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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

YOUNGSUK KIM, an individual, and  
on behalf of other members of the  
general public similarly situated,

Plaintiff,

v.

BENIHANA, INC, a Florida  
corporation,

Defendant.

Case No. 5:19-cv-02196-JWH-KKx

**ORDER ON PLAINTIFF'S  
MOTION TO CERTIFY CLASS  
[ECF No. 91] AND DEFENDANT'S  
MOTIONS TO EXCLUDE  
OPINIONS OF PLAINTIFF'S  
RETAINED EXPERTS [ECF  
Nos. 100 & 101]**

1 Before the Court in this class action case are the motion of Plaintiff  
 2 Youngsuk Kim for class certification<sup>1</sup> and the motions of Defendant Benihana,  
 3 Inc. to exclude the opinions of Kim’s retained experts, Dr. Thomas J. Maronick<sup>2</sup>  
 4 and Dr. Eric F. Forister.<sup>3</sup> After considering the papers filed in support and in  
 5 opposition,<sup>4</sup> as well as the oral argument of counsel during the hearing on  
 6 January 7, 2022, the Court orders that the Class Certification Motion is  
 7 **DENIED**, the Maronick Motion is **DENIED**, and the Forister Motion is  
 8 **GRANTED**, as set forth herein.

## 9 I. BACKGROUND

### 10 A. Procedural History

11 In September 2019, Kim, individually and on behalf of all others similarly  
 12 situated, filed his Complaint commencing this action in San Bernardino County  
 13 Superior Court.<sup>5</sup> Two months later, Benihana removed the action to this Court  
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 15  
 16

17 <sup>1</sup> Pl.’s Mot. for Class Certification (the “Class Certification Motion”) [ECF No. 91].

18 <sup>2</sup> Def.’s Mot. to Exclude Ops. of Thomas J. Maronick (the “Maronick Motion”) [ECF No. 100].

19 <sup>3</sup> Def.’s Mot. to Exclude Ops. of Eric F. Forister (the “Forister Motion”) [ECF No. 101].

20 <sup>4</sup> The Court considered the following papers: (1) Am. Compl. (the  
 21 “Amended Complaint”) [ECF No. 27]; (2) the Class Certification Motion  
 22 (including its attachments); (3) Def.’s Opp’n to the Class Certification Motion  
 23 (the “Opposition”) [ECF No. 99]; (4) Pl.’s Reply in Supp. of the Class  
 24 Certification Motion (the “Reply”) [ECF No. 108]; (5) the Maronick Motion  
 25 (including its attachments); (6) Pl.’s Opp’n to the Maronick Motion (the  
 26 “Maronick Opposition”) (including its attachments) [ECF No. 109]; (7) Def.’s  
 27 Reply in Supp. of the Maronick Motion (the “Maronick Reply”) (including its  
 28 attachment) [ECF No. 112]; (8) the Forister Motion (including its attachments);  
 (9) Pl.’s Opp’n to the Forister Motion (the “Forister Opposition”) (including  
 its attachments) [ECF No. 110]; and (10) Def.’s Reply in Supp. of the Forister  
 Motion (the “Forister Reply”) (including its attachment) [ECF No. 113].

<sup>5</sup> See generally Compl. [ECF No. 3, Ex. A]. On July 15, 2020, the Court approved the parties’ stipulation to dismiss Plaintiff Jennifer Greene without prejudice. See Order Granting Stip. to Dismiss Pl. Jennifer Greene [ECF No. 53].

1 pursuant to 28 U.S.C. §§ 1441(a), 1446(a), and 1453(b), asserting jurisdiction  
2 under 28 U.S.C. § 1332.<sup>6</sup>

3 Kim filed the operative Amended Complaint in March 2020.<sup>7</sup> In that  
4 pleading, Kim asserts the following four claims for relief against Benihana:  
5 (1) Violation of the California Unfair Competition Law (the “UCL”),  
6 Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) Violation of the California False  
7 Advertising Law (the “FAL”), Cal. Bus. & Prof. Code §§ 17500, *et seq.*;  
8 (3) Violation of the California Consumer Legal Remedies Act (the “CLRA”),  
9 Cal. Civ. Code §§ 1750, *et seq.*; and (4) Breach of Express Warranty.

10 In February 2021,<sup>8</sup> the Court denied Benihana’s motion for judgment on  
11 the pleadings.<sup>9</sup> Kim filed the instant Class Certification Motion on  
12 September 27, and it is fully briefed. Benihana filed the instant Maronick and  
13 Forister Motions on October 29, and they are fully briefed.

#### 14 **B. Factual Allegations**

15 The facts as alleged in the Amended Complaint are as follows:

16 Between 2015 and 2019, Kim patronized various Benihana restaurants in  
17 California, including locations in Santa Monica,<sup>10</sup> where Kim purchased certain  
18 Food Products<sup>11</sup> on Benihana’s menu that were advertised as containing “crab,”  
19 among other ingredients.<sup>12</sup> Before purchasing the Food Products, Kim read the  
20 hardcopy and online menus, and he relied upon the statements therein regarding

21 \_\_\_\_\_  
22 <sup>6</sup> Notice of Removal [ECF No. 3] ¶¶ 9–17.

23 <sup>7</sup> *See generally* Amended Complaint.

24 <sup>8</sup> Unless otherwise noted, all dates are in 2021.

25 <sup>9</sup> *See* Order on Def.’s Mot. for J. on the Pleadings (the “Order”) [ECF  
26 No. 63].

27 <sup>10</sup> Amended Complaint ¶¶ 15 & 23.

28 <sup>11</sup> According to the Amended Complaint, the “Food Products” include the  
“Shrimp Lovers Roll, Shrimp Crunchy Roll, Alaskan Roll, Dragon Roll, Chili  
Shrimp Roll, Rainbow Roll, Spider Roll, Sumo Roll Baked, and Lobster Roll,  
and/or California Roll” (collectively, the “Food Products”). *Id.* at ¶ 2.

<sup>12</sup> *See id.* at ¶¶ 2, 3, 15, 17, 25, & 40.

1 the Food Products’ respective ingredients.<sup>13</sup> Under each menu item,  
2 Benihana’s menus list that item’s respective ingredients. With respect to the  
3 Food Products, Benihana’s menus list “crab” as one of the ingredients.<sup>14</sup> There  
4 is also a symbol appended to the “crab” ingredient that refers to a footnote that  
5 states, “‘Kani kama crab’ and ‘kani kama crab mix’ contain imitation crab.”<sup>15</sup>  
6 Based upon those representations, Kim believed that the Food Products  
7 contained some amount of real crab, and he made the decision to purchase the  
8 Food Products based upon that belief.<sup>16</sup> The Food Products, however, do not  
9 actually contain any amount of real crab; therefore, according to Kim, the menus  
10 are misleading, deceptive, and false.<sup>17</sup>

## 11 II. LEGAL STANDARD

### 12 A. Expert Opinion

13 When evaluating a motion for class certification, “a district court is not  
14 limited to considering only admissible evidence in evaluating whether Rule 23’s  
15 requirements are met.” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1005 (9th  
16 Cir. 2018) (internal citation omitted). At the same time, a “district court need  
17 not dispense with the standards of admissibility entirely” at the class  
18 certification stage. *Id.* at 1006. The court “should evaluate admissibility under  
19 the standard set forth in *Daubert* . . . . But admissibility must not be dispositive.  
20 Instead, an inquiry into the evidence’s ultimate admissibility should go to the  
21 weight that evidence is given at the class certification stage.” *Id.* (referencing  
22 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

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25 <sup>13</sup> *Id.* at ¶¶ 6, 17, 24, & 51.

26 <sup>14</sup> *See id.* at ¶ 3.

27 <sup>15</sup> *See id.*

28 <sup>16</sup> *See id.* at ¶¶ 3, 6, 23, 24, & 49.

<sup>17</sup> *See generally id.*

1 Under the Federal Rules of Evidence, a “witness who is qualified as an  
2 expert by knowledge, skill, experience, training, or education may testify in the  
3 form of an opinion or otherwise,” Fed. R. Evid. 702, provided that:

4 (a) the expert’s scientific, technical, or other specialized knowledge  
5 will help the trier of fact to understand the evidence or to determine  
6 a fact in issue;

7 (b) the testimony is based on sufficient facts or data;

8 (c) the testimony is the product of reliable principles and methods;  
9 and

10 (d) the expert has reliably applied the principles and methods to the  
11 facts of the case.

12 *Id.* When applying the *Daubert* standard, a district court must “make a  
13 ‘preliminary assessment’ of (1) whether the expert is qualified to present the  
14 opinion offered, (2) ‘whether the reasoning or methodology underlying the  
15 testimony is scientifically valid,’ and (3) ‘whether that reasoning or  
16 methodology properly can be applied to the facts in issue.’” *Lewert v. Boiron,*  
17 *Inc.*, 212 F. Supp. 3d 917, 924 (C.D. Cal. 2016), *aff’d*, 742 F. App’x 282 (9th Cir.  
18 2018) (quoting *Daubert*, 509 U.S. at 592–93).

## 19 **B. Class Certification**

20 “The class action is ‘an exception to the usual rule that litigation is  
21 conducted by and on behalf of the individual named parties only.’” *Wal-Mart*  
22 *Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*,  
23 442 U.S. 682, 700–701 (1979)). “Rule 23(a) ensures that the named plaintiffs  
24 are appropriate representatives of the class whose claims they wish to litigate.”  
25 *Id.* at 349.

26 Rule 23(a) imposes the following prerequisites on class actions: (1) the  
27 class is so numerous that a joinder of all members is impracticable (numerosity);  
28 (2) there are questions of law or fact common to the class (commonality); (3) the

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