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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **SOUTHERN DIVISION**
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NICOLAS TORRENT, on Behalf of Himself and All Others Similarly Situated, **Plaintiff,** **v.** **YAKULT U.S.A., Inc.,** **Defendant.**	**Case No.: SACV 15-00124-CJC(JCGx)** **ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

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24 ## I. INTRODUCTION

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26 Plaintiff Nicolas Torrent brought this suit against defendant Yakult U.S.A., Inc.
27 under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et*
28 *seq.*, on behalf of a putative class of California Yakult purchasers, alleging that Yakult's

marketing and advertising claims concerning "digestive health" are false and likely to deceive reasonable consumers. Torrent's operative complaint seeks damages,[1] restitution, a declaratory judgment, and injunctive relief on behalf of the putative class, and he has moved for class certification under Rule 23(b)(1)(A) and Rule 23(b)(2) of the Federal Rules of Civil Procedure.[2] His motion for class certification indicates that he "seeks, *inter alia*, a declaration that Defendant is engaging in false advertising and corresponding injunctive relief, including corrective advertising." (Dkt. 41 Pl.'s Mot. for Class Cert. at 4.) Though the "*inter alia*" leaves open the possibility that Torrent is also seeking damages and restitution (as indicated in his complaint), Torrent's counsel asserted for the first time at oral argument that Torrent is *only* seeking the declaratory and injunctive relief he specified in his motion.

As explained in more detail below, the Court concludes that though Mr. Torrent has Article III and statutory standing to pursue his UCL claim with respect to recovering restitution and declaratory relief, he lacks Article III standing to seek injunctive relief. Owing to his lack of standing to pursue injunctive relief, he has failed to provide a sound rationale for class certification under either (b)(1)(A) or (b)(2). His motion of class certification is therefore DENIED.

II. BACKGROUND

The Court explained the details of Torrent's allegations against Yakult in a prior order denying Yakult's motion to dismiss, (Dkt. 31), and will briefly restate them here.

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[1] Though Torrent's prayer for relief, (Dkt. 32, Second Amended Compl. at 14-16), includes a request for money damages in addition to restitution, he does not appear to be eligible to recover money damages, as his only claim is brought under California's UCL. Under the UCL, "damages cannot be recovered." *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009). The California Supreme Court has indicated that under the UCL, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution." *Id.* (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003)).

[2] All citations to a "Rule" in this opinion refer to the Federal Rules of Civil Procedure.

Yakult manufactures and sells probiotic beverages under the name "Yakult" that contain a microorganism called *Lactobacillus casei* Shirota. Yakult's marketing and advertising materials highlight the beverage's health benefits. The product packaging, for example, contains the flowing message:

> Yakult is a delicious refreshing drink for everyone. Created in Japan in 1935 by our founder, microbiologist Dr. Minoru Shirota, each bottle of Yakult contains around 8 billion live and active beneficial cultures called *Lactobacillus casei* Shirota. Drink one or two bottles daily to help balance your digestive system and maintain overall health.

(Dkt. 32, Second Amended Complaint (SAC) ¶¶ 7, 10.) Torrent alleges that despite this and related health claims, Yakult fails to actually confer any health benefit and that there is no credible scientific evidence that the probiotics in the beverage do what Yakult claims. The SAC cites several studies that cast doubts on the health benefits of *Lactobacillus casei* Shirota in particular or probiotics in general. (SAC ¶¶ 25-26, 28.)

Torrent further alleges that he purchased Yakult multiple times, with his last purchase being in October 2014 at a Ralph's supermarket in Venice, CA. (SAC ¶¶ 6, 30.) He asserts that he relied on Yakult's false and misleading packaging and advertising claims and believed that he was purchasing a product that would confer "benefits to his digestive system as well as his overall health." (*Id.*) He further alleges that "but for" Yakult's misrepresentations, he "would not have purchased Yakult, and/or would not have paid a premium for Yakult over the price of other beverages that are not promoted as improving health." (SAC ¶ 30.)

Torrent seeks to certify a class of "all persons or entities who purchased Yakult while physically present in the state of California since January 27, 2011." (SAC ¶ 31.)

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 23, district courts have broad discretion to determine whether a class should be certified. *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001) (abrogated on other grounds). The party seeking class certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); Fed. R. Civ. P. 23. Rule 23(a) provides that a case is appropriate for class certification as a class action if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). These four requirements are often referred to as numerosity, commonality, typicality, and adequacy. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982).

Rule 23(b) defines different types of classes. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2012). Torrent asserts that he meets the requirements to form a class under either Rule 23(b)(1)(A) or Rule 23(b)(2). Rule 23(b)(1)(A) requires a finding that separate actions by or against individual class members would risk "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23 (b)(1)(A). Rule 23(b)(2) requires that the party opposing the class "has acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

As with other actions in federal court, the Court must first decide the threshold question of whether the plaintiff has Article III standing if that is at issue in the case. In the class action context, "a court must first determine whether at least one named class representative has Article III standing, then question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) (internal quotation marks removed). Here, Torrent is the only named plaintiff. Yakult is arguing that Torrent lacks Article III standing to seek injunctive relief on behalf of himself (and, therefore, the class). (Dkt. 44, Def.'s Opp'n Br. at 9-12.) The Court will first resolve this standing issue before addressing Rule 23's requirements.

IV. ANALYSIS

A. Article III Standing for Injunctive Relief

"In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). Not only must at least one named plaintiff satisfy constitutional standing requirements, but the plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Article III standing to sue requires a plaintiff show "(1) an injury-in-fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that the injury is redressable by a favorable ruling." *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1128 (N.D. Cal. 2014) (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). Under California's UCL, a private person has statutory standing only if he "has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.

Torrent's pleadings indicate that he has both Article III standing and statutory standing to seek restitution under the UCL. He has pled that he was injured because he purchased Yakult multiple times in reliance on false and misleading statements Yakult placed on the product packaging, and that but for those misrepresentations, he would not have purchased the product or at least would not have paid a premium for the product over others not promoted as having health benefits. (SAC ¶ 30.) This injury is redressable by a favorable ruling awarding restitution because such relief would restore to Torrent the money that he would not have spent on Yakult absent the misrepresentations. Torrent therefore has standing to pursue his UCL claim and to seek restitution.

But though Torrent could pursue his UCL claim with respect to restitution, he lacks Article III standing to pursue injunctive relief relating to that claim. Consistent with Article III's standing requirements, a plaintiff seeking injunctive relief must proffer evidence that there is "a sufficient likelihood that [he] will be wronged in a similar way" in the future. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). "To establish standing for prospective injunctive relief, [a p]laintiff must demonstrate that 'he has suffered or is threatened with a 'concrete and particularized' legal harm . . . coupled with 'a sufficient likelihood that he will again be wronged in a similar way,'" *Dabish v. Infinitelabs, LLC*, No. 13-CV-2048, 2014 WL 4658754, at *5 (S.D. Cal. Sept. 17, 2014) (citing *Bates*, 511 F.3d at 985 (9th Cir. 2007)); *see also Bates*, 511 F.3d at 985 (holding that a plaintiff must establish a "real and immediate threat of repeated injury" to demonstrate Article III standing). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

Yakult argues that Torrent lacks standing to pursue injunctive relief because he has not alleged that he intends to purchase the Yakult products at issue in this litigation ever again. Torrent's assertion that absent the misrepresentations he either would never have

purchased the product or would never have paid a premium for it, (Compl. ¶ 30), strongly suggests that he has no intention of ever buying Yakult again. Federal district courts applying California's UCL have reached contrary conclusions about the effect of Article III's standing requirements on UCL claims seeking injunctive relief. *See In re ConAgra*, 302 F.R.D. 537, 573-76 (C.D. Cal. Aug. 1, 2014) (collecting many cases both for against the position Yakult has asserted here).

Many opinions, including *In re ConAgra*, have adopted Yakult's position. *See, e.g., Werdebaugh v. Blue Diamond Growers*, 12-cv-2724, 2014 WL 2191901, at *9 (N.D. Cal. May 23, 2014) ("[B]ecause Werdebaugh has not alleged, let alone provided evidentiary proof, that he intends or desires to purchase Blue Diamond almond milk products in the future, there is no likelihood of future injury to Plaintiff that is redressable through injunctive relief, and Plaintiff lacks standing to pursue that remedy"); *Forcellati v. Hyland's, Inc.*, No. CV 12-1983, 2014 WL 1410264, at *13 (April 9, 2014) ("Plaintiffs do not suggest that they are likely to purchase Defendants' products in the future. Instead, they contend that the Article III standing requirement for injunctive relief does not apply in the consumer protection context. Some district courts in this Circuit have taken this approach, holding that a plaintiff in a false advertising case retains standing to pursue injunctive relief so long as the products continue to be deceptively marketed and sold by the defendant. These courts have reasoned that to hold otherwise would severely undermine the efficacy of California's consumer protection laws. We decline to adopt this approach. We find more persuasive the courts that have insisted that it is improper to carve out an exception to Article III's standing requirements to further the purpose of California consumer protection laws" (internal quotation marks and citation omitted)).

Other opinions have reached the opposite result based on the desire not to upset the enforcement mechanisms of the UCL and other California consumer protection laws:

> If the Court were to construe Article III standing for FAL and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ("once bitten, twice shy") and would never have Article III standing.

Henderson v. Gruma Corp., No. CV 10-04173, 2011 WL 1362188, at *7 (C.D. Cal. Apr. 11, 2011); *see also Koehler v. Litehouse, Inc.*, No. CV 12–04055 SI, 2012 WL 6217635 (N.D. Cal. Dec. 13, 2012) (same); *Rasmussen v. Apple Inc.*, 27 F. Supp. 3d 1027, 1045 (N.D. Cal. March 14, 2014) (stating in dicta that "[s]ome courts have disagreed with this reasoning [of the cases finding no Article III standing in this context], correctly recognizing the limitation this places on federal courts to enforce California's consumer laws.").

Having considered the perspectives of the many courts that have addressed this issue, this Court agrees with those concluding that "Article III's standing requirements take precedence over enforcement of state consumer protection laws." *In re ConAgra*, 302 F.R.D. at 575 (citing *Mason v. Nature's Innovation, Inc.*, 12-cv-2019, 2013 WL 1969957, at *4 (May 13, 2013) and *Garrison v. Whole Foods Mkt. Grp., Inc.*, No. 13-5222, 2014 WL 2451290, at *5 (N.D. Cal. June 2, 2014)).

Because Torrent has not even alleged that he intends to by Yakult in the future, let alone submitted evidence to that effect, the Court concludes that he lacks Article III standing to pursue injunctive relief here. Mr. Torrent's inability to seek injunctive relief in this case greatly undermines his ability to pursue a class action under either Rule 23(b)(1)(A) or Rule 23(b)(2) so the Court will for the sake of efficiency forgo the analysis of the Rule 23(a) requirements and proceed directly to the Rule 23(b) analysis.

B. Class Certification under Rule 23(b)(1)(A)

Rule 23(b)(1)(A) provides an avenue to class certification when actions by individual class members would subject it to "incompatible standards of conduct." With the prospect of injunctive relief off the table, Mr. Torrent cannot show that rulings in cases brought by individual plaintiffs would result in Yakult being subject to such "incompatible standards." In addition to an injunction, Torrent seeks declaratory relief that Yakult's digestive health messaging violates the UCL. (Pl.'s Reply Br. at 9.) Nonetheless, an attempt to enforce such a judgment would necessarily be injunctive in nature. Because Torrent lacks standing to seek such prospective relief, there is no danger of declaratory relief that would result in conflicting obligations stemming from this litigation with Torrent as class plaintiff.

And though Torrent has standing to litigate his UCL claim and seek restitution in federal court, restitution cannot form the basis for the creation of a (b)(1)(A) class. As the Ninth Circuit explained when vacating the certification of a class formed under Rule 23(b)(1)(A):

> In this case, a judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff. By paying the first judgment, defendants could act consistently with both judgments. The declaratory relief sought by plaintiffs does not alter this conclusion. They seek only a declaration of liability. They have not specified, and we cannot discern, what obligations such a declaration would impose upon defendants that a judgment for damages would not.

McDonnell-Douglas Corp. v. U.S. Dist. Court for Cent. Dist. of California, 523 F.2d 1083, 1086 (9th Cir. 1975); *see also Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1194 (9th Cir. 2001). As with the compensatory damages at issue in *McDonnell-Douglas Corp.*, here monetary relief in the form of restitution can be awarded on a case-

by-case basis without creating the conflicting obligations for Yakult necessary to form a class under Rule 23(b)(1)(A).

C. Class Certification under Rule 23(b)(2)

A class action formed under Rule 23(b)(2) 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." Fed. R. Civ. P. 23(b)(2). Though in the instant case Torrent seeks a declaratory judgment stating that Yakult's digestive health message violates the UCL, such declaratory relief cannot "correspond" to any injunctive relief at all, as he does not have standing to pursue an injunction. Torrent's briefing makes no argument that he can certify a (b)(2) class simply by requesting such declaratory relief, absent the injunctive relief he also seeks. Without such a showing, the Court must deny his motion to certify a (b)(2) class.

Were Torrent still pursuing restitution, that effort would only hinder his effort to certify a (b)(2) class. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court held that only monetary relief that is "incidental" to injunctive relief can be pursued in 23(b)(2) class actions. 131 S. Ct. 2541, 2557 (2011). "[I]ncidental damages, which may remain available in (b)(2) class suits, are those that would flow to the class as a whole by virtue of its securing the sought after injunctive relief." Newberg on Class Actions § 4:36 (5th ed.) (citing *Dukes*, 131 S. Ct. at 2560). The restitution sought in Torrent's complaint cannot be "incidental" to his effort to obtain injunctive relief now that it has been established that he does not have Article III standing to pursue that prospective relief. Because Torrent cannot benefit from injunctive relief, the monetary relief he sought would necessarily be his primary concern, as opposed to something merely incidental to injunctive relief. *See Jiminez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 250 (C.D. Cal.

1 2006) (determining that in that case monetary relief must be the primary concern of class
2 members who were ineligible for injunctive relief).
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4 Furthermore, in *Dukes* the Supreme Court held that Rule 23(b)(2) would not permit
5 class certification if monetary relief had to be calculated on an individual basis. 131 S.
6 Ct. at 2557. The Court explained that:
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8 > One possible reading of [Rule 23(b)(2)] is that it applies *only* to requests for
9 > such injunctive or declaratory relief and does not authorize the class
10 > certification of monetary claims at all. We need not reach that broader
> question in this case, because we think that, at a minimum, claims for
> *individualized* relief (like the backpay at issue here) do not satisfy the Rule.

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12 *Id.* Similarly, even were it possible for Torrent to obtain injunctive relief in the instant
13 case, the restitution he seeks in his complaint could not be recovered as part of a (b)(2)
14 class, as it necessarily requires individual calculations of monetary relief related to the
15 amount of Yakult purchased during the class period and the retail price paid by each
16 consumer.
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18 The Court concludes that Plaintiff has failed to satisfy the requirements of Rule
19 23(b)(2) and cannot certify this putative class under that provision.
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21 **V. CONCLUSION**
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23 Mr. Torrent's motion for class certification is DENIED.
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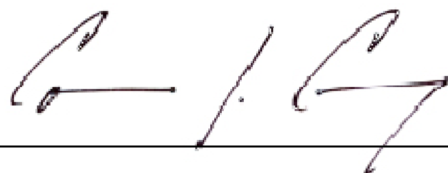
25 DATED: January 5, 2016



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27 CORMAC J. CARNEY
28 UNITED STATES DISTRICT JUDGE