, but where determining particular issues on a representative basis might prove efficient and economical. In re Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985). In that matter, Judge Ross T. Roberts determined that if the requirements under Rule 23(c)(4) was that the proposed class must meet all the requirements under Rules 23(a) and 23(b), there would be no need or place for Rule 23(c)(4). Id. Instead, Judge Roberts found that the appropriate application of the Rule 23(b) predominance requirement, as applied in a partial class certification request under Rule 23(c)(4) is "simply that the

issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole. In applying this test the court must obviously consider the nature of the other potential issues in the litigation; but, to me at least, the ultimate analytical process followed in that regard is quite different than in the usual application of this part of Rule 23(b)." Id. Judge Roberts found that the effect of this determination was to lessen the importance of the predominance requirement, and instead correspondingly increase the importance of 23(b)(3)'s superiority requirement. Id.

As noted by plaintiff, there are common dispositive answers to central questions in this case that will bind the class, such as whether the components in defendant's flavorings should be disclosed under FDA regulations or not. These questions can be answered in a "single stroke," and this Court believes that it would be appropriate for these questions to be answered on a class-wide basis, particularly given this Court's history with and knowledge of this matter. Accordingly, the Court finds that an issues class may be certified under Rule 23(c)(4), and that these common question predominate that issues class: whether the orange juice products contain added flavors not permitted by federal law; whether the orange juice products omit disclosure of added flavors as required by federal labeling laws; whether the orange juice products conformed to the representations on the labels of the products; whether the orange juice products omitted material information from the products' labels; whether defendant warranted that the orange juice products would conform to the label representations; and whether defendant breached these warranties.

2. Superiority

Rule 23(b)(3) requires that class resolution be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Rule 23(b)(3) lists four factors relevant to the superiority analysis: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action.

As discussed above, this Court believes that a Rule 23(c)(4) issues class, as defined above, is the superior means of resolving those common questions. As noted by plaintiffs, individuals proceeding on the common questions would be highly unlikely, as those questions require extensive research and specialized inquiry into the juice contents. Plaintiffs' counsel has already undertaken much of this burden, to the benefit of class members. Concentrating the litigation in this forum makes sense, as this Court is already quite familiar with the facts underlying the common questions identified above. The common questions identified above will be manageable for class determination, as they each depend on identical conduct by defendant.

Accordingly, plaintiffs have demonstrated superiority under Rule 23(b)(3) and 23(c)(4).

F. Class Definition

As the Court finds plaintiffs' proposed classes should be certified, the Court adopts the following class definitions: (1) all purchasers of Simply Orange orange juice in Alabama, California, Florida, Illinois, Missouri, New Jersey, and New York during the class periods defined in note 2, above; (2) all purchasers of Minute Maid Premium from concentrate orange juice in Alabama from March 10, 2008 to the present; and (3) all purchasers of Minute Maid Pure Squeezed Never From Concentrate orange juice in Alabama from January 1, 2011 to the present. For each of these classes, the Court has

certified an issues class under Fed. R. Civ. P. 23(c)(4) to determine the following questions: whether the orange juice products contain added flavors not permitted by federal law; whether the orange juice products omit disclosure of added flavors as required by federal labeling laws; whether the orange juice products conformed to the representations on the labels of the products; whether the orange juice products omitted material information from the products' labels; whether defendant warranted that the orange juice products would conform to the label representations; and whether defendant breached these warranties.

G. Notice

Plaintiffs have not submitted a proposed form of notice. Therefore, the Court **ORDERS** plaintiffs to submit their proposed notice on or before **August 17, 2017**. Defendant may file its objections, if any, on or before **August 31, 2017.** Plaintiffs may reply to the objections on or before **September 14, 2017**.

IV. Conclusion

Therefore, for the foregoing reasons, plaintiffs' motion for class certification (Doc. No. 280) is granted in part, and the Court certifies an issues class pursuant to Fed. R. Civ. P. 23(c)(4).

Pursuant to Fed. R. Civ. P. 23(g), the Court appoints Norman E. Siegel as Liaison Class Counsel and Stephen A. Weiss, James E. Cecchi, and Kim Richman as Class Counsel under Rule 23(g). Paul Wieczorek, Cheryl D'Aloia, John Albert Veal, Jr., Randall Davis, Kirk Yee, Jeremy M. Dasaro, and Carole Sovocool, are appointed class representatives.

IT IS SO ORDERED.

Date: July 24, 2017
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge