UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID SPACONE, individually, and on behalf of other members of the general public similarly situated, Plaintiff, v. SANFORD, L.P., Defendant.	Case No.: 2:17-CV-02419-AB-MRW **ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

On November 20, 2017, Plaintiff David Spacone filed a First Amended Class Action Complaint ("FAC," Dkt. No. 27) which alleged that Sanford, L.P. (erroneously sued as Elmer's Products, Inc.) ("Sanford") violated several California state statutes, including: (1) the Consumers Legal Remedies Act ("CLRA"), Cal. Bus. & Prof. Code §§ 1750–1782; (2) the False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500–17535; (3) the Fair Packaging and Labeling Act ("FPLA"), Cal. Bus. & Prof. C. § 12606(b); and (4) the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200–17204. On March 18, 2018, Spacone filed a Motion for Class Certification ("Mot.," Dkt. No. 36). Sanford filed an opposition ("Opp'n," Dkt. No. 49) on May 4, 2018 and Spacone filed a reply ("Reply," Dkt. No. 54) on May 25, 2018. The Court

heard oral argument on June 15, 2018. Having considered the materials submitted by the parties and argument of counsel, for the reasons provided below, the Court **DENIES** Spacone's Motion.

I. FACTUAL BACKGROUND

Plaintiff David Spacone, a resident of Hollywood, California, purchased a two gram package of Krazy Glue all-purpose adhesive from a True Value hardware store in summer 2016. FAC ¶ 5. This Krazy Glue packaging included a Stay Fresh Container ("SFC"), a larger opaque plastic cylinder that housed the tube that held two grams of Krazy Glue cyanoacrylate adhesive ("Def.'s Product"). Spacone declares that he reasonably relied on Sanford's packaging when he purchased Krazy Glue, and that the SFC's opaque plastic led him to believe that the package contained more adhesive than it actually did. FAC ¶¶ 20, 25–26. Spacone initially suggested that he only purchased Krazy Glue once. Spacone Dep. (Dkt. No. 54–2) 57:22–58:3. He later clarified that he completely used the first package and later purchased a second package of Krazy Glue the same day to complete an automotive trim repair. Spacone Dep. 88:8–89:5, 116:8–10.

Spacone claims that the empty space in the SFC between the SFC interior and the exterior of the inner Krazy Glue tube constitutes nonfunctional slack fill that violates the Fair Packaging and Labeling Act ("FPLA"), Cal. Bus. & Prof. C. § 12606(b). The act defines slack fill as "the difference between the actual capacity of a container and the volume of product contained therein," and defines nonfunctional slack fill as "the empty space in a package that is filled to substantially less than its capacity for reasons other than any one or more of" fifteen enumerated justifications for empty space within commercial packaging. *Id.*

Spacone asks the Court to certify a class of purchasers of Krazy Glue products sold within non-transparent SFC containers with nonfunctional slack fill, defined as follows: "All individuals who purchased one or more KG Stay Fresh Container Products in California from January 31, 2013, until the date of trial." Mot. 2:22–24.

Sanford opposes.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23 ("Rule 23") controls class certification. Under Rule 23(a) a party may represent 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." Fed. R. Civ. P. 23(a). A plaintiff must establish all four prerequisites—numerosity, commonality, typicality, and adequacy of representation—to obtain class certification.

Further, a plaintiff must also demonstrate that the action is one of the three "types" of class actions identified in Rule 23(b). Spacone seeks certification under Rule 23(b)(2) and Rule 23(b)(3). Rule 23(b)(2) permits certification if the action is one in which "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). Rule 23(b)(3) permits certification if the action is one in which "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." Fed. R. Civ. P. 23(b)(3).

The U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, (2011) held that class certification is permitted only if the trial court is satisfied, following a "rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Dukes*, 564 U.S. at 351. Although class certification analysis may often bleed into a court's analysis of a plaintiff's claims, *id.*, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen, Inc. v. Conn. Retirement Plans and Tr. Funds*, 568 U.S. 455, 465–66 (2013).

III. DISCUSSION

Sanford challenges class certification, arguing that Spacone failed to meet his commonality, typicality, and adequate representation burdens under Rule 23(a)[1], and fails to meet his burden under Rules 23(b)(2) and 23(b)(3). Opp'n 9:5-6. Further, Sanford argues that Spacone does not enjoy statutory standing. Opp'n 9:8. The Court will address statutory standing, ascertainability, typicality, and adequacy.

A. Plaintiff Lacks Statutory Standing.

1. Legal Standard for Standing Under the UCL, CLRA, and FAL.

Standing is a threshold issue the Court must resolve before class certification. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("[S]tanding is the threshold issue in any suit. If the individual plaintiff lacks standing, the court need never reach the class action issue."); *see also Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) (adopting approach whereby " 'once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met.' ") (citing Newberg on Class Actions § 2:6 (5th ed.)),. To establish statutory standing under California's Unfair Competition Law, a plaintiff must demonstrate (1) injury in fact, (2) lost money or property, and (3) causation. *Kwikset Corp. v. Sup. Ct.*, 51 Cal.4th 310, 322 (2011). "The plain import of [the lost money or property element] is that a plaintiff now must demonstrate some form of economic injury." *Kwikset*, 51 Cal.4th at 323. In addition, plaintiffs must establish a causal relationship or reliance on a defendant's alleged misrepresentation to establish standing. *Kwikset*, 51 Cal.4th at 325; *see also Hall v. Time Inc.*, 158 Cal.App.4th 847, 855 (2008), *as modified* (Jan. 28, 2008).

In *Kwikset*, the Court offered examples of lost money or property that could establish standing amid a misleading label. When a consumer relies on accurate and

[1] Sanford does not dispute that the proposed class would meet the numerosity prerequisite under Rule 23(a)(1). *See* Opp'n 9:5-6.

truthful labeling, and misrepresentations deceive the consumer into purchasing a product, the economic harm is that "the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately." *Id.* at 329 (original emphasis). "Plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue." *Kwikset*, 51 Cal.4th at 317.[2] Regarding the causation component of statutory standing, consumers who rely on product labels and take issue with misrepresentations "contained therein can satisfy the standing requirement . . . by alleging . . . that he or she would not have bought the product *but for* the misrepresentation." *Kwikset*, 51 Cal.4th at 329–30 (emphasis added). The UCL's standing requirements apply equally to claims under the CLRA and the FAL. *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1103 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) (so noting).

To establish standing, Spacone must plausibly assert that he lost money or property (economic injury) because Sanford misrepresented their Krazy Glue. Spacone must further establish that but for this misrepresentation, he would not have bought Krazy Glue, at least not at the price it was offered. Sanford argues that Spacone lacks statutory standing because he cannot show that he lost money or property due to an alleged misrepresentation of Sanford's product.

Spacone frames his standing argument within Rule 23(a)(3) typicality, saying that he "has shown that he suffered a concrete injury in reliance on Defendant's packaging of the Krazy Glue Products, and that his reliance and injury are typical of class members." Reply 2:11–13. To further justify his typicality claim, Spacone

[2] Proposition 64, approved by California voters on Nov. 2, 2004, sought to reduce frivolous unfair competition lawsuits while protecting the citizen's right to pursue actions under California law. PROPOSITION—CONSUMER PROTECTION, 2004 Cal. Legis. Serv. Prop. 64 §1(d) (Proposition 64) (WEST).

references *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992): "typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Further, Spacone asserts that the statutes in question focus on Sanford 's conduct, "not on the subject state of mind of the class members." *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 526 (N.D. Cal. 2012). Thus, Spacone's claimed injury focuses on Sanford's conduct, not any possible money or property loss he suffered.

2. Spacone Has Not Established Standing Under the UCL, CLRA, or FAL.

Spacone's arguments do not persuade. Since Proposition 64 narrowed standing requirements for the UCL, the Court must ask whether Spacone demonstrated that he lost money or property (endured economic injury) before it may judge Sanford's conduct. Sanford points to numerous instances during Spacone's deposition where he effectually denied that he suffered any economic injury as a result of Defendant's alleged misrepresentation. The Court thoroughly reviewed the transcripts and finds that they establish that Spacone does not assert any loss of money or property because of Sanford's alleged misrepresentations. Repeatedly, Spacone testified that he did not lose money or property when he purchased Sanford's product. Direct quotes of Spacone's economic harm denials from his deposition follow below.

Spacone admits that he did not overpay for the product:

> Q (Mr. Cart, Defendant's counsel): And you don't have a problem with how much you paid for the product?
> A (David Spacone, Plaintiff): No.

Spacone Dep. 123:5–7.

Spacone denies that he was "ripped" off or stolen from and reiterates that he was simply misled:

> Q: Yeah. I mean, look, do you feel like Krazy Glue stole your money?
> A: I mean – well, I have an issue with – yeah, I have an issue with Krazy Glue, but it has nothing to do with stealing money. Stealing is a whole another – I don't feel – no, I wasn't stolen from.

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> Q: Yeah. Do you feel like you got ripped off?
> A: I feel like I was misled. I don't feel like I was ripped off. Ripped off is ripped off. Misled is misled.
> Q: Yeah. Ripped off is somebody took something from me. That's – they're mutually exclusive to me.

Spacone Dep. 124:11–125:1.

Spacone relays his disinterest in a refund from Sanford, and instead identifies his problem as the inconvenience and waste of time he experienced driving back to the hardware store in Hollywood traffic to secure more Krazy Glue to finish his project instead of buying enough during his first trip:

> Q: Did you go back to the True Value Hardware Store and ask for a refund?
> A: No, I did not.
> Q: Did you ask for a refund at all from Krazy Glue?
> A: No, I did not.
> Q: Why not?
> A: I just did not.
> Q: Do you want a refund on your Krazy Glue?
> A: No, I do not.
> Q: Why not?
> A: I just don't.
> Q: You don't want your money back?
> A: No.
> Q: Why not?
> A: Because the money wasn't the issue. It was my time.
> Q: So that's what you're so mad, that you had to go back to the store?
> A: Yeah. Correct. Do you live in Los Angeles? Going back and forth in Hollywood isn't what it–it's–getting anywhere is an ordeal, so.
> Q: So is it fair to say that what you were upset about was that if you had known the amount of glue in each package, you would have bought more than one the first time; is that right?
> A: Correct.

Spacone Dep. 118:15–119:17.

Spacone did not claim he lost money or property. Instead, driving in Hollywood traffic unexpectedly was his injury. Furthermore, Spacone expressly testifies that had

he realized the true amount of glue contained in the packages, he would have purchased two packages instead of one on his first trip to the hardware store:

> Q: I'm trying to figure out what you're telling me, and I want to make sure I got it right. So if I don't, let me know. Is it your contention that had you known how much glue is in the Krazy Glue package when you went to the store the first time, that you would have bought of them at that time?
>
> . . .
>
> A: It wasn't -- I can't answer that -- the only answer that I can give you with all honesty is that if the packaging was correct, in my estimation, what I believed to be correct, that I would have been able to have purchased enough glue top have gotten the job done, and I would not have had to have gone back to the place -- to True Value Hardware to go buy it again, if that answers your question.

Spacone Dep. 121:13–122:5.

> Q: And is it your contention that if you has known how much glue was actually in the glue tube when you went to True Value the first time, that you would have bought two Krazy Glues?
> A: How much – if I had known – not if I had known how much glue was in the tube, but just if the package was what it appeared to be. That was my contention.
> Q: Okay. So is it your contention that if the first time you went to True Value, the package had contained as much glue as it appeared to contain to you –
> A: Yes.
> Q: -- that you would have bought two of them?
> A: I would have – I would have bought more, correct.

Spacone Dep. 120:13–121:3.

Nowhere does Spacone testify that, for example, he would not have purchased that amount of Krazy Glue at the price offered or at all—classic examples of economic injury. Instead, he repeatedly denies that he lost money in reliance on Sanford's alleged misrepresentations, and defined his injury as wasting time in Hollywood traffic. Thus, the Court finds that Spacone cannot establish loss of money or property as necessary to establish standing under the UCL. Nor can Spacone display *but for* causation given his testimony that but for Sanford's alleged

misrepresentation, he would have purchased two Krazy Glue packages instead of one on his hardware store trip. This only reinforces that Spacone's injury is not economic but mere inconvenience, because purchasing two packages the first time would have saved him the second trip in traffic. Wasted time does not equal lost money or property, so Spacone cannot establish statutory standing.

In his reply brief, Spacone does not address his repeated denials that Sanford's product representations caused him to lose money or property. Spacone argues that "he suffered a concrete injury in reliance on Defendant's packaging of the Krazy Glue Products, and that his reliance and injury are typical of class members," Reply 2:11–13, but this only reinforces this injury's non-economic nature: "he had to return to the store to purchase a second Krazy Glue because the unexpected substantial empty space resulted in Plaintiff not having enough glue to finish his project." Reply 4:5–7. Contrary to law, Spacone relies only on his claim that he was misled by Spacone's product representations and fails to show he lost money or property as a result of those representations. Finally, Spacone does not respond to his *but for* causation problem.

The Court notes that Spacone submitted a declaration wherein he states he "lost money or property because [he] did the receive the amount of glue [he] expected to receive based on the visible packaging of the All Purpose Krazy Glue." Spacone Decl. (Dkt. No. 38-3), ¶ 7. The Court finds that this testimony contradicts Spacone's repeated and unequivocal deposition testimony that he did not take issue with the product's price and that his injury involved the inconvenience of having to make a second hardware store trip to purchase a second package. The Court therefore disregards the declaration under the sham affidavit rule and finds that it does not establish standing. *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.").

Only in the concluding minutes of a lengthy oral argument did Spacone's counsel triage the standing issue by directing the Court toward some muddled

testimony from near the end of Spacone's deposition:

> Q: Okay. Now, I believe you gave an answer–you said something about you want to make sure Krazy Glue is not profiting by misleading consumers. Is that your contention?
> A: My contention–my contention is that Krazy Glue with their – by misleading is that they're not only–you know, not only–not only in this whole incident they wasted my time, but it's actually correct that they're actually making a profit due to the fact that they're misleading–misleading me. I wouldn't–I wouldn't have purchased–I wouldn't have made a second purchase. I wouldn't have purchased as much. Krazy Glue wouldn't have gotten as much money from me if, in fact, the packaging was correct, as I saw it, if I wasn't misled.

Spacone Dep. 145:15–146:5.

The Court finds that this testimony does not establish that Spacone lost money or property as required to establish standing for several reasons. First, the testimony revolves around Sanford's profit, not Spacone's injury. Spacone does not articulate how Sanford's product representations misled customers, does not address Krazy Glue's price, does not comment on the option to avoid buying Krazy Glue, or any other economic *loss*. Spacone's complaint centers on his purchase of two Krazy Glue packages, a concern that does not reconcile with his admission that if he fully understood the amount of available cyanoacrylate adhesive within a single Krazy Glue package upon his initial purchase he would have purchased two packages in the first place. That solution would result in the same cost to Spacone and the same profit to Sanford.

Second, insofar as the Court could interpret Sanford's testimony as claiming economic injury, such interpretation would conflict with all of his other testimony concerning price and injury, wherein he (1) denies economic injury repeatedly, (2) complains only about temporal inconvenience, and (3) indicates in hindsight that if given a second chance he would purchase two Krazy Glue packages to avoid a repeat foray into Hollywood traffic. The Court has not found any case directly addressing

whether such testimony can establish standing when a deponent repeatedly denied economic harm, but the Court finds the sham affidavit doctrine to be instructive, if not analogous.

Construing Spacone's testimony generously, his deposition in the aggregate requires the Court to navigate a contradiction—Spacone's repeated lost money or property denials cannot coexist alongside his later economic injury argument. At oral argument, Spacone's counsel offered no rationale or reasoning on how to reconcile Spacone's repeated and unequivocal testimony that foreclosed standing by denying economic injury, with Spacone's muddled, last-minute testimony alluding to Sanford's profits or his sham declaration that he lost money buying Krazy Glue.

Therefore, the Court finds Spacone has not shown he lost money or property because of Sanford's alleged misrepresentations, so he lacks statutory standing to pursue his claims.

B. The Proposed Class Is Not Ascertainable.

1. Legal Standard

A class certification requirement not included in Rule 23 is ascertainability, a prudential standard that requires courts to find whether it is administratively feasible to ascertain whether individuals are members of proposed classes. *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998); *see also Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 523 (C.D. Cal. 2011) ("A class is sufficiently defined and ascertainable if it is administratively feasible for the court to determine whether a particular individual is a member.") (citation omitted). Courts use objective criteria to determine ascertainability; subjective material such as a person's state of mind is not permitted. *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 677 (S.D. Cal. 1999); *see also Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 Fed. Appx. 782, 787 (11th Cir. 2014) ("The analysis of the objective criteria also should be administratively feasible. 'Administrative feasibility' means 'that identifying class members is a manageable process that does not require much, if any, individual inquiry.'") (citation omitted),

and In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 337 (S.D.N.Y. 2002) ("An identifiable class exists if its members can be ascertained by reference to objective criteria. Where any criterion is subjective, e.g. state of mind, the class is not ascertainable.") (citation omitted). Courts may frame ascertainability complications as problems with Rule 23(a) commonality, typicality, or adequacy of representation. *Dzieciolowski v. DMAX Ltd.*, No. CV 15-2443-AG (ASX), 2016 WL 6237889, at *4 (C.D. Cal. Apr. 27, 2016); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge.").

In *Algarin v. Maybelline, LLC*, 300 F.R.D. 444 (S.D. Cal. 2014), plaintiffs pursued a class action against Maybelline pursuant to the UCL and CLRA, and sought monetary and injunctive relief regarding makeup that Maybelline marketed as lasting for twenty-four hours without transfer. Defendant introduced evidence from a qualified marketing expert on the reasonable consumer of their twenty-four-hour makeup products and their target audiences' purchase motivations that the *Algarin* court found dispositive. *Id.* at 453. The report found that repeat purchasing indicated both customer satisfaction and a consumer base that fully understood the product's "duration claims and realities" when they made repeat purchases. *Id.* Further, 45% of the total sample were satisfied with defendant's product based on repeat purchasers and 9% of the total sample constituted "one-time purchasers who expected the product to last twenty-four hours and thus are 'injured' in the manner alleged by plaintiffs." *Id.* at 454. The *Algarin* court found this expert report "to be based on reliable methodologies, relevant to the issues at hand, and useful to the trier of fact." *Id.* at 453. The *Algarin* court also found that the plaintiffs' claims failed Rule 23(a) because the proposed common questions did not allow common proof and did not typically relate to proposed class members. *Id.* at 457–58. Given repeat purchasers' clarity toward defendant's product limitations, the court found injunctive relief under Rule 23(b)(2) inappropriate. *Id.* at 453-454, 458. Common questions did not predominate,

and the proposed class failed the superiority requirement of Rule 23(b)(3). *Id.* at 459, 461. The *Algarin* court denied class certification. *Id.* at 461.

2. The Butler Report

In the present case, Sanford introduced an expert report by Sarah Butler, Managing Director at NERA Economic Consulting and an expert in survey research, market research, sampling, and statistical analysis. Expert Report of Sarah Butler ("Butler Rep.," Dkt. No. 47-4, Ex. 2). Sanford asked Butler to evaluate consumer perceptions of Krazy Glue products and packaging. Butler Rep. ¶ 8. Sanford attempts to identify repeat purchasers among the Krazy Glue consumer population, "determine whether consumers would be misled and believe that the product contains more glue than it does," and discern consumer price expectations. Butler Rep. ¶ 8.

After thorough and extensive review of the Butler Report, the Court finds Butler qualified, and her opinion based on reliable and standard statistical methodologies[3], relevant to the present issues, and beneficial to the trier of fact. Butler's report sought data from California consumers, aged eighteen and older, who purchased cyanoacrylate adhesive in the last five years. Butler Rep. ¶ 18. Keeping with standard litigation survey practice, Butler conducted a "double-blind" survey, where neither survey proctors nor respondents possessed knowledge of the survey's sponsor or its intent. Butler Rep. ¶ 22(a). Respondents provided their gender, age, and residence state at the survey outset, and respondents who failed to understand or abide by the survey instructions were excluded from the survey, along with all non-Californian residents. Butler Rep. ¶ 22(c), (d).

Four hundred one Californian super glue consumers fully responded to the survey, and of that population two hundred seventy-one or 67.6 percent bought Krazy

[3] "Potential survey respondents were contacted using an internet panel hosted by Research Now Survey Sampling International (SSI). SSI complies with the standards for online survey data panels set forth by ESOMAR (The World Association for Marketing and Opinion Research)." Butler Rep. ¶ 19.

Glue in the last five years. Butler Rep. ¶ 43. The remainder bought other brands of cyanoacrylate adhesive brands during that period. Butler Rep. ¶ 43. Butler provided respondents with a list of factors they may have considered when purchasing super glue and included "amount of product in the package" and "stay fresh packaging" in the list. Butler suggests that this exercise allowed her to "evaluate the extent to which [each factor] was an important feature [that] consumers would consider when making a product purchase." Butler Rep. ¶ 48. The five most popular respondent features listed were "product strength, reliability of product, price, how quickly the product works, and past experience with the product." Butler Rep. ¶ 49, Table 2. "Less than one quarter of respondents (22.9%), indicate that 'the amount of product in the package' was one of a number of reasons the purchased the product." Butler Rep. ¶ 49. More respondents (27.9%) chose "stay fresh packaging" as an important criterion when selecting super glue. Butler Rep. ¶ 49. Respondents also allocated points to indicate the relative importance of their super glue feature choices; on average, product strength, reliability of product, and price gleaned the highest points. Butler Rep. ¶ 50, 51. "Amount of product in the package" ranked thirteen out of seventeen; Butler argued that the results suggest that even the minority of respondents who chose this item ascribed it little value. *Id.*¶ 51.

Butler found that more than three-quarters of respondents purchased Krazy Glue in the Stay Fresh Container more than once. Butler Rep. ¶ 52. Butler asked repeat super glue purchasers (of Krazy Glue or other cyanoacrylate adhesives) if they were satisfied with their most recent purchase; no respondent indicated being misled by the Stay Fresh Container or finding differences between product volume and their expectations. Butler Rep. ¶ 54. Only five respondents (1.9%) used the entire super glue package supply in one sitting. Butler Rep. ¶ 55. Only 4.5% of respondents indicate Plaintiff's assumption that Krazy Glue lacks an applicator and is completely filled with adhesive. Butler Rep. ¶ 60. A cost companion exercise showed that "respondents do not think Krazy Glue in the Stay Fresh Container is more expensive

relative to the same amount of Krazy Glue packaged in foil tubes, thereby demonstrating that they do not believe the former contains more glue." *Id.* ¶ 68. According to the Butler Report, the "vast majority of consumers who have purchased Krazy Glue in a Stay Fresh Container have purchased the product more than once", and bought it on average between 4 and 5 times. Butler Rep. ¶ 9(a) (p. 126). Thus, repeat purchasers appear within the proposed class in high proportion. No respondents who purchased Krazy Glue in a Stay Fresh Container expressed dissatisfaction with the product "because of the amount of glue provided, or because they believed they were misled by how the product was packaged as it relates to the amount of glue being purchased." Butler Rep. ¶ 9(b) (p. 126). Consumers remain clear about Krazy Glue product attributes and limitations. "Respondents did not think that the relative price of Krazy Glue in the Stay Fresh Container was any different than the price of Krazy Glue in the foil package." Butler Rep. ¶ 9(c) (p. 127). Misperceptions of glue volume or amount do not affect consumer product affordability assumptions.

The Butler Report indicates that most consumers within Spacone's proposed class have not been misled. Many are repeat purchasers like Maybelline's cosmetics consumers in *Algarin* who do not complain of misleading packaging and return to the brand for a host of reasons. Butler Rep. ¶¶ 53, 54. Most respondents do not consider the amount of adhesive provided important when purchasing super glue, and only five respondents out of 401 (1.9 percent) discussed using the entire product in one sitting. Butler Rep. ¶¶ 49, 50, 55. The clear majority of survey respondents indicated that Krazy Glue comes with an applicator of some type. Butler Rep. ¶ 9. The Butler Report makes clear that Krazy Glue, a household item sold in multiple locations alongside multiple comparative competitor products, courts a fair number of repeat purchasers. Butler Rep. ¶ 45.

Spacone argues that methodological differences between the expert report the *Algarin* court used and the Butler Report suggest that the Butler Report does not meet the existing standard. Reply 6:17–22. As Spacone phrased his argument:

> Thus, the Butler Survey falls immensely short of that provided in *Algarin*, does not address Plaintiff's theory of liability, and provides irrelevant results at best because it fails to identify who "target customers" are, includes non-putative class members, and fails to ask any relevant questions regarding actual purchasers' expectations and understanding regarding the amount of glue provided in the Stay Fresh Container.

Butler Rep. 6:17–22.

To argue that the Butler Report's sample size renders its conclusions meaningless for a proposed class of several million Krazy Glue purchasers, Spacone asserts that the Butler Report includes "146 respondents who purchased the Krazy Glue products at issue within the last five years and 255 respondents who have not purchased the Krazy Glue products at issue within the last five years." Reply 5:21–23. Spacone faults the survey for relying on too small a sample size, and for not asking consumers what their expectations concerning the amount of glue were at the point of sale, if they understood what the term Stay Fresh Container meant and if they understood how much 2 grams of Krazy Glue is. Reply 5:24-6:2.

3. The Butler Report Establishes that the Class Is Not Ascertainable.

The Court finds that the Butler Report establishes that the class is not ascertainable. More than three-quarters of Butler's survey respondents purchased Krazy Glue in the SFC more than once, and on average four to five times. As in *Algarin*, these purchasers evidently are not misled by the SFC packaging and are not injured by any misrepresentation. The ascertainability test requires the Court to easily separate repeat purchasers who have evidently not suffered economic injury, from first-time Krazy Glue consumers who could assert an economic injury in accord with the proposed class' common question. Here, based on the Butler survey, a majority—indeed, the vast majority—of class members are repeat purchasers who were neither misled nor injured.

The Butler Report offers the Court proposed class data that reasonably influences its ascertainability calculus. Without opposing social science data to countervail Butler's methodology, it is not reasonable for the Court to ignore Butler's class analysis. Spacone's suggestion that the Court replace double-blind survey data with a hypothetical reasonable consumer in its class certification deliberation asks us to imagine what we may know. The Court declines this invitation.

The Court holds that the proposed class lacks ascertainability, as it includes far too many repeat Krazy Glue purchasers who likely do not share Spacone's concerns with Sanford's product. The Court cannot disaggregate those repeat Krazy Glue purchasers from first-time Krazy Glue buyers.

C. Plaintiff's Proposed Class Does Not Satisfy the Typicality Prerequisite of Rule 23(a).

1. Legal Standard

To certify a class action under Rule 23(a), one or more proposed class members may sue or be sued as representative parties on behalf of all proposed class members only if (1) the proposed class is so numerous that joinder of all members proves impracticable (numerosity), (2) the proposed class presents questions of law or fact common to the class (commonality), (3) representative parties' claims or defenses are typical of class claims or defenses (typicality), and (4) representative parties must fairly and adequately protect class interests. As stated, Spacone must establish all four of the prerequisite elements of Rule 23(a).

Sanford does not challenge numerosity, and the Court finds that element satisfied. The Court now turns to typicality. To certify a proposed class under Rule 23(a)(3), the plaintiff must show that a named party's claims are typical of the proposed class. The typicality test asks "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." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir.

2011) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). The named plaintiff's claims need not be identical to those of every other class member or stem from identical fact narratives. *Ellis,* 657 F.3d at 985 n. 9 (quoting *Hanon*, 976 F.2d at 508). "We do not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868–69 (9th Cir. 2001)). A named plaintiff may fail to satisfy Rule 23(a)(3) if their "unique background and factual situation" imposes atypical defense preparations on the named plaintiff when compared to other class members. *Ellis*, 657 F.3d at 984.

Spacone asserts that his claims are typical of those within the proposed class, as all purchased Sanford's Krazy Glue housed in the same packaging at issue during the same period in California. Mot. 11:4–10. Sanford responds with an extensive rebuttal of Spacone's typicality claims and argues that Spacone lacks standing because he cannot establish economic injury and causation as required by the UCL, the CLRA, and the FAL. Opp'n 9:8–11:6.

2. Spacone's Claims Are Not Typical of the Proposed Class.

Given the Court's finding that Spacone lacks standing in this case, along with the materially different Krazy Glue purchasing experience between Spacone and a significant proportion of his proposed class, Spacone's claims are not typical of the proposed class as the class is currently defined. Here, the Rule 23(a)(3) prerequisite is not fulfilled.

D. Plaintiff Is Not an Adequate Representative.

Rule 23(a)(4) requires that the representative "fairly and adequately protect the interests of the class." Whether the class representatives satisfy the adequacy requirement depends on "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees,

1 and the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487
2 (9th Cir.1994) (*quoting Brown v. Ticor Title Ins. Co*., 982 F.2d 386, 390 (9th
3 Cir.1992)). Moreover, "it is self-evident that a Court must be concerned with the
4 integrity of individuals it designates as representatives for a large class of plaintiffs."
5 *In re Computer Memories Securities Litig*., 111 F.R.D. 675, 682 (N.D. Cal.1986).
6 "Generally, unsavory character or credibility problems will not justify a finding of
7 inadequacy unless related to the issues in the litigation." *Del Campo v. Am. Corrective*
8 *Counseling Servs., Inc*., No. C 01-21151 JW PVT, 2008 WL 2038047, at *4 (N.D.
9 Cal. May 12, 2008) (*citing Byes v. Telecheck Recovery Services, Inc*., 173 F.R.D. 421,
10 427 (E.D.La.1997). "The honesty and credibility of a class representative is a relevant
11 consideration when performing the adequacy inquiry because an untrustworthy
12 plaintiff could reduce the likelihood of prevailing on the class claims." *Harris v.*
13 *Vector Marketing Corp*., 753 F.Supp.2d 996, 1015 (N.D.Cal.2010) (*quoting Searcy v.*
14 *eFunds Corp*.., 2010 WL 1337684, at *4 (N.D.Ill. Mar.31, 2010)). "[A] plaintiff with
15 credibility problems may be considered to have interests antagonistic to the class."
16 *Ross v. RBS Citizens, N.A*., 2010 WL 3980113, at *4 (N.D.Ill. Oct.8, 2010).
17 Here, the Court does not question class representative Mr. Spacone's overall
18 character. However, the Court finds that Mr. Spacone's questionable standing
19 assertion impedes his ability to adequately represent his proposed class. As noted
20 above, the Court finds that Spacone's declaration and the unclear testimony at the end
21 of his deposition are insufficient to overcome his repeated admissions that effectively
22 disprove standing. But even were the Court to find this ostensible conflict of evidence
23 sufficient to let the standing issue go forward, his credibility as to his claimed injury
24 jeopardizes the class's ability to prevail. Spacone's repeated and unambiguous denials
25 at deposition to the effect that he did not take issue with the price of the Krazy Glue
26 product he purchased, that his injury was inconvenience, and that had he known how
27 much adhesive the SFC actually contained, the only thing he would have done
28 differently is purchase two packages in a single trip at a minimum call into question

any subsequent assertions that he lost money or property because of the alleged misrepresentations—the fundamental elements of standing that Spacone must prove. Because there are at least serious questions going to Spacone's standing and his credibility to claim an economic injury but-for the alleged misrepresentation, the Court considers him as having interests antagonistic to the class and he is not reasonably well-situated to pursue the interests of the class.

IV. CONCLUSION

The Court finds that class certification is not appropriate because Spacone (1) lacks standing to raise claims under the UCL, FAL, or CLRA, (2) fails to provide the Court an ascertainable proposed class, (3) presents an atypical member of his proposed class under Rule 23(a)(3), and (4) is not an adequate class representative. Spacone's Motion for Class Certification is therefore **DENIED**.

IT IS SO ORDERED.

Dated: August 09, 2018

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE