

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND

CIVIL MINUTES -- GENERAL

Case No. **CV 10-8452-JFW (MANx)**

Date: April 12, 2011

Title: IN RE BRAZILIAN BLOWOUT LITIGATION

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly
Courtroom Deputy

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [filed 2/17/2011; Docket No. 40]

On February 17, 2011, Plaintiffs April Kyle and George Bakus ("Plaintiffs") filed a Motion for Class Certification.¹ On February 28, 2011, Defendant GIB, LLC ("Defendant") filed its Opposition. On March 7, 2011, Plaintiffs filed a Reply. On March 28, 2011, Plaintiffs and Defendant each filed a Supplemental Brief. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's April 4, 2011 hearing calendar and the parties were given advance notice. After considering the moving, opposing, reply, and supplemental papers, and the arguments therein, the Court rules as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND²

Defendant advertises, markets, and sells a popular hair-straightening product, "Brazilian Blowout Solution," and a related product, "Brazilian Blowout Acai Professional Smoothing

¹Since the filing of the Motion for Class Certification, Plaintiffs April Kyle and George Bakus filed a Second Amended Complaint, adding Robyn Williams as a named plaintiff. However, the Court will not appoint Robyn Williams as a class representative because Plaintiffs have not provided any evidence or argument to support her appointment.

²To the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

Solution,” to hair stylists, salons and others throughout the United States. According to Plaintiffs, Defendant failed to disclose that these products contained formaldehyde, and beginning in August of 2008, affirmatively represented that these products were “formaldehyde free,” “contain[ed] no formaldehyde,” “contain[ed] no harsh chemicals,” and were “100% salon safe.”

Recently, however, Oregon OSHA, a division of the Oregon Department of Consumer Business Services (“Oregon OSHA”) analyzed 19 samples of Brazilian Blowout Solution and found an average formaldehyde level of 8.0%, and analyzed 37 samples of Brazilian Blowout Acai Professional Smoothing Solution and found an average formaldehyde level of 8.8%, well above acceptable, regulated levels.³

Plaintiffs allege that they purchased Brazilian Blowout Solution and/or Brazilian Blowout Acai Professional Smoothing Solution, in reliance on Defendant’s representations and omissions regarding the formaldehyde content of the products. In their Second Amended Class Action Complaint, Plaintiffs, on behalf of themselves and all others similarly situated, allege the following claims for relief: (1) fraud and deceit; (2) negligent misrepresentation; (3) unlawful, unfair and/or fraudulent business practices in violation of California Business and Professions Code § 17200, *et seq.* (“UCL”), (4) deceptive advertising practices in violation of California Business and Professions Code § 17500, *et seq.* (“FAL”), (5) unjust enrichment; (6) breach of contract; (7) breach of express warranty; and (8) negligence.

Plaintiffs now move this Court for an order certifying the following class under Federal Rule of Civil Procedure 23(b)(3):

All persons and entities within the United States who purchased Brazilian Blowout Solution or Brazilian Blowout Acai Professional Smoothing Solution (the “Class”).

Plaintiffs also request that they be appointed as class representatives and that their counsel, Baron & Budd P.C., be appointed as class counsel.

II. LEGAL STANDARD

Before certifying a class, the trial court must conduct a “rigorous analysis” to determine whether the party seeking certification has met the prerequisites of Federal Rule of Civil Procedure 23. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *as amended*, 273 F.3d 1266 (9th Cir. 2001). The party seeking class certification bears the burden of demonstrating that the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) have been satisfied. *Id.*

Under Rule 23(a), a class action is only proper if:

- (1) the class is so numerous that joinder of all members is impracticable;

³Defendant denies the accuracy of the Oregon OSHA results. The Court makes no determination that the Oregon OSHA results are accurate, but merely considers the results as they relate to the requirements of Rule 23.

- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. Proc. 23(a).

If the Rule 23(a) prerequisites are met, the Court must decide if certification is appropriate under Rule 23(b). In this case, Plaintiffs seek certification of the Class under Rule 23(b)(3), which authorizes certification if:

[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 these 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.

Fed. R. Civ. P. 23(b)(3).

At this stage of the proceedings, the Court must accept the factual allegations in the complaint as true. *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir.1975). However, the Court is "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir.1992) (internal quotation marks omitted).

III. DISCUSSION⁴

A. Rule 23(a) Requirements

⁴Throughout its Opposition and Supplemental Brief, Defendant argues that the class definition is overbroad because the Class includes purchasers of the products who did not read or hear any formaldehyde-related representations and who did not rely upon any formaldehyde-related representations in making the decision to purchase the products. The Court addresses these arguments in its predominance analysis.

1. Numerosity

To satisfy the numerosity requirement of Rule 23(a), the class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Joinder need not be impossible so long as potential class members would suffer a strong litigation hardship or inconvenience if joinder were required.” *Rannis v. Recchia*, 2010 WL 2124096, at *3 (9th Cir. May 27, 2010) (citing *Harris v. Palms Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)). Courts routinely find the numerosity requirement satisfied when the class consists of 40 or more members. See *EEOC v. Kovacevich “5” Farms*, 2007 WL 1174444, at *21 (E.D. Cal. Apr. 19, 2007).

In this case, the numerosity requirement is easily satisfied as thousands of customers have purchased Brazilian Blowout Solution or Brazilian Blowout Acai Professional Smoothing Solution in the United States.

2. Commonality

The commonality requirement is satisfied “if there are questions of fact and law which are common to the class.” Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2) is construed “permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Indeed “[a]ll questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient as is a common core of salient facts coupled with disparate legal remedies within the class.” *Id.* “The commonality test is qualitative rather than quantitative – one significant issue common to the class may be sufficient to warrant certification.” *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 (9th Cir. 2007).

The Court concludes that Plaintiffs have met their burden of demonstrating that there are questions of fact and law which are common to the Class. See *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975) (“Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant’s course of conduct is in its broad actions actionable, which is not defeated by slight differences in class members’ positions . . .”). The common questions of fact and law include, but are not limited to: (1) whether Defendant represented that the products were formaldehyde-free, contained no harsh chemicals, and were 100% salon safe; (2) whether the products contained formaldehyde or harsh chemicals; (3) whether Defendant’s representations were false or misleading or likely to deceive the public; (4) whether Defendant failed to disclose that the products contained formaldehyde; (5) whether Defendant had a duty to disclose that the products contained formaldehyde; and (6) whether Defendant knew that its representations were false or misleading.⁵

⁵Defendant claims that the following issues preclude a finding of commonality: (1) lack of uniformity in the products’ formulas and ingredients; (2) lack of a standardized marketing campaign; (3) lack of uniformity in labeling the products; and (4) the necessity for an individualized inquiry into each class member’s exposure to, and reliance on, the alleged misrepresentations. The Court concludes that none of these factors preclude the Court from making a finding of commonality, and most of these factors are more appropriately addressed under the

3. Typicality

Typicality exists when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.1998). “Although the claims of the purported class representative need not be identical to the claims of other class members, the class representative ‘must be part of the class and possess the same interest and suffer the same injury as the class members.’” *Lymburner v. U.S. Financial Funds, Inc.*, 263 F.R.D. 534, 540 (N.D. Cal. 2010) (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). To assess whether or not the representative’s claims are typical, the Court examines “whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D.Cal.1985)). In addition, “class certification is inappropriate where the putative class representative is subject to unique defenses which threaten to become the focus of the litigation.” *Id.* (citing cases).

Defendant argues that Plaintiffs’ claims are not typical because (1) Plaintiffs did not rely on Defendant’s representations in purchasing the products and thus lack standing to serve as class representatives; and (2) Plaintiff April Kyle is claiming different injuries than the Class.

Plaintiffs have adequately demonstrated that Plaintiffs relied on Defendant’s representations and have standing to represent the Class. “Reliance is proved by showing that the defendant’s misrepresentation or nondisclosure was an ‘immediate cause’ of the plaintiff’s injury-producing conduct.” *In re Tobacco II*, 46 Cal.4th 298, 326 (2009) (quotations, citations, and alterations omitted).

While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. It is not necessary that the plaintiff’s reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his conduct. It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision. Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material.

Id. 326-27 (quotations, citations, and alterations omitted).

With respect to Plaintiff April Kyle, although she first learned about the Brazilian Blowout products from her clients, before purchasing the product, she visited Defendant’s website and researched what she “was exposing [herself] to, how safe it was, the integrity of the product.” Kyle Depo. at 55:23-56:10, Feb. 21, 2011. The website contained representations that the product was formaldehyde-free, and when she placed her order, she specifically requested formaldehyde-free

predominance requirement of Rule 23(b)(3). Rule 23(a)(2) “only requires that there be *some* common issues of fact and law.” *Keilholtz v. Lennox*, 268 F.R.D. 330, 337 (N.D. Cal. 2010).

product. With respect to Plaintiff George Bakus, although he first learned about Brazilian Blowout from his brother-in-law, before purchasing the product, he did his own research which included reviewing Defendant's website. He specifically testified that "the fact that they said it was 100% safe" and that "it was formaldehyde free" influenced his decision to purchase the product. Bakus Depo. at 124:15-125:4, Feb. 28, 2011. The Court finds that this evidence is sufficient to establish that both Plaintiffs relied on Defendant's alleged representations and omissions.

In addition, although Plaintiff April Kyle suffered from skin irritation, nostril irritation, and headaches, Plaintiff April Kyle understands that this lawsuit does not seek compensation for any of her past or future personal injuries, nor does she seek compensation for such injuries at this time.⁶ Kyle testified that she filed this action because "the main objective is to be compensated for my money that I spent on products because it wasn't what they advertised it to be." Kyle Depo. at 117:17-118:7.

Accordingly, the Court concludes that Plaintiffs' claims are typical. Plaintiffs have presented evidence that they, like the other class members, purchased Brazilian Blowout Solution or Brazilian Blowout Acai Professional Smoothing Solution, that they relied on representations that those products were formaldehyde free, did not contain harsh chemicals and were 100% salon safe, and that they suffered similar injuries as absent class members.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). To satisfy constitutional due process concerns, "absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-3 (1940)). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

Defendant contends Plaintiffs are inadequate representatives because their claims are not typical of the Class. However, as discussed, the Court has rejected this contention and concluded that Plaintiffs' claims are typical of the Class. Plaintiffs have submitted declarations that state that they understand their responsibilities as class representatives, that no conflicts exist between their interests and other members of the Class, and that they intend to vigorously pursue all claims asserted in this lawsuit. In the absence of any contrary evidence, the Court concludes that Plaintiffs will fairly and adequately protect the interests of the Class.

As for the appointment of Plaintiffs' counsel, Defendant does not dispute that Plaintiffs'

⁶Plaintiff April Kyle testified, however, that she may seek compensation for personal injuries that "may come later." Kyle Depo. at 118:4-5. She stated, "I mean, I don't know what could harm me. I don't know what's to come later, being that I was exposed to this." Kyle Depo. at 118:12-15. If Plaintiff April Kyle decides to pursue claims for such personal injuries, the Court will be required to re-evaluate its conclusion that her claims are typical of the Class.

counsel will fairly and adequately represent the interests of the Class. Plaintiffs' counsel have submitted a declaration demonstrating that they have had substantial experience with similar class actions and other complex litigation and have the time and resources to adequately represent the Plaintiffs in this action. Plaintiffs' counsel have also conducted a significant amount of work in identifying and investigating the claims of the class members, and in preparing this motion for class certification within the 90-day deadline under Local Rule 23-3. Accordingly, the Court concludes that class counsel will fairly and adequately represent the interests of the Class.

B. Rule 23(b)(3) Requirements

In order to certify a class pursuant to Rule 23(b)(3), Plaintiffs must demonstrate that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and that (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). A showing of commonality under Rule 23(a)(2) is not sufficient to fulfill the requirements of Rule 23(b)(3). See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). To satisfy the requirements of Rule 23(b)(3), common questions must constitute a significant aspect of the case which can be resolved for members of the class in a single action. *Id.* "[T]o meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof.'" *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001). "The overarching focus [is] whether trial by class representation would further the goals of efficiency and judicial economy." *Vinser v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009).

1. Predominance

The Court concludes that Plaintiffs have met their burden of demonstrating that questions of law or fact common to class members predominate over questions affecting only individual members.

Plaintiffs have demonstrated that California law applies to the entire nationwide Class, including out-of-state class members. "To apply California law to claims by a class of nonresidents without violating due process, the Court must find that California has a 'significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class'" *Keilholtz v. Lennox Hearth Products, Inc.*, 268 F.R.D. 330, 339 (N.D. Cal. Feb. 16, 2010)(citations omitted). Plaintiffs have demonstrated that California has significant contacts to the claims asserted such that applying California law to out-of-state class members comports with due process. Indeed, Defendant is headquartered in California, and maintains its principal offices in California. In addition, the key marketing and advertising decisions regarding the Brazilian Blowout products were made by management from offices in North Hollywood, California. See, e.g., *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 242 (2001) (affirming application of California law to the claims of a nationwide class where defendant was a California corporation, with its principal place of business in California, and where the brochures promising free telephone support were prepared in California and distributed from California). Defendant does not contest that the application of California law to out-of-state class members comports with due process, nor

does Defendant claim that the law of any other state applies.⁷ Accordingly, California law will apply to the entire nationwide Class.

As the Court previously concluded, Plaintiffs have demonstrated that there are numerous other common questions of law and fact. As noted in footnote 5, Defendant contends that common questions of law and fact do not predominate, and that the following issues preclude class certification: (1) lack of uniformity in the products' formulas and ingredients; (2) lack of a standardized marketing campaign; (3) lack of uniformity in labeling of the products; and (4) the necessity for an individualized inquiry into each class member's exposure to, and reliance on, the alleged misrepresentations.

First, Defendant has failed to present any evidence that there were any meaningful variations in the products' formulas and ingredients, such that the Court would have to make an individualized inquiry into the chemical concentration of different batches of products. Indeed, all of the evidence presented by the parties demonstrates the presence of some level of formaldehyde in Brazilian Blowout products. Moreover, Defendant admits that its products contain methylene glycol, which according to the Oregon OSHA report, is synonymous with "formaldehyde in solution." Defendant also admits that there may be, in fact, no variation in the products' methylene glycol levels, regardless of manufacturer. The Court will not deny class certification based on the mere speculation that the amount of formaldehyde in Defendant's products may have varied.

In addition, Plaintiffs have presented substantial evidence that Defendant employed a standardized marketing campaign throughout the United States, which was centered on its formaldehyde free claims, since at least some time in 2009 or 2010. Defendant, on the other hand, has failed to present *any* evidence that class members were able to purchase Brazilian Blowout products without being exposed to the alleged misrepresentations during this time period. Indeed, according to the evidence presented by Plaintiffs, Defendant's representations regarding the formaldehyde content of its products were an integral part of every aspect of its marketing and advertising campaigns, appearing in its brochures, website, labels, and packaging.⁸ See, e.g., Brady Depo. at 24:14-25:23, 35:4-36:8, 38:19-40:14, 48:21-49:20, 51:2-5, 52:19-54:3, 58:12-17, 86:4-9, 95:7-96:21, 101:8-18, 107:18-23, Feb. 10, 2011; Semler Depo. at 32:1-14, 45:16-46:19; 64:3-8, 64:23-65:2, 65:19-23, Feb. 11, 2011. In fact, the Chief Executive Officer was unable to recall *any* promotional materials used in Defendant's "sales pitches" to stylists that did not include a formaldehyde-free claim. Brady Depo. at 86:4-9. The Chief Executive Officer also testified that all of Defendant's sales representatives were trained "as part of their sales pitch" to tell stylists that

⁷Because Defendant does not claim that the law of any other state applies, the Court does not need to undertake California's governmental interest analysis.

⁸Defendant contends that the Class should not be certified because not all of the product labels contained the formaldehyde-free claim and points out that some labels included a list of ingredients. However, the representations on the labels were only one of the many ways Defendant communicated its formaldehyde-free claim, and Defendant has failed to present any evidence that a customer could purchase a Brazilian Blowout product without being exposed to the formaldehyde-free claim. In addition, it is undisputed that Defendant never disclosed on its labels or in its lists of ingredients that the Brazilian Blowout products contained formaldehyde.

there was no formaldehyde in the Brazilian Blowout products. Brady Depo. at 64:3-8; 64:23-65:2; 95:7-14.

Defendant makes no attempt to produce any credible, contrary evidence demonstrating that it lacked a standardized marketing campaign. Instead, Defendant disingenuously argues that sales representatives did not use a standardized sales script at road shows and trade shows, and that the sales representatives were instructed to represent the products as formaldehyde free only if asked by the customer. Yet, even at these road shows and trade shows, where Defendant claims no script was used, it was Defendant's practice to distribute brochures, containing the formaldehyde-free representations. Brady Depo. at 96:16-21. Furthermore, before a stylist could "call in" an order for Brazilian Blowout, the stylist had to be "certified." Bakus Depo. at 46:11-14. If the stylist was certified on-line, the stylist was required to "review all product content provided on the Brazilian Blowout Website," which included Defendant's formaldehyde-free claims. Accordingly, unless and until further discovery demonstrates otherwise, the Court concludes that an individualized inquiry into each class member's exposure to Defendant's representations will not be necessary. See *In re First Alliance Mortg. Co.*, 471 F.3d 977, 991 (9th Cir. 2006) ("Class treatment has been permitted in fraud cases where, as in this case, a standardized sales pitch is employed."); *In re Am. Continental Corp./Lincoln Sav. and Loan Sec. Litig.*, 140 F.R.D. 425, 430 (D. Ariz. 1992) ("Class actions are appropriately utilized in situations where a 'standardized sales pitch' is employed.").

The Court was initially troubled by the lack of a time frame in Plaintiffs' class definition, in light of the evidence submitted by the parties demonstrating that Defendant did not begin its standardized marketing campaign until at least some time in 2009. See, e.g., Brady Depo. at 24:15-25:7, 34:12-14, 39:11-12, 49:14-22; Semler Depo. at 20:14-15, 45:16-46:15. However, the Court will not deny certification on this basis. Additional discovery will likely establish the date on which Defendant began making the alleged misrepresentations, which will in turn establish the appropriate time frame for the Class. *Perez v. First American Title Ins. Co.*, 2009 WL 2486003, at *8 (D. Ariz. Aug. 12, 2009) ("While the Court is troubled by Plaintiffs' failure to place time limits on the proposed class, the Court will not deny certification on this basis. Discovery may provide the temporal scope of the class . . ."). Defendant's Chief Executive Officer, Michael Brady, and Defendant's majority owner, Monte Devin Semler, both testified that Defendant should be able to determine the date on which they commenced marketing the products as formaldehyde free.

More importantly, Plaintiffs' claims are not solely based on affirmative misrepresentations, but are also based on Defendant's failure to disclose material information, e.g., that its products contained formaldehyde or other harsh chemicals. Assuming Plaintiffs are able to establish the requisite duty to disclose,⁹ this theory will apply to the entire Class, regardless of when the member purchased the product or whether Defendant had a standardized marketing campaign.

Defendant also argues that individualized issues of reliance preclude certification of the Class. However, under either the UCL or FAL, relief is available without individualized proof of deception, reliance and injury. See *In re Tobacco II Cases*, 46 Cal.4th 298, 320 (2009); see also *Steroid Hormone Product Cases*, 181 Cal. App. 4th 145, 154 (2010) ("[W]hile a named plaintiff in a

⁹Plaintiffs may, for example, be able to establish the requisite duty to disclose based on OSHA's formaldehyde standard, 29 C.F.R. § 1910.1048, *et seq.*

UCL class action now must show that he or she suffered injury in fact and lost money or property as a result of the unfair competition, once the named plaintiff meets that burden, no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members.”). Although Plaintiffs must prove actual reliance as an element of their fraud and negligent misrepresentation claims, reliance may be presumed as to the entire Class if Defendant’s misrepresentations or omissions were material. *Vasquez v. Superior Court*, 4 Cal.3d 800, 814 (1971) (“[I]f the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class.”); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1085 (1993) (“[W]hen the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class.”). Defendant, of course, may rebut that presumption or inference, but at this stage of the litigation, it has failed to present any evidence that any unnamed class members did not rely on the alleged misrepresentations or omissions in deciding to purchase Defendant’s products.¹⁰ Although additional discovery may disclose that common issues do not predominate with respect to Plaintiff’s fraud and negligent misrepresentation claims, on the evidence presented in this motion, the Court concludes that common issues predominate.

With respect to Plaintiffs’ remaining claims for relief, the Court does not anticipate, nor does Defendant claim, that there are any other individualized issues which would preclude class certification.

2. Superiority

Rule 23(b)(3) provides the following non-exhaustive list of factors to assist the Court in determining whether a class action is superior to other available methods for fairly and efficiently adjudicating the controversy: (1) the class members’ interest in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action.

The Court agrees with Plaintiffs that individual prosecution of Plaintiffs’ claims is impractical because the cost of litigating a single case would likely exceed the potential return. Moreover, to Court’s knowledge, there are no individual actions pending against Defendant based on the claims asserted by Plaintiffs. While there are other state court class actions pending, this action is apparently the most procedurally advanced. The Court also agrees with Plaintiffs that adjudicating these claims as a class action will promote efficiency by avoiding multiple individual lawsuits, and the Court does not anticipate any particular difficulties in managing this case as a class action.

¹⁰Defendant argues, without any evidentiary support, that “the members of any proposed class will have purchased the Solutions based on any number of reasons unrelated to formaldehyde – product loyalty, brand loyalty, scent, diversification of products to offer their own customers, bottle color.” Defendant’s Supplemental Brief, at 6. Defendant did not present a single declaration from any class member in support of this statement. In absence of any evidentiary support, the Court will not consider such a statement, especially in light of the substantial evidence presented by Plaintiffs that the alleged representations and omissions were material to the reasonable consumer.

Defendant claims that the Class is unmanageable and not superior to other methods of adjudication because the formula of its products varied over time and different manufacturers made different batches of the products. However, as discussed, there is no evidence that the amount of formaldehyde or methylene glycol in Defendant's products differed in any meaningful way. The Court will not deny certification based on mere speculation that different batches of products contained different levels of formaldehyde. In addition, the fact that Defendant may seek discovery from the Brazilian manufacturers also does not preclude certification. Unless Defendant has some evidence that the amount of formaldehyde or methylene glycol differed in some material way, it will not be necessary to "trace the contents of a particular bottle to a specific batch of the products manufactured by a particular company in South America." Lastly, Defendant has failed to demonstrate that the Brazilian manufacturers are indispensable parties to this litigation.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs' Motion for Class Certification is **GRANTED**. Plaintiffs' claims for (1) fraud and deceit; (2) negligent misrepresentation; (3) unlawful, unfair and/or fraudulent business practices in violation of California Business and Professions Code § 17200, *et seq.*, (4) deceptive advertising practices in violation of California Business and Professions Code § 17500, *et seq.*, (5) unjust enrichment; (6) breach of contract; (7) breach of express warranty; and (8) negligence shall be maintained as a class action on behalf of the following class of plaintiffs:

All persons and entities within the United States who purchased Brazilian Blowout Solution or Brazilian Blowout Acai Professional Smoothing Solution.

The Court appoints Plaintiffs April Kyle and George Bakus as class representatives and Baron & Budd P.C. as class counsel.

The parties are ordered to meet and confer on or before **April 21, 2011**, to discuss the provision of notice to class members. The parties are further ordered to file a joint plan for effecting notice and an agreed-upon notice to class members on or before **April 28, 2011**. In the unlikely event that the parties cannot agree upon the joint plan and notice to class members, the parties shall file a joint report by **April 28, 2011**, containing each party's alternative plan and notice to class members, along with a brief explanation of each party's respective position.

If at anytime, it appears that common questions of law or fact no longer predominate or if the Class becomes unmanageable, the Court will not hesitate to decertify the Class. See Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

IT IS SO ORDERED.