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

IN RE: FOLGERS COFFEE, MARKETING LITIGATION.	)	Case No. 21-2984-MD-W-BP
	)	This Document Relates to Member
	)	Case No. 21-00828-CV-W-BP

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

In this multidistrict litigation ("MDL"), Plaintiffs generally allege Defendants, The J.M. Smucker Company and its subsidiary, The Folger Coffee Company, are liable for labeling coffee canisters in a way that misrepresents how many cups of coffee a consumer can brew from the canisters' contents. Now pending is Plaintiffs' Motion for Class Certification. (Doc. 255.) For the following reasons, the Motion is **GRANTED IN PART**.

I. BACKGROUND

The Court has discussed the background of this MDL in numerous previous Orders. (*E.g.*, Docs. 48, 67, 105, 125, 239, 310, 333.) The operative pleading is Plaintiffs' Third Amended Complaint. (Doc. 240.) The Court summarizes the state of this case, as relevant to the Motion it resolves here.

Defendants sell Folgers ground coffee products in cannisters of various sizes, flavors, and roasts, and the products at issue here are listed in Doc. 263-2 (the "Products"). Each Product represents, on its front label, that it "MAKES UP TO" a certain quantity of "6 FL OZ CUPS" of coffee (the "Up To Claim"). The amount listed in the Up To Claim differs from Product to Product depending on the size of the cannister and the amount of ground coffee therein. Each Product also provides, on its back label, instructions for two methods of brewing coffee: (1) the Single-Serving Method, which requires one tablespoon of ground coffee to brew one serving of coffee and (2) the

Pot Method, which requires one-half of a measuring cup (or eight tablespoons) of ground coffee to brew ten servings.

Plaintiffs are individuals from various states who have purchased Products. They allege the Up To Claim is deceptive because the Products do not produce the number of cups claimed when one follows the brewing instructions provided on the back label. Plaintiffs assert claims individually but have also filed a Motion for Class Certification, which seeks certification of six statewide classes. (Doc. 255.) As the Court has previously explained, it will first evaluate issues related to the Missouri class, (*see* Doc. 386), and thus focuses on Plaintiff Mark Smith's suit here.

Smith is a Missouri resident who has purchased some of the Products (namely, Classic Coffee Roast, 30.5 oz and 100% Columbian Coffee, 24.2 oz)[1] in Missouri. He seeks to represent a Missouri class with respect to two claims:[2]

- Violation of the Missouri Merchandising Practices Act (the "MMPA"); and
- Unjust enrichment/quasi-contract.

(Doc. 240; Doc. 263-4, p. 1.)[3]

Before proceeding, it is helpful to discuss Smith's theory to provide additional context. In the Third Amended Complaint, Smith alleges the Single-Serving Method of brewing cannot meet the Up To Claim. (Doc. 240, ¶¶ 30-40.) As explained above, however, the brewing instructions are not limited to the Single-Serving Method—they also contain the Pot Method, which makes

[1] The Third Amended Complaint alleges Smith purchased two other Products: Folgers Country Roast Coffee, 31.1 oz. and Gourmet Supreme Coffee, 27.8 oz, (Doc. 240, ¶ 18), but they are not on the list of Products for which Smith seeks class certification, (Doc. 263-2.)

[2] Smith asserts the following additional claims in the Third Amended Complaint: breach of express warranty, breach of the implied warranty of merchantability, common law fraud, and negligent misrepresentation. But he does not seek class certification for these claims.

[3] All page numbers are those generated by the Court's CM/ECF system and may not correspond to the documents' original pagination.

more coffee with fewer grounds and thus produces an amount of coffee closer to the Up To Claim than does the Single-Serving Method. (*See* Doc. 270-2, pp. 9-22 (Report of Carol Hockert, Smith's measurement expert).) Smith asserts the Up To Claim is deceptive because consumers do not grasp the brewing instructions' nuance; instead, they believe that both the Single-Serving Method and the Pot Method will meet the Up To Claim, even though a comparison of the two Methods suggests otherwise.[4]

To establish the Up To Claim is false, the Court has previously noted that, while "a promise to provide 'up to' a certain quantity is not a guarantee that that quantity will be achieved," a claim may be made if "there is a significant disparity between that quantity and the amount a consumer can actually produce . . . ." (Doc. 105, p. 15 (cleaned up).) Smith attempts to meet this standard by arguing (1) consumers believe the Single-Serving method will meet the Up To Claim but (2) it does not and (3) the disparity is sufficiently significant to make the Up To Claim deceptive. Additionally, Smith asserts that the Pot Method cannot meet the Up To Claim and that the disparity is sufficiently significant to make the Up To Claim false and misleading with respect to it. (*See, e.g.*, Doc. 305, pp. 21-22, 27-28.)

The Motion for Class Certification has been fully briefed. *(See* Docs. 305, 316, 350.) When the parties did so, the Court had not yet decided to proceed with the Missouri Class before addressing the other actions in this MDL. Thus, the parties generally presented their arguments and mentioned Missouri law without focusing directly on it. (*See, e.g.*, Doc. 305, pp. 46-47, 55-42; Doc. 316, pp. 40-42 & n.20; 53-54; Doc. 350, pp. 31-32 & nn. 28-29.) But, after the Motion was fully briefed and the Court had decided to proceed with the Missouri Class first, the parties

[4] As explained above, the Single-Serving Method uses *one* tablespoon of ground coffee to create *one* cup of coffee, while the Pot Method uses *eight* tablespoons of ground coffee to create *ten* cups of coffee, demonstrating the Pot Method is more efficient.

were directed to provide additional information regarding the elements of Smith's claims, his theory, and the evidence needed to establish it. (Doc. 391.) The parties subsequently complied with the Court's request. (*See* Docs. 395, 404, 406.) The Court resolves the parties' arguments regarding certification of a Missouri class below, setting out additional facts as necessary.

II. DISCUSSION

As explained above, Smith seeks to represent a Missouri class with respect to two claims. He has proposed the following class definition:

> All persons who purchased any of the Products in Missouri for personal, family, or household purposes, and not for resale, during the time period from August 27, 2015, to present.

(Doc. 263-4.)

Class certification is governed by Federal Rule of Civil Procedure 23. But, before proceeding to that Rule's requirements, two prerequisites must be met. First, "[a] class must . . . be defined in such a way that anyone within it" satisfies "[t]he irreducible constitutional minimum of standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (quotations omitted). Second, a class "must be adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (quotation omitted).

With respect to Rule 23, the proposed class must satisfy all four prerequisites of Rule 23(a) and at least one of the provisions of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Pursuant to Rule 23(a), the party seeking certification must demonstrate that the proposed class satisfies the requirements of numerosity, commonality, typicality, and adequate representation to ensure that any class claims are limited "to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (cleaned up). As relevant here, Rule 23(b)(3) requires that (1) "questions of law or fact common to class

members predominate over any questions affecting only individual members" and (2) a class action is the "superior" method of adjudicating the controversy.

Importantly, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, a plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that" the requirements are in fact met. *Id.* Additionally, a district court must undertake a "rigorous analysis" to ensure that Rule 23 is satisfied. *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011). Finally, while the Court's analysis will frequently entail some overlap with the merits of the underlying claims, *Wal-Mart*, 564 U.S. at 351, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits 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. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013).

A. Standing

"Article III of the Constitution limits the jurisdiction of the federal courts to cases or controversies." *In re SuperValu, Inc. Consumer Data Sec. Breach Litig.*, 870 F.3d 763, 767 (8th Cir. 2017) ("*In re SuperValue*"). "A plaintiff invoking the jurisdiction of the court must demonstrate standing to sue by showing that []he has suffered an injury in fact that is fairly traceable to the defendant's conduct and that is likely to be redressed by the relief []he seeks," and these requirements "do not change in the class action context." *Id.* at 768. There is no question that Smith has standing to assert claims, on behalf of himself, based on the Products he purchased. (Doc. 240, ¶ 4.) But Defendants make two other arguments with respect to standing.

First, Defendants argue Smith does not have standing to represent the Missouri Class as to Products he did not purchase.[5] It appears the Supreme Court has not considered this exact issue, and lower courts construing its precedents have "taken three broad positions on how related the product[s] purchased by the named plaintiff and putative class members must be[.]" *Browning v. Anheuser-Busch, LLC*, 539 F. Supp. 3d 965, 977 (W.D. Mo. 2021) (reviewing cases and summarizing approaches). One of those positions is the "substantially similar" standard, and the Court joins the other courts which find it most persuasive. *See id.* at 977-78. Under this standard, "[t]he overarching question is whether the plaintiff's averred injury is substantially similar to the claims of those []he seeks to represent." *Id.* Important to this analysis are the similarity of both "the products at issue" and "the operative facts." *Id.* at 978 (quotation omitted).

The Court finds that, with respect to Missouri Class members, the injury alleged is—at the least—substantially similar. Smith alleges the Products' Up To Claim is deceptive, and the Record shows that, for all Products, the Up To Claim differs only in the quantity of servings represented. Thus, the issues and evidence relating to the Products' Up To Claims are appropriate for class-wide treatment as discussed herein. And, given the nature of Smith's claims, the Court rejects Defendants' argument that differences in other aspects of the Products—such as different product sizes, coffee roasts, and design elements, (Doc. 316, p. 57-58)—disrupt this ruling. *See Browning*, 539 F. Supp. 3d at 969-70, 978 (finding the substantially similar test was satisfied—despite alleged differences in words, imagery, and beverage flavor (e.g., pomegranate versus lime)—because all "claims . . . [were] predicated on substantially similar facts, mainly how these malt beverages were

[5] To support this argument, Defendants rely in part on the general principle that standing does not change in the class action context, *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016); *In re SuperValu, Inc.*, 870 F.3d at 768. However, *Spokeo* and *In re SuperValu* involved a distinct issue: the requirement that at least one named plaintiff must personally have standing in order to represent a class, as standing does not exist merely because someone in the class has standing. 578 U.S. at 338 n.6; 870 F.3d at 768.

packaged, including [the defendant]'s use of cocktail names and associated imagery," to suggest products contained alcohol when they did not).

Second, Defendants argue the class improperly contains members who lack standing, arguing that, if members purchased a Product knowing it contained a shortfall or otherwise were not deceived by the Product's label, they have not suffered the necessary injury. The Court rejects this argument. "[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction," and "jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (cleaned up); *see also Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 766 (8th Cir. 2020) (rejecting the argument that some class members did not have standing because they did not suffer damages from a breach of contract and noting the defendant "challenge[d] the merits of some class members' claims, but couch[ed] the argument as one challenging those class members' standing"). Here, Smith has alleged a misrepresentation was included on all Products and has provided a theory of injury for all consumers. The fact that some class members did not care about or were not deceived by the misrepresentation is better addressed in the context of the merits of the claim.[6]

The Court concludes the requirements of standing are satisfied here.

[6] The Court notes most of the cases cited by Defendants evaluate the merits of the claim, rather than standing. *See, e.g.*, *Bratton v. Hershey Co.*, 2018 WL 934899, at *2-*4 (W.D. Mo. Feb. 16, 2018); *Owen v. Gen. Motors Corp.*, 2007 WL 1655760, at *3-*5 (W.D. Mo. June 5, 2007). Only one case cited by Defendants addresses standing. *In re Bisphenol-A (BPA) Polycarbonate Plastic Prod. Liab. Litig.*, 2011 WL 6740338 (W.D. Mo. Dec. 22, 2011). But that case is distinguishable because the plaintiffs claimed that the defendants should have disclosed certain information when selling baby bottles and training/sippy cups. *Id.* Thus, to the extent class members already had the relevant knowledge (and many individuals likely did, given that research is frequently performed before buying baby products), the allegedly appropriate disclosure would serve no purpose and no injury would have been sustained. *Id.* at *1 & n.3. In contrast, Smith claims the Products contained false information, not that information was withheld.

B. Ascertainability

"A class may be ascertainable when its members may be identified by reference to objective criteria." *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017). For convenience, the Court sets forth Smith's proposed class definition again:

> All persons who purchased any of the Products in Missouri for personal, family, or household purposes, and not for resale, during the time period from August 27, 2015, to present.

(Doc. 263-4.) Smith contends the class is ascertainable and asserts its members can be identified by submitting affidavits. (Doc. 305, pp. 38-39.) Defendants object to this approach, contending (1) individuals will be unable to attest reliably and verifiably that they bought a particular Product within the class period and (2) affidavits are inappropriate when a class definition includes a subjective element, pointing to the class definition's requirement that the Product be purchased for personal, family, or household purposes. (Doc. 316, pp. 37-39.)

The Court finds the class is ascertainable. Admittedly, the reason for the purchase may be subjective, but it can be verified by objective criteria, such as how the Product was ultimately used. Additionally, the cases upon which Defendants rely do not establish a class can never be certified when the class definition includes a subjective element. Two of the cases do not arise in the class certification context. *See Reynolds v. Concordia Univ.*, 2022 WL 1323236, at *17 (D. Minn. May 3, 2022); *Ferron v. Metareward, Inc.*, 698 F. Supp. 2d 992, 997 (S.D. Ohio 2010). And the third focused on the multipurpose use of large pickup trucks, finding this fact created an individualized inquiry regarding the subjective reason for the purchase. *Corder v. Ford Motor Co.*, 283 F.R.D. 337, 341-42 (W.D. Ky. 2012). Defendants do not point to a similar issue here. Further, *Corder* suggested that consumer class actions may be appropriate with other household items. *Id.* at 341.

As mentioned above, Defendants raise other concerns regarding the use of self-authentication affidavits. (Doc. 316, pp. 37-39.) The Court rejects these arguments, finding persuasive authorities such as *In re Dollar Gen. Corp. Motor Oil Mktg. & Sales Pracs. Litig.*, 2019 WL 1418292, at *15 (W.D. Mo. Mar. 21, 2019) ("*In re Dollar General*"), which rejected arguments similar to Defendants'.

The Court finds that the Missouri Class is ascertainable and that the use of self-authentication affidavits is appropriate here.

C. Rule 23(a)

To obtain class certification, Smith must "meet the prerequisites of numerosity, commonality, typicality, and adequacy of representation specified in Rule 23(a)." *Falcon*, 457 U.S. at 156 (quotation omitted). The Court addresses each requirement in turn.

1. Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Smith argues class membership is likely in the millions because Defendants, since May 2016, have sold approximately 660 million Products in the United States, over 229 million of which were sold in the six states originally at issue in this case. (Doc. 305, p. 39-40.) Defendants do not contest numerosity, (Doc. 316, p. 56), and the Court concludes the requirement is met here.

2. Commonality

Rule 23(a)(2) requires that "there [be] questions of law or fact common to the class." For purposes of this inquiry, "even a single common question will do[.]" *Dukes*, 564 U.S. at 338 (cleaned up). Additionally, commonality is related to Rule 23(b)(3)'s more demanding standard that "the questions of law or fact common to class members predominate over any questions

affecting only individual members[.]" *E.g.*, *Ebert v. General Mills, Inc.*, 823 F.3d 472, 478-79 (8th Cir. 2016); *see also Custom Hair Designs by Sandy v. Cent. Payment Co., LLC*, 984 F.3d 595, 601 (8th Cir. 2020) ("*Custom Hair*") ("Predominance subsumes the commonality requirement, so both can be analyzed through the lens of predominance."). The Court finds questions common to the class (e.g., how much coffee can the Products make) exist but will provide a fuller analysis when discussing Rule 23(b)(3).

3. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." "Typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Custom Hair*, 984 F.3d at 604. The claims of the entire class need not be identical, but the class representatives must generally "possess the same interest and suffer the same injury" as the unnamed class members. *Falcon*, 457 at 156. "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims[] and gives rise to the same legal or remedial theory." *Custom Hair*, 984 F.3d at 604.

Smith argues his claim is typical of all class members because (1) everyone purchased a Product with a deceptive Up To Claim and (2) all claims stem from the same course of conduct by Defendants. In response, Defendants reiterate their argument that Smith does not have standing to represent purchasers of Products he did not buy. (Doc. 316, pp. 57-58.)[7] In light of the Court's prior discussion, it concludes Smith has established typicality.

[7] Defendants also assert certain named Plaintiffs are subject to unique defenses, but Smith is not discussed. (Doc. 316, pp. 57-58.)

4. Adequacy

Rule 23(a)(4) requires the Court to find that "the representative parties will fairly and adequately protect the interests of the class." "The focus of [the Rule] is whether: (1) the class representatives have common interests with the members of the class, and (2) . . . the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982).

Smith contends he is an adequate representative because "[a]ll Class members suffered similar damages in that they purchased underfilled Products at artificially inflated prices" and "[t]he interests of [Smith] and the [Missouri Class] are fully aligned, as all Class members seek to hold Defendants liable for their misconduct, obtain relief, and ensure that going forward, Defendants' labeling complies with applicable laws[.]" (Doc. 305, p. 44.) He also states he and counsel are prepared to vigorously prosecute this case. With respect to adequacy, Defendants raise the same arguments they did for typicality. The Court finds Smith adequately represents the class. It further concludes Smith and the Missouri Class are represented by skilled counsel who are experienced in complex litigation and have been vigorously prosecuting this case. (*See, e.g.*, Docs. 257, 263.) Thus, the Court holds Rule 23(a)(4)'s requirement is met here.

D. Rule 23(b)

In addition to the Rule 23(a) requirements, a plaintiff must show that the putative class qualifies under one of the categories in Rule 23(b). Here, Smith seeks certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods for fairly and effectively adjudicating the controversy."

1. *Predominance*

The following principles guide the Court's analysis:

> Predominance gauges the relationship between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Custom Hair, 984 F.3d at 601 (cleaned up). "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Thus, the Court must consider what Smith needs to prove to recover under the MMPA and his unjust enrichment claim.

The MMPA provides:

> Any person who purchases . . . merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action . . . to recover actual damages.

Mo. Rev. Stat. § 407.025.1(1). Section 407.020 declares "an unlawful practice" to be, in part, "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . ." *Id*. § 407.020.1. The MMPA also requires a plaintiff to prove:

> (a) That the person acted as a reasonable consumer would in light of all circumstances;

(b) That the method, act, or practice declared unlawful by section 407.020 would cause a reasonable person to enter into the transaction that resulted in damages; and

(c) Individual damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty.

Id. § 407.025.1(2).[8]

Turning to unjust enrichment, Smith must show "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances." *Hargis v. JLB Corp.*, 357 S.W.3d 574, 586 (Mo. 2011) (en banc) (cleaned up).

Based on the required "rigorous analysis" of the parties' briefing, authorities, and evidentiary record, *see Bennett*, 656 F.3d at 814, the Court finds Smith can present common evidence for the above elements. For instance, the Record contains evidence of the following:

- Defendants' Up To Claim appeared on each Product and differed only in the quantity of servings it represented, (*see, e.g.*, Docs. 263-15 through 263-28) providing evidence the Missouri Class members were exposed to the Up To Claim.

- Product consumers perceive the Up To Claim to mean the Product will make the same total number of cups of coffee when making one cup at a time and when making a pot,

[8] The legislation creating these requirements took effect on August 28, 2020. Although Smith's case was filed thereafter—on November 23, 2021, (Case No. 21-00828-CV-W-BP, Doc. 1)—he asserts he is not subject to the additional requirements, pointing to a case filed by Sharel Mawby on August 27, 2020, (*see* Case No. 20-00822-CV-W-BP-01, Doc. 1-2.) That case was initially part of this MDL but was dismissed on September 26, 2022, based upon the parties' stipulation. (Doc. 177; Case No. 20-00822-CV-W-BP-01, Doc. 47.) Smith appears to believe his and Mawby's claims were combined when a Second Consolidated Class Action Complaint was filed in the MDL. Based on this premise, he argues his and the class's claims relate back to the day Mawby's case was filed. (Doc. 406, p. 2 n.1 (citing *Plubell v. Merck & Co., Inc.*, 434 F.3d 1070 (8th Cir. 2006).)

The Court disagrees. As it has explained, the use of a consolidated complaint did not combine cases or change the fact that this action is an MDL made up of individual suits. (*See, e.g.*, Doc. 67, pp. 10-11 ("[W]hile Plaintiffs clearly hope that this case will eventually become a class action, right now, *it is not a class action*—it is simply a collection of individual suits aggregated by the [Judicial Panel on MDL]." (emphasis in original)); Doc. 125, p. 4 (referencing a prior ruling and explaining "the individual Plaintiffs are not fungible in the manner Defendants suggest."); Doc. 239 (noting there was no question (1) an individual plaintiff could dismiss her case and (2) another individual could file her own case).) Smith's case is separate from Mawby's and was filed after the amendments to the MMPA took effect. Thus, the above requirements apply to his claims and *Plubell*, 434 F.3d 1070—which addressed whether an amended pleading that named a new class representative related back to the original pleading—is inapposite.

(Doc. 278-2), providing evidence Missouri Class connected the Up To Claim to the Product's brewing instructions and were deceived by it.

- Consumers prefer a Product with an Up To Claim, (Doc. 278-2), and Consumers were more likely to select a Product with an Up To Claim stating it makes a greater number of servings, (Doc. 279-1), providing evidence the Up To Claim impacted the Missouri Class members' purchasing decisions.

- The Products do not contain enough ground coffee to make the quantity of servings expressed on the Up To Claim, (Doc. 260), providing evidence Missouri Class members cannot make the promised number of servings when following the Products' brewing instructions.

- Given the number of servings the Products actually contained, purchasers would have paid less for the Products, (Doc. 340), providing evidence that Missouri Consumers suffered economic damages and Defendants realized an economic benefit at their expense.

This common evidence also supports Plaintiffs' theory that (1) Missouri consumers purchased Defendants' Products based on the Up To Claim's representation the Product contained enough coffee to make a specified number of servings but (2) they could not make that number of servings when they followed the Products' brewing instructions and (3) have thus been economically damaged because they paid a per-cup price premium for servings they did not receive. *See, e.g.*, *Custom Hair*, 984 F.3d at 601-02; *In re Dollar General*, 2019 WL 1418292, at *19-20.

Defendants contest this conclusion primarily by reiterating criticisms of Smith's experts and arguing weaknesses in expert evidence prevent the class from proving common questions with common evidence. For example, Defendants claim Smith lacks common evidence on a critical consumer perception issue—how many cups consumers believe the Up To Claim promises a product will make. Smith has produced one survey expert—Dr. J. Michael Dennis—who discussed consumer perception and analyzed whether consumers believe the Up To Claim can be met using both the Single-Serving Method and the Pot Method. The Court rejects Defendants' argument that Smith must also present evidence of how many cups consumers believe the Up To

Claim promises. The Up To Claim in this case uses plain, straightforward language, similar to the label at issue in *Martin v. Monsanto Company*, 2017 WL 1115167 (C.D. Cal. Mar. 24, 2017). (*See, e.g.*, Doc. 404, pp. 5-6 (Defendants acknowledging additional evidence of consumer perception is not needed when advertising is sufficiently clear).) Thus, the Court finds Smith need not prove exactly how many cups consumers perceive the Up To Claim will make; rather, given his theory, he must establish whether consumers believe the Up To Claim will be met under both the Single-Serving Method and the Pot Method.[9] Dr. Dennis's survey provides such evidence.

Defendants also argue Smith's experts fail to establish the inflated Up To Claim caused consumers to purchase the product. The Court acknowledges Dr. Dennis's opinion that consumers prefer a Product with an Up To Claim does not prove that the allegedly inflated Up To Claim caused consumers to purchase a Product. However, Dr. Samantha Iyengar—Smith's other survey expert—provides such evidence, especially when coupled with Dr. Dennis's opinion. Dr. Iyengar conducted "a Conjoint or Choice Based Conjoint (CBC) Survey," the basic idea of which is that "consumer preferences for a particular product are based on the value they attach to the individual features or attributes of the product." (Doc. 279-1, ¶¶ 11, 12.) The survey asked respondents to choose between products with multiple attributes (i.e., brand, flavor and roast, packaging type, net weight, number of servings, and price) that varied across the questions. (Doc. 279-1, ¶¶ 29-46).

> While each product configuration had the same list of attributes, the levels for each of the attributes varied randomly and respondents were encouraged to make trade-offs when deciding among the various combinations of attributes and levels presented to them (*e.g.,* choosing between one product with a preferred feature versus another product which lacks the preferred feature but is offered at a lower price).

[9] For the reasons stated in the Order Denying Defendants' Motion to Exclude or Strike Opinions Offered by Dr. Dennis, the Court rejects Defendants' argument that his study failed to connect the Up To Claim to the brewing instructions contained on the packaging. (Doc. 428, p. 7.)

(Doc. 249-1, ¶ 13.) From this survey Dr. Iyengar concluded that "serving amount has a significant and positive impact on consumers' preferences, with consumers more likely to select a product with a larger number of servings compared to a smaller number of servings, holding all else constant." (Doc. 279-1, ¶ 53.) Thus, Smith provides common evidence on the question of whether the inflated Up To Claim impacted a consumer's decision to purchase a Product.

Defendants rely heavily on criticisms of Dr. Iyengar's methodology and conclusions when arguing against the above conclusion. However, as the Court explained in its Order Denying Defendants' Motion to Exclude or Strike Opinions Offered by Dr. Iyengar, (Doc. 429), these criticisms do not merit exclusion. Rather, they affect the weight a jury may place on Dr. Iyengar's opinion, not its admissibility.

Defendants also rely on two Eighth Circuit opinions, *Hudock v. LG Electronics U.S.A., Inc.*, 12 F.4th 773 (8th Cir. 2021), and *In re St. Jude Medical, Inc.*, 522 F.3d 836 (8th Cir. 2008), but the Court finds the facts of both cases differ significantly from the facts of this case. For example, *St. Jude* involved representations made by treating physicians when describing a heart valve implant, and the Eighth Circuit concluded common evidence could not establish the nature of the alleged misrepresentation because some class members had not received the alleged misrepresentation at all. 522 F.3d at 838-39. *Hudock* involved statements regarding a television refresh rate, and the defendant presented evidence that (1) some products at issue did not contain the alleged misrepresentation, (2) some class members did not see or rely on the alleged misrepresentation, and (3) some class members did not find the statement at issue material to their purchasing decision. 12 F.4th at 777. The Eighth Circuit concluded the question of what motivated consumers to purchase a television (1) was individualized, (2) impacted issues of

reliance and causation, and (3) could be raised by the defendant, making class certification inappropriate. *Id.*

In contrast, Smith has produced common evidence on both the nature of the misrepresentation and the impact the misrepresentation had on consumers' purchasing decisions. Unlike the alleged misrepresentations in *St. Jude* and *Hudock*, the Up To Claim was contained on the front of all Products and consists of an objective statement. Further, and as discussed above, Dr. Iyengar conducted a survey designed to test consumer preferences for relevant attributes and concluded the inflated Up To Claim "had a significant and positive impact on consumers' preferences, with consumers more likely to select a product with a larger number of servings compared to a smaller number of servings, holding all else constant." (Doc. 279-1, ¶ 53.) Lastly, unlike the defendants in *St. Jude* and *Hudock*, Defendants have not presented evidence that members of the Missouri class (1) did not receive or consider the Up To Claim when purchasing Products or (2) purchased the Products due to other Product attributes.[10]

Defendants next argue Smith cannot establish the Products fail to meet the Up To Claim—and thus that the Claim is false—with common evidence. For this issue, Smith retained Carol Hockert, a measurement expert, who tested the Products and found that, "if a consumer followed the directions on the package, they would not be able to realize the number of cups of coffee claimed on the container for any of the products tested." (Doc. 270-2, ¶ 28.) Defendants reiterate their arguments for excluding Hockert, but the Court has rejected them. (*See* Doc. 430, pp. 7-13.) Defendants (largely based on arguments previously raised) also invite the Court to (1) find that Hockert's results do not establish the Up To Claim cannot be met and (2) adopt the opinion of

[10] In comparing this case to *Hudock*, Defendants do not cite Smith's testimony but rather testimony of the named Plaintiffs for other proposed statewide classes. (Doc. 316, p. 54.) And the Court is aware of no similar evidence in the Record for Smith or the Missouri Class.

Defendants' measurement experts over Hockert's. The Court, however, declines to "engage in free-ranging merits inquiries at the certification stage." *Amgen Inc.*, 568 U.S. at 466.

Finally, Defendants argue Smith cannot establish damages are measurable on a classwide basis using a model that reflects his theory of liability. They reiterate arguments raised when seeking to exclude the opinions of Dr. Iyengar and Dr. Daniel Werner, Smith's damages expert, who created four models to measure damages in this case.[11] For the reasons explained in other Orders, (Doc 429, pp. 6-12, Doc. 431), the Court rejects these arguments. Defendants also contend Dr. Werner's method of calculating damages is inconsistent with Smith's evidence on other issues. But this argument is based on the flawed premise that Smith has not produced evidence regarding how the size of the Up To Claim impacts consumers' purchasing decisions; as discussed above, Dr. Iyengar provides such evidence. The Court finds Dr. Werner's opinion establishes damages may be measured across the entire class consistent with Smith's theory of liability. *See, e.g.*, *Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 559 (W.D. Mo. 2014) (because "[t]he application of [the plaintiff's] model to each class member is merely mechanical," the possibility of "variation does not defeat the common issue of liability and the calculation of damages is [still] based on a single model applicable to all members of the class"); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (recognizing a class can be certified even when some "important matters will have to be tried separately, such as damages").

Thus, the Court concludes Smith has established common questions of law or fact predominate over individual class member questions.

[11] Two of Dr. Werner's models rely on the results of Dr. Iyengar's survey.

2. Superiority

Rule 23(b)(3) also requires the Court to find "that a class action [is] superior to other available methods for fairly and efficiently adjudicating the controversy." The Court considers the following factors in conducting this analysis:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already 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). Further, "[c]lass actions are superior when the class members' claims are generally small and unlikely to be pursued individually." *Custom Hair*, 984 F.3d at 605.

Smith's briefing supports that (1) the claim of each Missouri Class member is of small value, thus making the effort and expense to individually pursue a claim prohibitive and any interest in individually controlling the claim small or nonexistent, and (2) there is no known litigation of similar claims outside this MDL. (Doc. 305, p. 60-62.) Defendants' briefing does not dispute or address these points. The Court is also satisfied class resolution of the Missouri claims is superior and manageable. *See, e.g.*, *In re Dollar General*, 2019 WL 1418292, at *21.

E. Rule 23(c)(2)(B) Notice

"For any class certified under Rule 23(b)(3)[,] . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must also contain certain information. *See id.* Neither party addresses the notice requirement. Accordingly, the Court will direct the parties to confer and advise the Court about their intended

next steps for the litigation of the Missouri claims, including the provision of notice to members of the Missouri Class.

III. CONCLUSION

The Court finds class certification is appropriate here. The class is adequately defined and ascertainable. Smith also satisfies all four requirements of Rule 23(a). Finally, questions of law or fact common to class members predominate over questions affecting only individual members, and a class action is superior to other methods of adjudicating the issues in this case, satisfying Rule 23(b)(3). For these reasons:

- Plaintiffs' Motion for Class Certification, (Doc. 255), is **GRANTED** as to the Missouri Class.
- Under Federal Rule of Civil Procedure 23(b)(3), Plaintiff Mark Smith's Missouri Merchandising Practices Act and unjust enrichment claims are **CERTIFIED** as a single class action defined as:

> All persons who purchased any of the Products in Missouri for personal, family, or household purposes, and not for resale, during the time period from August 27, 2015, to present.

The Missouri Class's Products are those listed in Doc. 263-2.

- Plaintiff Mark Smith is **DESIGNATED** as the class representative of the Missouri Class.
- The law firms of Faruqi & Faruqi, LLP and Lynch Carpenter, LLP are **APPOINTED c**lass counsel for the Missouri Class.

The parties are **DIRECTED** to, by no later than September 4, 2024, (1) confer about the next steps of litigating the Missouri Class, including the provision of notice to class members, and (2) file a Joint Status Report regarding the same.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE: July 31, 2024