UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 16-189 JGB (SPx)**	Date	August 31, 2021
Title	***Veda Woodard, et al. v. Lee Labrada, et al.***		

Present: The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) GRANTING Plaintiffs' Applications to Seal (Dkt. Nos. 345, 353, 375); (2) DENYING AS MOOT Remaining Media Defendants' Motion for Summary Judgment (Dkt. No. 333); (3) GRANTING InterHealth's Motion for Summary Judgment (Dkt. No. 347); (4) GRANTING-IN-PART and DENYING-IN-PART LBN's Motion for Summary Judgment (Dkt. No. 352); (5) GRANTING-IN-PART and DENYING-IN-PART Labrada Defendants' Motion for Summary Judgment (Dkt. No. 357); and (6) GRANTING-IN-PART and DENYING-IN-PART Plaintiffs' Motion for Class Certification (Dkt. No. 351) (IN CHAMBERS)

Before the Court are Defendants InterHealth Nutraceuticals, Inc.'s ("InterHealth") partial motion for summary judgment ("MSJ 1," Dkt. No. 347), Labrada Bodybuilding Nutrition, Inc.'s ("LBN") partial motion for summary judgment ("MSJ 2," Dkt. No. 352), and Lee Labrada ("Mr. Labrada") and Labrada Nutritional Systems, Inc.'s ("LNS")[1] partial motion for summary judgment ("MSJ 3," Dkt. No. 357, and collectively, "MSJs") pursuant to Federal Rule of Civil Procedure (the "Rule(s)") 56. Also before the Court are Plaintiffs Trina Rizzo-Marino ("Rizzo-Marino"), Veda Woodard ("Woodard"), and Diane Morrison's ("Morrison") (collectively, "Plaintiffs") applications to seal ("Applications," Dkt. Nos. 345, 353, 375) and motion for class certification ("MCC," Dkt. No. 351, and collectively with the MSJs, "Motions"). After considering all papers filed in support of and in opposition to the Motions,

[1] The Court refers to LBN and Labrada Defendants collectively as simply "Labrada" throughout this Order.

the Court GRANTS the Applications, DENIES the Media Defendants' MSJ as MOOT, GRANTS MSJ 1, GRANTS-IN-PART and DENIES-IN-PART MSJ 2, GRANTS-IN-PART and DENIES-IN-PART MSJ 3, and GRANTS-IN-PART and DENIES-IN-PART the MCC. [2]

I. BACKGROUND

On February 2, 2016, Plaintiff Woodard filed a complaint against Defendants Mr. Labrada, LBN, LNS, Dr. Oz, Entertainment Media Ventures, Inc. doing business as Oz Media,[3] Zoco Productions, LLC ("Zoco"), Harpo Productions, Inc. ("Harpo"), Sony Pictures Television, Inc., Naturex, Inc.,[4] and InterHealth. ("Complaint," Dkt. No. 1.) On June 2, 2016, Plaintiffs Woodard, Rizzo-Marino, and Morrison filed a First Amended Complaint, which contains eleven causes of action: (1) fraud, deceit, and suppression of facts under Cal. Civ. Code §§ 1709-1811 and the common law of all states; (2) negligent misrepresentation under Cal. Civ. Code § 1710(2) and the common law of all states; (3) violations of the Unfair Competition Law ("UCL") under Cal. Bus. & Prof. Code §§ 17200, et seq.; (4) violation of the Consumer Legal Remedies Act ("CLRA") under Cal. Civ. Code § 1700, et seq.; (5) violation of the False Advertising Law ("FAL") under Cal. Bus & Prof. Code § 17500, et seq.; (6) breach of express warranty under Cal. Comm. Code § 2313; (7) breach of implied warranty of merchantability under Cal. Comm. Code § 2314; (8) breach of express warranty under N.Y. U.C.C. § 2-313; (9) breach of implied warranty under N.Y. U.C.C. § 2-314; (10) breach of express warranties to intended third party beneficiaries; (11) violation of the Magnuson-Moss Warranty Act ("MMWA") under 15 U.S.C. § 2301, et seq.; (12) unfair trade practices under N.Y. Bus. Law § 349; and (13) false advertising under N.Y. Bus. Law § 350. ("FAC," Dkt. No. 88.)

A. Motions for Summary Judgment

On March 2, 2020, InterHealth filed MSJ 1 (see MSJ 1) and filed in support:

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[2] Dr. Mehmet C. Oz ("Dr. Oz"), Harpo, and Zoco (collectively, the "Remaining Media Defendants") filed a fourth motion for summary judgment. ("Media Defendants' MSJ," Dkt. No. 333.) The Remaining Media Defendants filed a notice of settlement in this matter on March 26, 2020 and were dismissed as a party on March 27, 2020. (Dkt. Nos. 414, 418.) At times, the Court relies on undisputed facts within documents and evidence submitted with the Media Defendants' MSJ because the evidence is necessary to provide factual context to the remaining MSJs. (See "DSUF 1," Dkt. No. 334.) The Media Defendants' MSJ is DENIED as moot.

[3] On February 26, 2020, the Court granted the parties' stipulation to dismiss Entertainment Media Ventures as a party. (Dkt. No. 341.)

[4] On April 23, 2019, the Court granted preliminary approval of a class action settlement between Plaintiffs and Naturex. (Dkt. No. 293.) On October 7, 2019, the Court granted final approval of the class action settlement and dismissed Naturex as a party. ("Final Approval Order," Dkt. No. 321.)

- Memorandum of points and authorities ("Memo 1," Dkt. No. 347-1);
- Declaration of Mary Helen Lucero ("Lucero") ("Lucero Declaration," Dkt. No. 347-2)
    - Exhibit A, a true and correct copy of the SuperCitrimax Trademark Licensing Agreement ("TLA")
    - Exhibit B, a true and correct copy of the proposed Labrada product label ("Proposed Label")
    - Exhibit C, a true and correct copy of email correspondence between InterHealth and Labrada regarding the TLA;
- Declaration of Fred Zilz (Dkt. No. 347-3)
    - Exhibits A-E, a true and correct copy of data from test results of SuperCitrimax's contents ("Zilz Exhibits A-E," 347-3-7)[5];
- Declaration of David Corneil (Dkt. No. 347-8);
    - Exhibit A, a true and correct copy of InterHealth's expert chemist Jason Clevenger's report;
    - Exhibit B, a true and correct copy of the transcript of Lucero's deposition
    - Exhibit C, a true and correct copy of the declaration of Dr. Oz;
    - Exhibit D, a true and correct copy of the transcript of Rizzo-Marino's deposition;
    - Exhibit E, a true and correct copy of the transcript of Morrison's deposition;
    - Exhibit F, a true and correct copy of the transcript of Woodard's deposition;
    - Exhibit G, a true and correct copy of the transcript of Kyle Workman's ("Workman") deposition ("Workman Depo.");
    - Exhibit H, a true and correct copy of the transcript of George Belch, Ph.D's ("Dr. Belch") deposition ("Belch Depo.");
    - Exhibit I, a true and correct copy of the transcript of Amy Chiaro's deposition;
- Declaration of Ray Rahman ("Rahman") ("Rahman Declaration," Dkt. No. 347-9);
- Proposed Order (Dkt. No. 347-10); and
- Statement of Undisputed Facts ("DSUF 2," Dkt. No. 348).

On March 2, 2020, LBN filed MSJ 2 (see MSJ 2) and filed in support:

- Statement of Undisputed Facts ("DSUF 3," Dkt. No. 352-1);
- Declaration of Rahman ("2d Rahman Declaration," Dkt. No. 352-2);
    - Exhibit A, Labrada inventory sales history reports ("2d Rahman Exhibit A," Dkt. No. 352-3);
    - Exhibit B, a second set of Labrada inventory sales history reports ("2d Rahman Exhibit B," Dkt. No. 352-4);
- Declaration of James G. Munisteri ("Munister") (Dkt. No. 352-5);

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[5] Due to their size, Zilz Exhibits A-E span several entries in the docket despite all depicting the same test results of SuperCitrimax's contents. (See Dkt. Nos. 347-3-7.) Although InterHealth refers to each docket entry as just "Exhibit A," for ease of reference, the Court refers to each separate docket entry as a different exhibit and labels each subsequent exhibit in alphabetical order.

- Exhibit C, a true and correct copy of excerpts of the transcript of Morrison's deposition (Dkt. No. 352-6);
- Exhibit D, a true and correct copy of excerpts of the transcript of Rizzo-Marino's deposition ("2d Rizzo-Marino Depo.," Dkt. No. 352-7);
- Exhibit E, a true and correct copy of excerpts of the transcript of Woodard's deposition (Dkt. No. 352-8);
- Exhibit F, a true and correct copy of the expert report of Dr. David B. Allison ("Dr. Allison") ("Allison Report," Dkt. No. 352-9);
- Exhibit G, a true and correct copy of the rebuttal report of Dr. Allison ("Allison Rebuttal," Dkt. No. 352-10);
- Exhibit H, a true and correct copy of excerpts from the transcript of Dr. Allison's deposition (Dkt. No. 352-11);
- Exhibit I, a true and correct copy of the abstract of the Tajik study cited by Dr. Allison ("Tajik Study," Dkt. No. 352-12);
- Exhibit J, a true and correct copy of the abstract of the Astell study cited by Dr. Allison (Dkt. No. 352-13);
- Exhibit K, a true and correct copy of the abstract of the Onakpoya study cited by Dr. Allison (Dkt. No. 352-14);

- Declaration of Ramirez ("Ramirez") ("Ramirez Declaration," Dkt. No. 352-15); and
- Proposed Order (Dkt. No. 352-16).

On March 2, 2020, Labrada Defendants filed MSJ 3 (see MSJ 3) and filed in support:

- Statement of Undisputed Facts ("DSUF 4," Dkt. No. 357-1);
- Declaration of Rahman ("3d Rahman Declaration," Dkt. No. 357-2 (attaching Exhibits A-B));
- Declaration of Munisteri (Dkt. No. 357-7)
  - Exhibit C, a true and correct copy of excerpts of the transcript of Workman's deposition (Dkt. No. 357-8);
  - Exhibit E, a true and correct copy of excerpts of the transcript of Rizzo-Marino's deposition (Dkt. No. 357-9);
  - Exhibit F, a true and correct copy of excerpts of the transcript of Woodard's deposition (Dkt. No. 357-10);
  - Exhibit G, a true and correct copy of excerpts of the transcript of Morrison's deposition (Dkt. No. 357-11);
  - Exhibit H, a true and correct copy of excerpts of the interrogatory responses of Morrison (Dkt. No. 357-12);
  - Exhibit I, a true and correct copy of excerpts of the interrogatory responses of Woodard (Dkt. No. 357-13);
  - Exhibit J, a true and correct copy of excerpts of the interrogatory responses of Rizzo-Marino (Dkt. No. 357-14);
- Declaration of Ramirez (Dkt. No. 357-5);
  - Exhibit D, a true and correct copy of the labels used on the Labrada products at issue (Dkt. No. 357-6);

- Declaration of Mr. Labrada (Dkt. No. 357-15); and
- Proposed Order (Dkt. No. 357-16).

On March 9, 2020, Plaintiffs opposed MSJ 1 ("Opposition 1," Dkt. No. 378) and filed:

- Declaration of Michael T. Houchin ("Houchin") (Dkt. No. 378-1);
- Table of Exhibits (Dkt. No. 378-2);
- Exhibit 1, copies of the labels for the Labrada Garcinia Cambogia Product ("Labrada GC") ("Labrada GC Label," Dkt. No. 378-3);
- Exhibit 2, copies of the TLA between InterHealth and Labrada (Dkt. No. 378-4);
- Exhibit 3, excerpts from the transcript of Workman's deposition (Dkt. No. 378-5);
- Exhibit 4, an email from Jason Barnett ("Barnett") to Ramirez (Dkt. No. 378-6);
- Exhibit 5, document of Inter Health approval of Labrada product label on January 3, 2013 (Dkt. No. 378-7);
- Exhibit 6, excerpts from the transcript of Lucero's deposition ("Lucero Depo.," Dkt. No. 378-8);
- Exhibit 7, document showing InterHealth's labeling guidelines ("InterHealth Labeling Guidelines," Dkt. No. 378-9);
- Exhibit 8, email from Ramirez to Barnett ("Ramirez-Barnett Email," Dkt. No. 378-10);
- Exhibit 9, a document showing clinical strength research for SuperCitrimax (Dkt. No. 378-11);
- Exhibit 10, excerpts from the deposition transcript of Dr. Barbara Petersen (Dkt. No. 378-12):
- Exhibit 11, excerpts of scientific studies regarding garcinia cambogia ("GC") funded by InterHealth or conducted by InterHealth-funded researchers (Dkt. No. 378-13);
- Exhibit 12, a January 3, 2013 General Purchase Agreement between InterHealth and Labrada's contract manufacturer, JW Nutritional (Dkt. No. 378-14);
- Exhibit 13, a letter from InterHealth to JW Nutritional purporting to show InterHealth extending JW Nutritional a line of credit to manufacture the Labrada products (Dkt. No. 378-15);
- Exhibit 14, audio transcript for Episode 4-052 of the Dr. Oz Show regarding GC ("Episode III Transcript," Dkt. No. 378-16);
- Exhibit 15, United States Patent Number 7858128 describing InterHealth's patent for its brand of GC (Dkt. No. 378-17);
- Exhibit 16, InterHealth's press release promoting Dr. Oz Show's feature GC for weight loss (Dkt. No. 378-18);
- Exhibit 17, a letter from InterHealth to JW Nutritional detailing a shortage in GC since the Dr. Oz Show Episode III (Dkt. No. 378-19);
- Exhibit 18, an email from InterHealth to Zoco pitching the promotion of an InterHealth product (Dkt. No. 378-20);
- Exhibit 19, an agreement between Zoco and InterHealth to promote a product (Dkt. No. 378-21);
- Exhibit 20, Allison Report (Dkt. No. 378-22);

- Exhibit 21, Allison Rebuttal (Dkt. No. 378-23);
- Exhibit 22, Mullins v. Premier Nutrition Corp., Case No. 3:13-cv-01271-RS (Aug. 29, 2019 N.D. Cal. 2019) (Dkt. No. 378-24);
- Exhibit 23, laboratory test results performed by GAAS Analytical showing that Labrada GC contains less than 60% HCA[6] (Dkt. No. 378-25);
- Exhibit 24, excerpts from the deposition transcript of Morrison (Dkt. No. 378-26);
- Exhibit 25, excerpts from the deposition transcript of Woodard (Dkt. No. 378-27);
- Exhibit 26, the declaration of Morrison ("Morrison Declaration," Dkt. No. 378-28);
- Exhibit 27, the declaration of Woodard ("Woodard Declaration," Dkt. No. 378-29);
- Exhibit 28, a printout from Walgreen's website showing the sale of Labrada GC (Dkt. No. 378-30);
- Exhibit 29, Labrada Defendants and LBN's Rule 26(a)(1) disclosures (Dkt. No. 378-31);
- Exhibit 30, InterHealth's Rule 26(a)(1) initial disclosures (Dkt. No. 378-32);
- Exhibit 31, InterHealth's supplemental Rule 26(a)(1) disclosures (Dkt. No. 378-33);
- Exhibit 32, InterHealth's second supplemental Rule 26(a)(1) disclosures (Dkt. No. 378-34); and
- Exhibit 33, an email from Keith Lessman to Barnett (Dkt. No. 378-35);
- A statement of genuine disputes of material fact (Dkt. No. 378-36); and
- Plaintiffs' evidentiary objections ("Pl. Objections 1," Dkt. No. 378-37).

On March 9, 2020, Plaintiffs opposed MSJ 2 ("Opposition 2," Dkt. No. 369) and filed:

- Declaration of Houchin (Dkt. No. 369-1);
- Exhibit 1, true and correct copies of the labels of Labrada GC product (Dkt. No. 369-2);
- Exhibit 2, true and correct copies of the labels for the Labrada green coffee bean extract ("GCBE") product ("Labrada GCBE") ("Labrada GCBE Label," Dkt. No. 369-3);
- Exhibit 3, true and correct copies of excerpts of the deposition of Woodard ("5th Woodard Depo.," Dkt. No. 369-4);
- Exhibit 4, true and correct copies of excerpts of the deposition of Morrison ("5th Morrison Depo.," Dkt. No. 369-5);
- Exhibit 5, true and correct copies of excerpts of the deposition of Rizzo-Marino ("5th Rizzo-Marino Depo.," Dkt. No. 369-6);
- Exhibit 6, the declaration of Woodard ("2d Woodard Declaration," Dkt. No. 369-7);
- Exhibit 7, the declaration of Morrison ("2d Morrison Declaration," Dkt. No. 369-8);
- Exhibit 8, the declaration of Rizzo-Marino ("Rizzo-Marino Declaration," Dkt. No. 369-9);
- Exhibit 9, a true and correct copy of the audio transcript for Episode 4-018 of the Dr. Oz Show (Dkt. No. 369-10);
- Exhibit 10, a true and correct copy of the audio transcript for Episode 4-052 of the Dr. Oz Show (Dkt. No. 369-11);

[6] "HCA" is short for hydroxycitric acid, a chemical found in GC that may promote weight loss. (DSUF 1 ¶ 109.)

- Exhibit 11, Allison Report (Dkt. No. 369-12);
- Exhibit 12, Allison Rebuttal (Dkt. No. 369-13);
- Exhibit 13, true and correct copies of excerpts from the deposition transcript of Dr. Allison (Dkt. No. 369-14);
- Exhibit 14, a true and correct copy of a study by S.B. Heymsfield ("Heymsfield Study," Dkt. No. 369-15);
- Exhibit 15, a printout from Walgreen's website showing the sale of Labrada GC (Dkt. No. 369-16);
- Exhibit 16, a CVS website printout showing the sale of Labrada GC (Dkt. No. 369-17);
- Exhibit 17, Labrada Defendants and LBN's Rule 26(a)(1) disclosures (Dkt. No. 369-18);
- Exhibit 18, breach of warranty notices sent to Defendants by Plaintiffs Woodard and Rizzo-Marino (Dkt. No. 369-19);
- A statement genuine disputes of material fact (Dkt. No. 369-20); and
- Plaintiffs' evidentiary objections ("Pl. Objections 2," Dkt. No. 369-21).

On March 9, 2020, Plaintiffs opposed MSJ 3 ("Opposition 3," Dkt. No. 371) and filed:

- Declaration of Houchin (Dkt. No. 371-1);
- Table of Exhibits (Dkt. No. 371-2);
- Exhibit 1, true and correct copies of excerpts from the deposition transcript of Workman (Dkt. No. 371-3);
- Exhibit 2, true and correct copies of excerpts from the deposition transcript of Mr. Labrada ("Labrada Depo.," Dkt. No. 371-4);
- Exhibit 3, true and correct copies of excerpts from the deposition transcript of Woodard ("6th Woodard Depo.," Dkt. No. 371-5);
- Exhibit 4, true and correct copies of excerpts from the deposition transcript of Morrison (Dkt. No. 371-6);
- Exhibit 5, true and correct copies of excerpts from the deposition transcript of Rizzo-Marino (Dkt. No. 371-7);
- Exhibit 6, Labrada Defendants and LBN's Rule 26(a)(1) disclosures (Dkt. No. 371-8);
- A statement genuine disputes of material fact ("PSGD 4," Dkt. No. 371-9); and
- Plaintiffs' evidentiary objections ("Pl. Objections 3," Dkt. No. 371-10).

On March 16, 2020, InterHealth replied to Opposition 1 ("Reply 1," Dkt. No. 402) and filed in support objections to Plaintiffs' evidence. ("InterHealth Objections," Dkt. No. 403.) On March 16, 2020, LBN replied to Opposition 2. ("Reply 2," Dkt. No. 408.) On March 16, 2020, Labrada Defendants replied to Opposition 3 ("Reply 3," Dkt. No. 406) and filed in support the declaration of Mr. Labrada ("2d Labrada Declaration," Dkt. No. 406-1), two exhibits (Dkt. Nos. 406-2–3), and a request for judicial notice ("RJN A," Dkt. No. 407).[7]

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[7] Labrada Defendants request that the Court take judicial notice of Plaintiffs' statement of genuine disputes of material fact. (See RJN A at 2.) However, records on a Court's own docket

The Court heard oral argument on November 23, 2020 and ordered Plaintiffs and LBN to submit supplemental briefing. The parties submitted their respective briefing on November 25, 2020. ("Plaintiff's Supplement," Dkt. No. 442; "LBN's Supplement," Dkt. No. 443.)

B. Motion for Class Certification

On March 2, 2020, Plaintiffs filed the MCC (see MCC) and filed in support:

- Memorandum of points and authorities ("MCC Memo," Dkt. No. 351-1);
- Declarations of Ronald A. Marron ("Marron") ("Marron MCC Declaration," Dkt. No. 351-2), Timothy Cohelan ("Cohelan MCC Declaration," Dkt. No. 351-44), Woodard ("Woodard MCC Declaration," Dkt. No. 351-45), Morrison ("Morrison MCC Declaration," Dkt. No. 351-47), Rizzo-Marino ("Rizzo-Marino MCC Declaration," Dkt. No. 351-49), and Gajan Retnasaba ("Retnasaba MCC Declaration," Dkt. No. 351-51);
- Forty-three exhibits ("MCC Exhibits 1–43," Dkt. Nos. 351-4–43, 351-46, 351-48, 351-50);
- Request for judicial notice ("RJN B," Dkt. No. 351-52);[8] and
- A proposed order (Dkt. No. 353-16).

On March 10, 2020, Labrada and InterHealth jointly opposed the MCC ("MCC Opposition," Dkt. No. 383) and filed in support a request for judicial notice. ("RJN C," Dkt. No. 380.)[9] On March 16, 2020, Plaintiffs replied to the MCC Opposition ("MCC Reply," Dkt.

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in the same matter need not be judicially noticed to be considered. Colodney v. Orr, 2015 WL 1636818, at *1 n.4 (C.D. Cal. Apr. 9, 2015), aff'd, 651 F. App'x 630 (9th Cir. 2016). As a result, Labrada Defendants' request for judicial notice is DENIED.

[8] In RJN B, Plaintiffs request judicial notice of six exhibits. (See RJN B.) Collectively, the exhibits include the allegedly deceptive labels on the products sold to Plaintiffs, information found on government websites, and a complaint in an action filed in the Western District of Texas. (Id.) All three types of evidence are properly subject to judicial notice. Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (holding that courts may take judicial notice of records in other courts); Kanfer v. Pharmacare US, Inc., 142 F. Supp. 3d 1091, 1098–99 (S.D. Cal. 2015) ("Courts addressing… product-labeling claims routinely take judicial notice of images of the product packaging."); Von Koenig v. Snapple Beverage Corp., 713 F. Supp. 2d 1066, 1073 (E.D. Cal. 2010) (explaining that matters of public record on government websites are properly subject to judicial notice). The Court thus GRANTS RJN B and takes judicial notice of the attached documents.

[9] In RJN C, Labrada and InterHealth request that the Court take judicial notice of a variety of exhibits submitted with the MSJs. (See RJN C.) However, as explained above, the Court need not take judicial notice of its own docket and can consider the items of evidence in RJN C without granting the request. Colodney, 2015 WL 1636818, at *1 n.4. Accordingly, the Court DENIES RJN C.

No. 404) and filed in support the declaration of Houchin (Dkt. No. 404-1) and five exhibits (Dkt. Nos. 404-2–6).

C. Applications to Seal

On March 2, 2020, Plaintiffs filed the first application to seal ("First Application," Dkt. No. 345) and filed in support a redacted memorandum of points and authorities ("First Application Memo," Dkt. No. 345-1), the redacted declaration of Marron (Dkt. No. 345-2), fifteen exhibits (Dkt. Nos. 345-3–17), and a proposed order (Dkt. No. 345-18).

On the same day as the First Application, Plaintiffs filed the second application to seal ("Second Application," Dkt. No. 353) and filed in support a redacted memorandum of points and authorities ("Second Application Memo," Dkt. No. 353-1), the redacted declaration of Houchin ("Houchin Seal Declaration," Dkt. No. 353-2), thirteen exhibits (Dkt. Nos. 353-3–15), and a proposed order (Dkt. No. 353-16).

On March 9, 2020, Plaintiffs filed the third application to seal ("Third Application," Dkt. No. 375) and filed in support a redacted memorandum of points and authorities ("Third Application Memo," Dkt. No. 375-2), the second declaration of Houchin (Dkt. No. 375-3), four exhibits (Dkt. Nos. 375-4–7), and a proposed order (Dkt. No. 375-1).

II. LEGAL STANDARD

A. Application to Seal

There is a strong presumption of public access to judicial records and documents. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 n.7 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); Pintos v. Pac. Creditors Ass'n, 605 F.3d 665, 677 (9th Cir. 2010). The presumption applies to pleadings filed with the court and extends to discovery material attached to those pleadings. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1134 (9th Cir. 2003). Although a request to seal judicial records offends the presumption in favor of public access, the right of access "is not absolute." Id. at 1135.

Generally, two standards govern requests to seal documents: the "compelling reasons" standard and the "good cause" standard. Pintos, 605 F.3d at 677. When the documents sought to be sealed are only "tangentially related" to the underlying cause of action, the court applies a "good cause" standard. Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097 (9th Cir. 2016). The Ninth Circuit in Chrysler recognized that whether a motion is dispositive or nondispositive should not automatically dictate which standard a court should apply. Id. at 1098 ("When using the words 'dispositive' and 'nondispositive,' we do not believe our court intended for these descriptions to morph into mechanical classifications. Rather, these descriptive terms are indicative of when a certain test should apply."). The Ninth Circuit continued, explaining: "[t]he focus in all of our cases is on whether the motion at issue is more than tangentially related

to the underlying cause of action." Id. at 1099 (citations omitted); see also Miotox LLC v. Allergan, Inc., 2016 WL 3176557, at *1 (Cal. June 2, 2016) (examining whether the documents were tangentially related to the cause of action). The Ninth Circuit, in discussing the compelling reasons standard, has stated: "[a] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the compelling reasons standard. That is, the party must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure[.]" Kamakana v. City and Cnty. of Honolulu, 447 F.3d 1172, 1178–79 (9th Cir. 2006).

"[T]he presumption of access is not rebutted where ... documents subject to a protective order are filed under seal as attachments to a dispositive motion. The ... 'compelling reasons' standard continues to apply." Foltz, 331 F.3d at 1136 (internal citations omitted); see also L.R. 79-5.2.2(a)(i) ("That the information may have been designated confidential pursuant to a protective order is not sufficient justification for filing under seal; a person seeking to file such documents under seal must comply with [the Local Rules].").

B. Rule 56

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying the portions of the pleadings and record that it believes demonstrate the absence of an issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Id. at 325. Instead, the moving party need only prove there is an absence of evidence to support the nonmoving party's case. Id.; In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250.

If the moving party has sustained its burden, the non-moving party must then show that there is a genuine issue of material fact that must be resolved at trial. Celotex, 477 U.S. at 324. The non-moving party must make an affirmative showing on all matters placed at issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." In re Oracle, 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

Critically, a trial court "may only consider admissible evidence when reviewing a motion for summary judgment." Weil v. Citizens Telecom Servs. Co., LLC, 922 F.3d 993, 998 (9th Cir. 2019) (citing Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)); see Fed. R. Civ. Proc. 56(e). At the summary judgment stage, district courts consider evidence with content that would be admissible at trial, even if the form of the evidence would not be admissible at trial. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003); Block v. City of Los Angeles, 253 F.3d 410, 418–19 (9th Cir. 2001).

When deciding a motion for summary judgment, the court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991). Thus, summary judgment for the moving party is proper when a "rational trier of fact" would not be able to find for the non-moving party based on the record taken as a whole. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

C. Rule 23

Federal Rule of Civil Procedure 23 ("Rule 23") governs the litigation of class actions. A party seeking class certification must establish the following prerequisites:

> (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). After satisfying the four prerequisites of numerosity, commonality, typicality, and adequacy, a party must also demonstrate one of the following: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. See Fed. R. Civ. P. 23(b)(1)–(3).[10]

A trial court has broad discretion over whether to grant a motion for class certification. See Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 712 (9th Cir. 2010). However, "[a] party seeking class certification must affirmatively demonstrate compliance with [Rule 23]—that is, the party must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). A district court must conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." Id. at 351. "Courts typically proceed claim-by-claim in determining whether the Rule 23 requirements have been met, particularly as to the Rule 23(a)(2) and (b)(3) requirements of common questions and predominance." Allen v. Verizon California, Inc., 2010 WL 11583099, at *2 (C.D. Cal. Aug. 12, 2010).

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[10] While some circuits have adopted an "ascertainability" prerequisite to certification, the Ninth Circuit has not. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.4 (9th Cir. 2017) ("ConAgra cites no other precedent to support the notion that our court has adopted an 'ascertainability' requirement. This is not surprising because we have not. Instead, we have addressed the types of alleged definitional deficiencies other courts have referred to as 'ascertainability' issues . . . through analysis of Rule 23's enumerated requirements.").

Rule 23 further provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues," Fed. R. Civ. P. 23(c)(4), or the "class may be divided into subclasses that are each treated as a class under this rule," Fed. R. Civ. P. 23(c)(5). "This means that each subclass must independently meet the requirements of Rule 23 for the maintenance of a class action." Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981).

III. APPLICATIONS TO SEAL

Plaintiffs request that the Court seal portions of various documents submitted with the MCC and in opposition to the MSJs. (See Applications.) Local Rule 79-5.2.2(b) requires that a filing party seeking to file documents designated by another as confidential pursuant to a protective order fulfill several enumerated procedural requirements. See L.R. 79-5.2.2(b). Moreover, because Plaintiffs request that the Court seal documents submitted with motions for summary judgment and class certification—motions more than "tangentially related" to the merits of this matter—they must establish "compelling reasons" to seal. A.B. v. Pac. Fertility Ctr., 2020 WL 945398, at *1 (N.D. Cal. Feb. 26, 2020) (holding that compelling reasons are required to prevail on motion to seal documents relating to class certification and collecting cases); Shapiro v. Hasbro Inc., 2016 WL 9137526, at *1 (C.D. Cal. July 20, 2016) (applying compelling reasons standard to motion for summary judgment). "[C]ompelling reasons sufficient to outweigh the public's interest in disclosure and justify the sealing of court records exist when such court files might have become a vehicle for improper purposes, such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." Kamakana, 447 F.3d at 1178.

The Court finds that Plaintiffs have complied with the Local Rules and established compelling reasons to seal the requested documents. The Houchin Seal Declaration states that Plaintiffs' counsel filed the Applications after meeting with opposing counsel and discussing the necessity of redactions and the scope of the purportedly confidential information. (Houchin Seal Declaration ¶¶ 9-11, 13-16.) The redacted documents submitted with the Applications reflect information designated as confidential pursuant to the parties' protective order that Defendants have refused to waive. (Id.)

The information to be sealed in the redacted documents themselves is a combination of Defendants' proprietary business information and sensitive commercial dealings that might be used to promote public scandal. Both sensitive commercial information and information that might promote public scandal can be compelling reasons to permit the filing of a document under seal. Table de France, Inc. v. DBC Corp., 2019 WL 6894521, at *2 (C.D. Cal. Oct. 18, 2019) (finding compelling reasons existed to protect proprietary business information); United States ex rel. Ruhe v. Masimo Corp., 2013 WL 12131173, at *1 (C.D. Cal. Aug. 26, 2013) (explaining that information that "promote[s] public scandal[]" justifies finding of compelling reasons to seal). Additionally, the requested redactions have been narrowly tailored after proper consultation with each of the Defendants with an interest in the publicization of the information. In total, the Court finds that the harm to Defendants' business interests and the risk of public scandal

stemming from the information within the redacted documents outweighs the public interest in discovery of the information. The Court therefore GRANTS the First Application, GRANTS the Second Application, GRANTS the Third Application, and permits Plaintiff to file the requested documents under seal.

IV. OBJECTIONS

InterHealth and Plaintiffs object to multiple items of evidence filed with the Motion. "[O]bjections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself" and are thus "redundant" and need not be considered. Burch v. Regents of Univ. of California, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted."). The Court therefore OVERRULES all such objections by the parties. Additionally, the Court need not consider some of the evidence objected to by the parties in order to decide the Motions. Objections not specifically addressed are OVERRULED.

A. InterHealth's Objections

InterHealth objects to multiple items of evidence Plaintiffs submit. (See InterHealth Objections.) As an initial matter, the Court notes that InterHealth fails to explain the basis for any of its objections aside from mere citations to the rules of evidence. Relatedly, InterHealth frequently objects to multiple items of evidence on multiple grounds but fails to specify which item of evidence violates which rule—a problem InterHealth's failure to expound on its bases for objection compounds. Because the Court cannot decipher what or why InterHealth objects to certain evidence, it cannot and does not consider many of InterHealth's objections to the evidence and OVERRULES those objections. See Warner-Tamerlane Publ'g Corp. v. Leadsinger Corp., 2008 WL 11334487, at *3 (C.D. Cal. Apr. 18, 2008) ("Lacking any specific link between the [evidence] and the multiple unexplained objections, the Court declines to indulge in speculation regarding the admissibility of Plaintiffs' evidence. [] Defendants' 'objections' are overruled."); see also Burch v. Regents of Univ. of California, 433 F. Supp. 2d 1110, 1123–24 (E.D. Cal. 2006) ("Because defendants only generally raise [an] objection without specifying which of the numerous exhibits… are actually [objectionable], the court overrules th[e] objection. The burden is on defendants to state their objections with specificity.") (citing Wright, Miller & Kane, 10B Federal Practice and Procedure § 2738).

InterHealth argues that the Allison Report's summaries of test results on the percentage of HCA in Labrada's products are hearsay and lack foundation. (InterHealth Objections ¶¶ 50-54.) The Allison Report sufficiently details Dr. Allison's qualifications and establishes him as a qualified expert on the scientific and evidentiary basis for claimed effects of marketed products. (Allison Report ¶¶ 22, 24.) Furthermore, as an expert witness Dr. Allison is permitted to opine on and formulate opinions based on hearsay. Fed. R. Evid. 703; Shalaby v. Irwin Indus. Toll Co., 2009 WL 10672274, at *1 (S.D. Cal. July 2, 2009) ("Federal Rule of Evidence 703 provides that an expert may rely upon hearsay or other inadmissible evidence to form the basis of his

opinion."). To the extent that InterHealth asserts that the results themselves are hearsay, the Court need not consider direct evidence of the results to rule on the MSJs. InterHealth's objections to the HCA testing results in the Allison Report are thus OVERRULED.

B. Plaintiffs' Objections

Plaintiffs object to multiple items of evidence cited by Defendants. (Pl. Objections 1-3.)

Plaintiffs object to LBN Exhibit I, a copy of the abstract of the Tajik Study discussed by Dr. Allison in his expert report, on the basis that it lacks proper authentication. (Pl. Objections ¶ 32.) The Court disagrees. The Allison Report references the Tajik Study's authors, topic, date, and publishing journal; provides a reference number; and lists other identifying information reflected in LBN Exhibit I. In all, the identifying features common to the Allison Report and the abstract give the Court confidence in the accuracy of the abstract. As a result, the Court OVERRULES Plaintiffs' objection.

Plaintiffs object to LBN Exhibit I as hearsay. (Pl. Objections ¶ 32.) However, LBN does not seek to use evidence of the abstract for the truth of the matter asserted. Fed. R. Evid. 801(c)(2). Instead, it appears to rely on the abstract to impeach the credibility of Dr. Allison's opinion of the study's findings—specifically, his opinion that the study does not support the claims made on the product labels at issue. The Court thus OVERRULES Plaintiffs' objection.

Plaintiffs object to LBN Exhibits J and K—abstracts from studies the Allison Report references—on the same grounds as LBN Exhibit I. (Pl. Objections ¶¶ 33-34.) For the reasons stated above, the Court OVERRULES Plaintiffs' objections.

Plaintiffs object to the Ramirez Declaration for lack of foundation and because LBN failed to disclose Ramirez as a witness. (Pl. Objections ¶ 44.) The Court OVERRULES the first ground because it finds that the declaration satisfactorily lays out Ramirez's basis of knowledge. However, LBN did not disclose Ramirez as a witness and has not met its burden of establishing that its failure to disclose Ramirez was "substantially justified or [] harmless." Fed. R. Civ. P. 37(c)(1). Accordingly, Plaintiffs' objection to the Ramirez Declaration is SUSTAINED. See Guzman v. Bridgepoint Educ., Inc., 305 F.R.D. 594, 608 (S.D. Cal. 2015) ("[B]ecause [the party's] non-disclosure violates Rule 26 and is not substantially justified or harmless, exclusion of [the] declaration is appropriate.").

Plaintiffs object to the Rahman Declaration submitted by Labrada Defendants because Rahman was not disclosed as a witness. (See generally Pl. Objections 2.) In response, Labrada Defendants submit a supplemental declaration from Mr. Labrada—a disclosed witness—corroborating Rahman's declaration. (See 2d Labrada Declaration.) The Court thus OVERRULES Plaintiffs' evidentiary objections to the Rahman Declaration because Labrada Defendants' failure to disclose Rahman as a witness is harmless. See Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or

at a trial, unless the failure… is harmless.") (emphasis added). Likewise, for the same reasons, the Court DENIES Plaintiffs' alternative request to defer ruling on MSJ 3 until Rahman can be deposed. (See Opp'n 3 at 12.)

Plaintiffs object to the Lucero Declaration, contending that Lucero lacks personal knowledge of Dr. Oz's relationship with InterHealth. (Pl. Objections 1 ¶ 12.) Lucero declares that she is testifying about the business relationship between Dr. Oz and InterHealth "[t]o the best of [her] knowledge" from her time as chief financial officer of InterHealth. (Lucero Declaration ¶¶ 2, 12-14.) The Lucero Declaration also states that "all [] facts contained in this Declaration are based upon my personal knowledge[.]" (Id. ¶ 1.) This is sufficient to establish personal knowledge and the Court therefore OVERRULES Plaintiffs' objection.

Plaintiffs object to portions of the Belch Deposition where Dr. Belch testified that he did not know of any existing business relationship between InterHealth and the Dr. Oz Show. (Pl. Objections 1 ¶ 12.) Plaintiffs assert that Dr. Belch lacks personal knowledge of the business relationship between InterHealth and the Dr. Oz Show. (Id.) Plaintiffs' counsel retained Dr. Belch as an expert in order to analyze the potential influence the claims on the product labels at issue might have on consumers. (Belch Depo. at 12:5-23.) Aside from eliciting a statement that he viewed episodes of the Dr. Oz Show, InterHealth does not lay a foundation for Belch's personal knowledge of the business relationship between the show and InterHealth. Accordingly, the Court SUSTAINS Plaintiffs' objection to the disputed portions of Belch's testimony.

V. UNDISPUTED FACTS

The material facts set forth below are sufficiently supported by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for purposes of the MSJs. See Fed. R. Civ. P. 56(e)(2); L.R. 56-3. The Court deems facts undisputed when the parties' "disputes" of that fact are merely restatements of the same fact, do not actually contradict the substance of a fact, or argue the relevancy and materiality of an otherwise undisputed fact. See Fed. R. Civ. P. 56(e)(2); L.R. 56-3.

A. General Facts

Woodard is and has been at all relevant times a resident of Murrieta, California. (DSUF ¶ 1.) Rizzo-Marino is and has been at all relevant times a resident of Brooklyn, New York. (Id. ¶ 4.) Morrison is and has been at all relevant times a resident of Bolivar, New York. (Id. 1 ¶ 9.)

Mr. Labrada is the chief executive officer, founder, and president of LBN. (DSUF 4 ¶ 1.) Mr. Labrada receives a salary for his work as chief executive officer of LBN and is not given additional compensation for the sale of the Labrada weight-loss products at issue. (DSUF 4 ¶¶ 2,

5-12.)[11] LNS is a corporate entity created by Mr. Labrada that has been dormant for almost twenty years. (Id. ¶ 13.) LNS does not have any employees. (Id.) Furthermore, LNS has never sold the Labrada weight-loss products or received profits from the sale of the products. (Id. ¶¶ 15-19.) LNS's finances are separate from Mr. Labrada's finances. (Id. ¶ 20.) LBN and LNS are distinct corporate entities and do not share finances or profits. (Id. ¶¶ 13, 17-18, 20.)

Dr. Oz is a resident of New Jersey who maintains his principal place of business in New York. (DSUF 1 ¶¶ 12, 13.) Dr. Oz is the host of the Dr. Oz Show ("DOS"). (Id. ¶ 14.) DOS is produced by ZoCo, a Delaware limited liability company with its principal place of business in New York. (Id. ¶ 16.) Harpo is an Illinois corporation with its principal place of business in Chicago, Illinois. (Id. ¶ 18.)

InterHealth is the supplier of ingredients used in GC products and does not sell finished consumer products to consumers. (DSUF 2 ¶¶ 1–3.) InterHealth is the inventor of a proprietary version of HCA known as "SuperCitrimax." (Id. ¶ 4.) InterHealth purports that SuperCitrimax contains 60% HCA on a dried basis. (Id. ¶ 5.) The GC powdered extract used for the production of SuperCitrimax is supplied by Laila Nutraceuticals of India. (Id. ¶ 6.)

Plaintiffs' claims pertain to two products sold by Labrada Defendants and LBN that contain ingredients manufactured and supplied by InterHealth and Naturex, Inc.: Labrada GC and Labrada GCBE (collectively, "Labrada Products"). (Id. ¶¶ 11, 37, 41, 42, 60, 64.) GCBE is an ingredient used in diet supplements, including Labrada GCBE. (DSUF 1 ¶ 24.) GC is an ingredient used in diet supplements, including Labrada GC. (Id. ¶ 25.) SuperCitrimax is a proprietary active ingredient produced by InterHealth and purchased by Labrada for use in Labrada GC. (Id. ¶ 27; DSUF 2 ¶ 8.)

B. The Doctor Oz Show Promotes GC and GCBE

A segment discussing GCBE aired on the DOS on April 26, 2012 ("DOS Episode I"). (DSUF 1 ¶ 21.) DOS Episode I re-aired on July 30, 2012. (Id. ¶ 31.) A non-scientific audience experiment involving GCBE was conducted on the DOS on September 10, 2012 ("DOS Episode II"). (Id. ¶ 22.) DOS Episode II was re-aired on December 27, 2012 and on September 2, 2013. (Id. ¶ 33.) A DOS episode aired on October 29, 2012 ("DOS Episode III") that involved GC. (Id. ¶ 23.) In all three DOS episodes, Dr. Oz referred to GC and GCBE using terms such as "magic," "miracle," "fat busting," and "busting… body fat for good." (Id. ¶ 104.) In contrast,

[11] Plaintiffs dispute this fact and others pertaining to the institutional layout of Mr. Labrada's corporate ownership on the basis that the source for such facts derives from the declaration of Rahman, a defense witness who was never disclosed. (See, e.g., PSGD 4 ¶¶ 5-11, 14-20.) However, as described above, the Rahman Declaration is admissible because the information within was obtainable from other sources. Labrada Defendants' failure to disclose Rahman as a witness is thus harmless. Furthermore, Plaintiffs do not dispute the underlying facts described in the Rahman Declaration. The Court thus considers the facts in the Rahman Declaration undisputed.

none of the three episodes mention Labrada, Labrada GCBE, or Labrada GC, and neither of the Labrada Products was on the market at the time the episodes originally aired.[12] (Id. ¶ 34; Belch Depo. at 37:4-8, 144:9-16.)

SuperCitrimax and InterHealth were also not explicitly mentioned or promoted on the DOS. (DSUF 1 ¶¶ 48, 50.) However, in DOS Episode III, show guest Dr. Chen promoted products with "mineral salts like potassium or potassium with calcium" to viewers. ("Episode III Transcript," Dkt. No. 356-20 at 16:25-17:1-5.) SuperCitrimax contains both potassium and calcium. (PSGD 1 ¶ 48.) Moreover, DOS Episode III featured former InterHealth consultant Dr. Harry Preuss, who briefly promoted GC products for the purpose of weight and fat loss. (DSUF 2 ¶ 17.) Dr. Preuss ceased any affiliation with InterHealth four years prior to his appearance on the DOS. (Id.) There was no agreement between Media Defendants and InterHealth to promote SuperCitrimax.[13] (DSUF 1 ¶ 51.) InterHealth was not aware that DOS planned to include a segment about GC until after DOS Episode III aired.[14] (Id. at ¶ 52; DSUF 2

[12] Plaintiffs dispute whether the three DOS episodes omit mention of the Labrada Products. (See "PSGD 1," Dkt. No. 356-58 ¶ 34.) In an effort to dispute this fact, Plaintiffs argue that "[a]lthough the episodes did not specifically mention the Labrada Products, the products were referenced on two of the shows… through Dr. Oz's use of the same promotional language that appears on the Labrada product labels[.]" (Id.) Plaintiffs neglect to acknowledge that all three episodes aired months before the Labrada Products and the labels described were on the market. (Belch Depo. at 37:4-8, 144:9-16.) Moreover, there is no evidence that the DOS coordinated the use of the identified "promotional language" with Labrada prior to the initial sale of the Products or any evidence that the DOS permitted Labrada to use promotional language from their show on the product labels. Perhaps most importantly, Plaintiffs do not dispute that the words "Labrada" or "Labrada Products" were never used on the DOS.

[13] Plaintiffs appear to dispute this fact by pointing out that Media Defendants previously agreed to promote a different proprietary ingredient for InterHealth on-air. (PSGD 1 ¶ 51.) But evidence that Media Defendants once agreed to promote an ingredient manufactured by InterHealth is not evidence that Media Defendants agreed to promote SuperCitrimax.

[14] Plaintiffs dispute this fact by arguing that "[t]here is evidence of a concerted effort between InterHealth and the Media Defendants because InterHealth issued a press release just two days after… [DOS Episode III] aired" and "the show referred to the SuperCitrimax ingredient." (PSGD 1 ¶ 52.) As to the first contention, a press release issued two days after Episode III was broadcast to the general public is not evidence that InterHealth was aware that the DOS would include a segment about GC prior to the airing of the episode. Admittedly, evidence that a guest on the show "referred to the SuperCitrimax" ingredient by name would be more germane. (Id.) But Plaintiffs' assertion that "the show referred to [] SuperCitrimax" mischaracterizes the evidence. The DOS did not identify SuperCitrimax by name. Instead, a guest urged viewers to purchase products with "mineral salts like potassium or potassium with calcium"—ingredients that SuperCitrimax contains. (Episode III Transcript at 16:25-17:1-5.)

¶ 16.) The DOS Episode III was filmed, produced, and aired before Labrada GC with SuperCitrimax was sold on the market. (DSUF 2 at ¶ 15.)

In November of 2012, after both DOS Episode I and II originally aired, Labrada GCBE went on the market. (DSUF 1 ¶ 55; DSUF 3 ¶ 1.) In March of 2013, almost five months after DOS Episode III originally aired, Labrada GC went on the market. (DSUF 1 ¶ 21; DSUF 3 ¶ 4.) Media Defendants have not compensated either the Labrada Defendants or InterHealth for the segments on GC and GCBE aired in DOS Episodes I, II, and III. (DSUF 1 ¶¶ 59–63.)

C. LBN and InterHealth Enter into the Trade Licensing Agreement

On January 4, 2013, LBN entered into the TLA with InterHealth. (DSUF 2 ¶ 41.) The TLA permitted LBN to display the SuperCitrimax trademark on Labrada GC under the terms and conditions of the TLA. (Id.) The TLA also required the Labrada GC Label to: (1) display the SuperCitrimax logo prominently anywhere on the label; (2) state that SuperCitrimax is a trademark of InterHealth; and (3) state that the HCA within was SuperCitrimax brand and list the SuperCitrimax patent number. (TLA at 4, 8.) The TLA empowered InterHealth to review and approve the label on Labrada GC, but the review was to be "solely with respect to compliance with the licensing and trademark usage requirements of t[he TLA.]" (Id. at 4.) Finally, the TLA contains a provision that permits InterHealth to request and audit Labrada's sales records of Labrada GC. (Id. at 5.)

Before approving the Labrada GC Label, InterHealth provided LBN with "labeling guidelines" containing a sample label "designed to offer visual guidelines for SuperCitrimax for satiety product labeling." (InterHealth Labeling Guidelines at 2.) The labeling guidelines reiterated the mandatory labeling requirements outlined in the TLA. (Id.) On the "front panel" section of the sample label, the phrase "[c]urbs [a]ppetite" was included immediately below the SuperCitrimax logo. (Id.) The Labrada GC Label includes the phrase "[c]urbs [a]ppetite" on the front panel directly above the SuperCitrimax logo. (Labrada GC Label at 2-3.)

The Labrada GC Label includes a references section that cites to three studies supporting the product's claims that it "reduce[s] body weight," "curb[s] appetite and food intake," and "boost[s] fat burning during exercise and enhances glycogen synthesis." (Id. at 3.) InterHealth provided LBN with similar studies and publications during negotiations with LBN and prior to finalization of the label. (Lucero Depo. at 56:11-57:5; see also Ramirez-Barnett Email.) One of the referenced studies was co-authored by Dr. Preuss. (Labrada GC Label at 3.) Another study was authored by Debasis Bagchi, who was employed as the InterHealth research and

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That fact alone is plainly insufficient to create a triable issue as to whether InterHealth had prior knowledge of the DOS segment. Finally, Plaintiffs argue that a guest featured on DOS Episode III, Dr. Preuss, was employed as a paid researcher for InterHealth. However, Dr. Preuss ceased all affiliation with InterHealth four years prior to the airing of DOS Episode III. (DSUF 2 ¶ 18; Lucero Depo. at 75:23-25.) Thus, the evidence cited by Plaintiffs is insufficient to create a triable issue as to whether InterHealth coordinated promotion with the DOS.

development director as late as 2011. (Id.; Lucero Depo. at 76:16-77:8.) An InterHealth representative testified that the company routinely provides scientific studies and publications regarding the efficacy of GC to its potential business partners. (Lucero Depo. at 56:11-57:5.) InterHealth did not request or require that LBN display the studies on the Labrada GC Label. (See generally TLA; Ramirez-Barnett Email.)

Consistent with the terms of the TLA, Labrada supplied a proposed Labrada GC Label to InterHealth. (DSUF 2 ¶ 44; Proposed Label.) Upon receipt of the proposed label, InterHealth responded with an email disclaiming that: (1) InterHealth was not responsible for the content of the label and that Labrada's legal counsel should review it for compliance with governmental regulations; (2) Labrada should check with legal counsel as to the compliance of the structure/function claims on the label; and (3) InterHealth was not approving claims on the label and was instead merely "reviewing for logo accuracy, [trademark] reference and clinical dosage." (DSUF 2 ¶¶ 44-46.) After detailing the limits of its review, InterHealth approved the final label for Labrada GC. (Lucero Depo. at 47:10-50:19.) In March of 2013, LBN began to sell Labrada GC with the approved label. (DSUF 3 ¶ 2.)

D. Plaintiffs' Purchase of GC and GCBE

1. Morrison

Morrison testified that she watched an unknown DOS episode featuring GCBE in 2012 and that she purchased several bottles of GC and GCBE products through an online retailer "within a couple of days" after the episode aired. ("7th Morrison Depo.," Dkt. No. 356-44 at 67:5-14, 120:22-121:2; DSUF 3 ¶¶ 15-16.) Morrison testified that she took written notes during the DOS episode and brought her notes to the store so she could "try to get exactly what [Dr. Oz] said." (DSUF 3 at ¶ 6.) Morrison testified her belief that the episode she viewed "was the April show, but I… can't be positive. But it seems like it [aired]… the early part of the year or so." (Id. at 121:2-5.) Morrison further testified that she was "not sure how early in the year" she watched the episode, but that she thinks it was "fairly early" in the year. (Id.) Morrison was asked whether "it's more likely that [she] purchased [the products] earlier in 2012 than… later [around] September []?" (Id. at 122:6-9.) Morrison responded, "I think so, but I can't be sure." (Id.) Morrison later purchased more GC and GCBE products in-store at a Walgreens or Wal-Mart no more than three additional times after her first purchase. (DSUF 2 ¶ 34; DSUF 3 ¶ 18.) Morrison purchased her last GCBE and GC products in 2012, "several months" after she finished her first bottles.[15] (7th Morrison Depo. at 105:6-12.)

[15] Morrison asserts that she purchased Labrada GC beginning in 2012 and "continuing until approximately late 2013." (Dkt. No. 356-53 ¶ 3.) But in her deposition, Morrison testified that she first purchased a GC product shortly after watching the DOS in 2012 and then purchased an additional bottle "several months later." (7th Morrison Depo. at 105:6-8.) Morrison confirmed that she purchased her final bottles of GC in 2012 and that "[once she] finished th[ose] bottle[s]… [she] didn't buy [GCBE or GC] ever again[.]" (Id. at 105:6-12.)

2. Woodard

Woodard testified that she watched DOS Episode II as it aired on September 10, 2012 and took notes during the episode. (DSUF 1 ¶ 80; DSUF 3 at ¶ 7.) Eight months after she viewed DOS Episode II and motivated by the DOS, Woodard visited a store to purchase GC and GCBE. (DSUF 3 ¶¶ 9-10; DSUF 1 ¶ 81.) While at the store, Woodard testified that she examined Labrada GC Label advertising that the product contained HCA and SuperCitrimax. (6th Woodard Depo. at 67:15-17.) Woodard purchased Labrada GC because the label for the product matched the information in her notes of DOS Episode II. (Id. at 315:6-316:1.) Woodard took the Labrada GC with the expectation that the product would "curb [her] appetite," as stated on the label. (Id. at 319:18-320:3.) Woodard made her final purchase of the Labrada Products in 2013. (DSUF 3 ¶ 38.) Aside from the labels on the Labrada Products, Woodard never observed any representation or advertising by InterHealth. (DSUF 2 at ¶ 37.) Woodard did not purchase the GC product because it contained SuperCitrimax. (Id. ¶ 39.) On January 19, 2016, Woodard provided notice of breach of warranties to LBN. (DSUF 3 ¶ 45.)

3. Rizzo-Marino

Rizzo-Marino first heard about GCBE from coworkers, who described it as a "miracle pill." (DSUF 1 at ¶ 6, 7.) Later, Rizzo-Marino watched two episodes of the DOS she had saved on her DVR and viewed the segments on GCBE. (DSUF 3 at ¶ 20.) Rizzo-Marino first purchased a GCBE product in-store around January of 2015.[16] (5th Rizzo-Marion Depo. at 78:17-24; DSUF 1 at ¶¶ 5, 8.) While at the store, she searched for a GCBE product "endorsed by [Dr. Oz]," one with a label that made clear it had "no by-product… [and] no fillers, so I knew… it was all natural." (5th Rizzo-Marion Depo. at 80:18-81:10.) Rizzo-Marino read "[m]aybe 90 percent" of the labels on several bottles in an effort to determine whether each product had by-products or fillers before purchasing the GCBE product. (Id. at 84:15-85:7.) Rizzo-Marino has never purchased a supplement containing GC. (DSUF 2 at ¶ 29.) On January 19, 2016, Rizzo-Marino provided notice of breach of warranties to LBN. (DSUF 3 at ¶ 45.)

Because Morrison's declaration unambiguously contradicts her sworn testimony, the Court declines to consider her statements that she continued purchasing GCBE and GC "until approximately late 2013." Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting [her] prior deposition testimony.").

[16] Rizzo-Marino offers conflicting testimony on the date of her first GCBE purchase. At one point, she testified that the first time she purchased a GCBE product was in January of 2015. (5th Rizzo-Marino Depo. at 78:17-21.) Later, she testified that she started and ended use of the products "somewhere [in] '13, '14[.]" (2d Rizzo-Marino Depo. at 375:11-15.) The Court need not determine the exact date Rizzo-Marino purchased Labrada GCBE to resolve the MSJs.

VI. MOTIONS FOR SUMMARY JUDGMENT

A. Choice of Law

Preliminarily, the Court notes that Plaintiffs allege parallel causes of action for fraud and negligent misrepresentation under New York and California law. (FAC at 54, 66.) In the MSJs and the corresponding oppositions, Plaintiffs and Defendants fail to address which state's law applies to which Plaintiff. Instead, the parties assess the fraud and negligent misrepresentation claims under both New York and California law for each Plaintiff.[17] While choice of law issues have not previously been implicated in this matter, the Court must determine the applicability of California and New York law in order to resolve the MSJs. As a result, the Court conducts a choice of law analysis to determine whether Plaintiffs' fraud and negligent misrepresentation claims should be analyzed under the law of New York or California.

In California, courts apply "a three-step 'governmental interest analysis' to address conflict of laws claims and ascertain the most appropriate law applicable to the issues [even] where there is no effective choice-of-law agreement." Washington Mut. Bank, FA v. Superior Court, 24 Cal. 4th 906, 919 (2001). Under the first prong of the analysis, "the foreign law proponent must identify the applicable rule of law… and [] show it materially differs from the law of California." Id. If the laws of California and the foreign state are identical, a "false conflict" exists, and a court should apply California law. Id. at 919–20. When the law of California and the law of a foreign state are not identical, a court must weigh the interests of each state in applying its law. Hurtado v. Superior Court, 11 Cal. 3d 574, 580 (1974). However, if only one state retains an interest in the application of its law, the law of the solely interested state should be applied without a full-fledged governmental interest analysis. Id. ("When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied.") (internal quotations omitted); see also Bauer v. Club Med Sales, Inc., 1996 WL 310076, at *3 (N.D. Cal. May 22, 1996) ("When only one of the jurisdictions has an interest in the application of its law, then there is only a 'false conflict' and the law of that jurisdiction applies.") (emphasis in original).

Here, Plaintiffs allege fraud and negligent misrepresentation under both California and New York law. (FAC at 54, 66.) The elements of fraud in New York and California are

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[17] Likewise, the parties' briefs address all other claims in the FAC under both New York and California law without discussing which state's law should apply. Unlike with Plaintiffs' fraud and negligent misrepresentation claims, the Court need not conduct a choice of law analysis to resolve the seemingly unaddressed issue: Plaintiffs' remaining claims under New York and California law are alleged only by the Plaintiff domiciled in that state. In other words, Woodard's claims in the FAC are limited to California's consumer protection and breach of warranty statutes, while Rizzo-Marino and Morrison's claims are limited to the analogous laws of New York. (See generally FAC.) The Court thus analyzes Plaintiffs' remaining claims under the law of each Plaintiffs' respective domicile state for purposes of resolving the MSJs.

materially identical.[18] "[I]f the relevant laws of each state are identical, there is no [conflict of laws] problem and the trial court may find California law applicable[.]" Washington Mut. Bank, 24 Cal. 4th at 919–20. Because New York and California fraud laws are materially indistinguishable, a "false conflict" exists between the law of each state. The Court will thus apply California law to all three Plaintiffs' fraud claims.

However, the Court finds that there are material differences between New York and California negligent misrepresentation law. Both states require proof of negligent misrepresentation and justifiable or reasonable reliance on that misrepresentation. Hydro Inv'rs, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20 (2d Cir. 2000); Fox v. Pollack, 181 Cal. App. 3d 954, 962 (1986). However, New York requires proof of a duty or special relationship and defendant's knowledge that "the information supplied in the representation… [was] desired by the plaintiff for a serious purpose[.]" Hydro Inv'rs, 227 F.3d at 20. California law requires neither. Fox, 181 Cal. App. 3d at 962. Additionally, California law requires proof of the defendant's intent to induce reliance and damages, neither of which are required by New York law. Id.

In light of the material differences between New York and California negligent misrepresentation law, the Court finds that each state holds the sole interest in applying domestic law to its resident Plaintiff. California has little interest in applying its law to Morrison and Rizzo-Marino—consumers allegedly victimized by misrepresentations in New York. Similarly, New York has minimal interest in applying New York law to Woodard, a consumer who was allegedly deceived in California by a California corporation and citizen of Texas. In contrast, both states have a significant interest in applying their negligent misrepresentation law to protect consumers purchasing goods within their borders. "When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none[]… the law of the interested state should be applied." Hurtado, 11 Cal. 3d at 580. Accordingly, the Court analyzes Woodard's negligent misrepresentation claims under California law and Morrison and Rizzo-Marino's negligent misrepresentation claims under New York law.

B. MSJ 1: InterHealth

1. Morrison

InterHealth moves for summary judgment on all of Morrison's claims. (See MSJ 1.) To begin, InterHealth argues that the Court should enter summary judgment on every claim Morrison alleges. According to InterHealth, Plaintiffs have failed to raise a triable issue as to whether Morrison purchased Labrada GC. (Memo 1 at 23.) InterHealth posits that because Morrison cannot establish a triable issue as to whether she purchased Labrada GC—the only

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[18] Specifically, fraud claims in New York and California both necessarily require a misrepresentation made with knowledge and intent, the reliance of the victim, and resulting damages. See Premium Mortg. Corp. v. Equifax, Inc., 583 F.3d 103, 108 (2d Cir. 2009) (describing the elements of fraud under New York law); All. Mortg. Co. v. Rothwell, 10 Cal. 4th 1226, 1239 (1995) (describing the elements of fraud under California law).

Labrada Product for which InterHealth supplied ingredients—her claims against InterHealth warrant summary judgment. (Id.) The Court agrees.

InterHealth supplied LBN with the SuperCitrimax ingredient used to manufacture Labrada GC and approved certain language on the Labrada GC Label. (DSUF 2 ¶ 4; Lucero Depo. at 47:10-50:19.) LBN first marketed and sold Labrada GC to the public in March 2013. (DSUF 4 ¶ 4.) Morrison testified that she first purchased supplements containing GC "a couple of days" after she watched an unspecified episode of the DOS featuring GCBE in 2012. (7th Morrison Depo. at 120:22-121:2.) The DOS featured GCBE on only two occasions: (1) in DOS Episode I, originally aired on April 26, 2012 and re-aired July 30, 2012; and (2) in DOS Episode II, originally aired on September 10, 2012. (DSUF 1 ¶¶ 21, 22, 31.) While Morrison "[couldn't] be positive" about the exact date she viewed the DOS and purchased a GC product, she stated that it "seems like it [aired]… the early part of the year or so" and that she watched the episode "fairly early" in 2012. (7th Morrison Depo. at 121:2-5.) Despite purchasing several GC products after her initial purchase, Morrison testified that she made her last purchase of GC at some point in 2012 "several months" after she finished her first batch of GC products. (Id. at 105:6.)

Morrison's deposition testimony indicates that she last purchased a GC supplement in 2012. Labrada GC was not on the market until March of 2013. Therefore, the evidence suggests that the GC product she purchased was not Labrada GC. Plaintiffs have not introduced other admissible evidence to suggest that Morrison purchased Labrada GC. As a result, the Court GRANTS MSJ 1 and DISMISSES all of Morrison's claims against InterHealth with prejudice.

2. Rizzo-Marino

Next, InterHealth contends that Rizzo-Marino's claims should be dismissed because the evidence reflects that Rizzo-Marino did not purchase Labrada GC. (Memo 1 at 22.) Plaintiffs submit that Rizzo-Marino does not allege claims against InterHealth in the first instance and otherwise concede that she has never purchased Labrada GC. (Opp'n 1 at 25.) The Court agrees that there is no evidence that Rizzo-Marino purchased Labrada GC. To the extent the FAC alleges claims against InterHealth on behalf of Rizzo-Marino, the Court GRANTS MSJ 1 and DISMISSES all of Rizzo-Marino's claims against InterHealth with prejudice.

3. Plaintiff Woodard

Finally, InterHealth seeks summary judgment on Woodard's claims. According to InterHealth, Plaintiffs cannot raise a triable issue as to whether InterHealth is responsible for the allegedly misleading statements on the label of Labrada GC. (Memo 1 at 15.) Moreover, InterHealth argues that it did not aid or abet LBN in creating the allegedly misleading elements of the label. (Id. at 18.) Finally, InterHealth asserts that it cannot be held liable for any of Woodard's breach of warranty claims. (Id. at 25.) The Court agrees with InterHealth and enters summary judgment on all of Woodard's claims against Woodard.

a. Fraud-based, Consumer Protection, and UCL Claims[19]

As an initial matter, while the applicable standard is arguably different depending on the claim, Woodard can raise a triable issue as to her fraud-based, consumer protection, or UCL claims only if the evidence indicates that InterHealth had at least some involvement in controlling the allegedly false statements on the Labrada GC Label. See, e.g., Galope v. Deutsche Bank Nat'l Tr. Co., 666 F. App'x 671, 674 (9th Cir. 2016) (internal citations omitted) ("Galope cannot attribute any deceptive statements to the Barclays Defendants during the loan origination process to maintain a cause of action for fraud. Thus, summary judgment was [] appropriate for this claim."); Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 809 (9th Cir. 2007) (holding that UCL, false advertising, and right of publicity claims failed because "Defendants lack sufficient control or personal involvement in the [unlawful] activities to be so liable"); Reed v. NBTY, Inc., 2014 WL 12284044, at *11 (C.D. Cal. Nov. 18, 2014) ("Defendants [] cannot be held liable under the consumer protection statutes for misrepresentations made by a third-party retailer without evidence that Defendants controlled the preparation or distribution of these statements."); Herron v. Best Buy Co. Inc., 924 F. Supp. 2d 1161, 1169 (E.D. Cal. 2013) ("A defendant's liability [under the UCL] must be based on his personal 'participation in the unlawful practices' and 'unbridled control' over the practices.") (quoting Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002)). Entry of summary judgment is therefore warranted if no reasonable trier of fact could find that InterHealth exerted control over the alleged misrepresentations in the label.

Woodard purchased Labrada GC after viewing several representations about the efficacy and content of the product on its label. (See Labrada GC Label at 2–4.) However, the evidence suggests that InterHealth was not responsible for the display of the allegedly false label. Instead, InterHealth's role in designing the label for Labrada GC was limited to the placement of its trademark on the label. Specifically, the TLA, a contract entered into with LBN on January 4, 2013, was InterHealth's sole source of control over the contents of the label. (DSUF 2 ¶ 41.) Per the terms of the TLA, LBN agreed to display the SuperCitrimax trademark prominently on the label of Labrada GC. (Id.) The TLA permitted InterHealth to review and approve the label but expressly disclaimed that review and approval of the label was to be "solely with respect to compliance with the licensing and trademark usage requirements of t[he TLA.]" (TLA at 4.)

Prior to the initial sale of Labrada GC, LBN supplied a proposed label to InterHealth for review. (DSUF 2 ¶ 44; see also Proposed Label.) Upon receipt of the proposed label, a representative for InterHealth reiterated via e-mail that InterHealth was not responsible for the content of the label and that it was not approving the claims on the label. (DSUF ¶¶ 44, 46.) Instead, the representative made clear that InterHealth was only "reviewing [] logo accuracy, [trademark] reference and clinical dosage" on the label. (Id. ¶ 46.) Shortly after the e-mail exchange, InterHealth approved the label for Labrada GC pursuant to the TLA. (Lucero Depo. at 47:10-50:19.) Thus, the TLA and e-mail communications between LBN and InterHealth

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[19] These claims of Woodard's include Claims One (fraud), Two (negligent misrepresentation), Three (UCL), Four (CLRA) and Five (CFAL). (See generally FAC.)

indicate that InterHealth's control over the Labrada GC Label was limited to the placement of the SuperCitrimax logo and appropriate dosage.[20]

Plaintiffs argue that alleged labeling misrepresentations should be attributed to InterHealth. First, Plaintiffs contend that InterHealth "provided scientific research to Labrada to support the challenged labeling claims" and that "[s]ome of the scientific studies were funded by InterHealth and are referenced on the label of the Labrada Product." (Opp'n 1 at 19.) Yet as InterHealth points out, it sent the referenced studies to LBN in response to the company's initial interest in SuperCitrimax on November 13, 2012—months prior to the drafting of the TLA and four months before Labrada GC was sold to the public. (Ramirez-Barnett Email at 2.) The studies appear to have been sent to inform LBN of the SuperCitrimax product, not as required labeling content. (Id. (depicting e-mail from InterHealth to LBN that states "[t]hanks for your interest in… SuperCitrimax… per our conversation today, I am including information on studies, labeling and pricing[.]").) To that point, the TLA does not require LBN to display the studies on the Labrada GC Label. In fact, the TLA explicitly extends LBN the discretion to use (or not use) research data provided by InterHealth. (TLA at 3.) Considering the totality of evidence, no rational trier of fact could attribute the display of the studies on the label to InterHealth.

Next, Plaintiffs argue that InterHealth's provision of a sample product label that describes various labeling guidelines for LBN establishes its control over the allegedly misleading labeling statements. (Opp'n 1 at 19.) The labeling guidelines and sample label, however, list only four "[m]andatory labeling requirements," each of which pertain to the placement of the SuperCitrimax logo or recommended dosage. (InterHealth Labeling Guidelines at 2.) Because the mandatory labeling requirements are unrelated to claims about the efficacy of Labrada GC, the labeling guidelines and sample label fail to raise a triable issue.[21]

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[20] Plaintiffs contend that this Court "previously found that [] language in the sample licensing agreement… attached to the [FAC] was sufficient to impose liability against InterHealth." (Opp'n 1 at 18.) Plaintiffs plainly ignore, however, that the Court's ruling on a motion to dismiss was predicated on Plaintiffs' allegations of a licensing agreement that offered InterHealth the "right to control… the content of the [Labrada GC] labels" and "require[d] licensees to 'display the SuperCitrimax Trademark on all labeling, advertisements, promotional materials, [and] to clearly associate required labeling statements with SuperCitrimax.'" ("MTD Order," Dkt. No. 190 at 11 (emphasis added).) Here, unlike Plaintiffs' allegations of the sample licensing agreement, the TLA limits InterHealth's control over the label and only requires that LBN display the SuperCitrimax trademark in a manner that "clearly associates the [] Trademark with the Licensed Product," as opposed to the allegedly false labeling statements. (Opp'n 1, Exhibit 2 at 3 (emphasis added).) Because the TLA does not afford InterHealth control over the content of the Labrada GC Label, nor require association of the SuperCitrimax trademark with the allegedly false labeling statements, Plaintiffs' contention is unconvincing.

[21] The sample label in the label guidelines does contain the phrase "curbs appetite" under the SuperCitrimax logo. (InterHealth Labeling Guidelines at 2.) That phrase is later used on the

Finally, Plaintiffs assert that the "60% HCA" symbol on the label under the SuperCitrimax trademark is a claim attributable to InterHealth and demonstrative of its control over the label. Plaintiffs are wrong. The HCA content listed on the label could not reasonably be attributed to InterHealth because the evidence suggests that InterHealth did not provide LBN with the percentage of HCA displayed on the Labrada GC Label. Instead, the HCA percentage is blank in the sample label drafted by InterHealth. (InterHealth Labeling Guidelines at 2.) Thus, the evidence indicates that the percentage of HCA advertised on Labrada GC was added by LBN rather than InterHealth.

Plaintiffs cannot raise a triable issue of fact as to whether InterHealth controlled the display of the alleged label misrepresentations on the Labrada GC Label.[22] The Court therefore finds that Plaintiffs cannot raise a triable issue as to Woodard's fraud-based, consumer protection, and UCL claims against InterHealth.

b. Aiding and Abetting and Civil Conspiracy Theories

For the reasons stated above, the evidence is insufficient to suggest that InterHealth aided or abetted the allegedly false claims on the Labrada GC Label. See Saunders v. Superior Court, 27 Cal. App. 4th 832, 846 (1994) (holding that aiding and abetting requires either (1) knowledge of a third-party's breach of duty in addition to substantial assistance or encouragement to so act or (2) substantial assistance in accomplishing the tortious result and personal conduct that constitutes a breach of duty to a third person).[23] Likewise, the evidence does not suggest that

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final Labrada GC Label, although in a different location and as part of a complete sentence. (Labrada GC Label at 3.) In addition to the phrase's different use and location on the final label, there is no evidence that InterHealth required use of the phrase or that use of the phrase on the final label was influenced by its appearance on the sample label. In the end, the reappearance of the "curbs appetite" phrase fails to amount to more than a "mere… scintilla" of evidence that InterHealth exerted control over the label. In re Oracle, 627 F.3d at 387.

[22] Plaintiffs briefly argue that InterHealth's financial interest in the manufacturing and sales process of Labrada GC—including evidence that InterHealth extended LBN a line of credit and included a provision in the TLA to audit Labrada GC sales—shows that it exerted control over the claims on the label. (Opp'n 1 at 19.) The Court disagrees. InterHealth's extension of credit or apparent interest in the sales performance of Labrada GC is immaterial to whether it exerted sufficient control over the content of the Labrada GC Label.

[23] Plaintiffs briefly contend that InterHealth is secondarily liable for the Remaining Media Defendants' alleged on-air misrepresentations in the DOS. As explained above, that theory is specious. See supra, Part V.B n.14. While the Court need not and does not readdress InterHealth's potential secondary liability at length, it further notes that: (1) there was no express agreement between InterHealth and the Remaining Media Defendants and no compensation was

InterHealth conspired with LBN to create the alleged labeling misrepresentations. See Kidron v. Movie Acquisition Corp., 40 Cal. App. 4th 1571, 1581–82 (1995) (explaining that civil conspiracies require an agreement to commit a tortious act and a tortious act committed pursuant to the agreement). To the contrary, the evidence indicates that InterHealth agreed to limit and actually did limit its involvement in the creation of the label to the placement of its trademark and dosage recommendations. Accordingly, the Court GRANTS MSJ 1 and DISMISSES Woodard's fraud-based, consumer protection, and UCL claims against Interhealth.

c. Breach of Warranty Claims[24]

Last, InterHealth moves for summary judgment on Woodard's remaining breach of warranty claims. (Memo 1 at 25.) Because Woodard's express warranty claim is premised on the label claims attributable solely to LBN, it fails as a matter of law. As to Woodard's implied warranty claim, "[v]ertical privity is a prerequisite in California for recovery on a theory of breach of implied warranties of fitness and merchantability." In re NVIDIA GPU Litig., 2009 WL 4020104, at *6 (N.D. Cal. Nov. 19, 2009) (citing All West Elecs., Inc. v. M–B–W, Inc., 64 Cal. App. 4th 717, 724 (1998)) (internal quotations omitted). In the absence of privity or an express agreement between Woodard and InterHealth, Woodard can establish a breach of implied warranty only if: (1) she relied on labels or advertisements written by InterHealth; (2) Labrada GC falls within the special exception involving foodstuffs, pesticides or pharmaceuticals; (3) Woodard was an intended third-party beneficiary of the TLA; or (4) the relations between Woodard and InterHealth justify treating them as if they were in contractual privity under the Direct Dealings Exception. Windham at Carmel Mountain Ranch Assn. v. Superior Court, 109 Cal. App. 4th 1162, 1169 (2003); Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 695 (1954).

None of these exceptions cover Woodard's breach of implied warranty claim. First, as detailed above, the label claims cannot be attributed to InterHealth or underpin a breach of warranty claim. Second, even if Labrada GC is a foodstuff, the exception applies only where "the product was not safe for consumption, or [] the product was contaminated or contained foreign objects." Thomas v. Costco Wholesale Corp., 2014 WL 5872808, at *3 (N.D. Cal. Nov. 12, 2014). It does not apply where a supplement is allegedly ineffective but otherwise fit for consumption. See Hammock v. Nutramarks, Inc., 2016 WL 4761784, at *5 (S.D. Cal. Sept. 12,

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exchanged for the GC segments on the DOS; (2) SuperCitrimax and InterHealth were never mentioned on the DOS; and (3) Dr. Preuss, the researcher who appeared on the DOS to promote GC and who Plaintiffs assert is a "paid researcher for [] InterHealth," ceased working for InterHealth four years prior to his appearance. (Opp'n 1 at 24; DSUF 2 ¶ 18; Lucero Depo. at 75:23-25.) Thus, Plaintiffs have failed to submit evidence of InterHealth's involvement in Remaining Media Defendants' alleged misrepresentations and cannot raise a triable issue as to its secondary liability for the alleged misrepresentations.

[24] Woodard's breach of warranty claims include Claims Eight (breach of implied warranty of merchantability), Nine (breach of express warranty), and Ten (violation of Magnuson-Moss Warranty Act). (See generally FAC.)

2016) (exception did not apply because "[t]he Products were fit for human consumption, but did not perform as advertised."). Third, Woodard and other Labrada GC consumers are not intended or express beneficiaries of the TLA.[25] Last, Woodard does not establish a relationship with InterHealth that might act as a proxy for privity under the direct dealings exception. Woodard therefore fails to raise a triable issue for her breach of implied warranty claim.

Finally, Woodard's MMWA claim "stand[s] or fall[s] with h[er] express and implied warranty claims under state law." Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008). Because she fails to raise a triable issue as to her express and implied warranty claims, her MMWA claim warrants summary judgment as well. The Court therefore GRANTS MSJ 1 and DISMISSES all three breach of warranty claims with prejudice. Moreover, all of Plaintiffs' claims against InterHealth fail as a matter of law. The Court thus GRANTS MSJ 1 and DISMISSES InterHealth as a party to this matter with prejudice.

C. MSJ 2: LBN

1. Claims One and Two: Fraud and Negligent Misrepresentation

LBN moves for entry of summary judgment on all claims brought by all Plaintiffs. First, LBN urges summary judgment on Claims One and Two for fraud and negligent misrepresentation under California and New York Law. (MSJ 2 at 9.) The Court examines each of LBN's arguments as to Claims One and Two below.

a. Reliance

LBN first contends that Plaintiffs' fraud claims must be dismissed for lack of reliance on the alleged labeling misrepresentations on the Labrada Products. To establish fraud under California law, Plaintiffs must raise a triable issue of fact as to their justifiable reliance on LBN's alleged labeling misrepresentations. Rothwell, 10 Cal. 4th at 1239. Plaintiffs' negligent misrepresentation claims require the same under both New York and California law. Hydro Inv'rs, 227 F.3d at 20; Fox, 181 Cal. App. 3d at 962. In California, "[a] plaintiff is not required to allege that [] misrepresentations were the sole or even the decisive cause of the injury-producing

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[25] Plaintiffs posit that "the trademark licensing agreement is [intended] for the benefit of consumers… who purchase" Labrada GC because it contains language giving LBN the right to sell, market, and distribute Labrada GC as a dietary supplement to customers worldwide." (Opp'n 1 at 21.) Once again, however, Plaintiffs support their argument by citing to immaterial evidence. The cited contractual language merely sets geographic and functional boundaries on the sale, marketing, and distribution of Labrada GC. (See generally TLA.) Plaintiffs fail to meaningfully explain how the cited language supports the idea that Woodard—or any consumer of Labrada GC for that matter—is an intended beneficiary of the TLA, an agreement centered on the use and appearance of InterHealth's trademark.

conduct." In re Tobacco II Cases, 46 Cal. 4th 298, 328 (2009) ("Tobacco II").[26] Instead, "[i]t is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing [plaintiff's] decision." Whiteley, 117 Cal. App. 4th at 678 (internal quotations omitted). In New York, negligent misrepresentation claims require a similar showing that "the defendant's act was a substantial cause of the events which produced the injury." Transamerica Ins. Fin. Corp. v. Fireman's Fund Ins. Co., 1992 WL 350800, at *9 (S.D.N.Y. Nov. 19, 1992) ("Transamerica").

LBN asserts that Plaintiffs did not rely on the label claims to purchase the Labrada Products. According to LBN, statements Dr. Oz made on the DOS induced Plaintiffs to purchase the Labrada Products. (MSJ 2 at 10.) LBN reasons that because Plaintiffs testified that they relied Dr. Oz's statements, they did not rely on the label claims to purchase the Labrada Products. (Id.) Plaintiffs argue that they need not show the label claims were "the sole or even the decisive cause" of their harm. Tobacco II, 46 Cal. 4th at 328. Instead, it is sufficient that a reasonable juror could find that the statements on the label were a "substantial factor[] in influencing [Plaintiffs'] decision" to purchase the Labrada Products. Whiteley, 117 Cal. App. 4th at 678; Transamerica, 1992 WL 350800, at *9. (Plaintiffs' Supplement at 1.) Plaintiffs therefore may allege that they relied on Dr. Oz's misrepresentations so long as they also relied on LDN's label misrepresentations.

Woodard raises a genuine issue of material fact as to whether she relied on the product labelling misrepresentations in purchasing LBN's products. Courts have held in similar cases that, while a plaintiff need not solely rely on a product label's misrepresentations, she must rely on those misrepresentations to some extent. See, e.g., Allen v. Hyland's Inc., 300 F.R.D. 643, 662 (C.D. Cal. 2014) (named plaintiffs in product packaging misrepresentation suit were only typical of the class where they established through deposition testimony that they relied on the

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[26] LBN attempts to distinguish Tobacco II by arguing that the California Supreme Court's analysis of reliance in that case was made in the context of a UCL claim. However, LBN's argument ignores that Tobacco II premised its ruling on two cases analyzing reliance in misrepresentation and fraud claims. See Boeken v. Philip Morris, Inc., 127 Cal. App. 4th 1640, 1650 (2005); see also Whiteley v. Philip Morris Inc., 117 Cal. App. 4th 635, 678 (2004). In turn, Boeken and Whiteley premised their analyses on the Restatement of Torts. See Restatement (Second) of Torts § 546 (1977) ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss.") (emphasis added). Since Tobacco II, other California district and appellate courts have broadly applied the substantial factor test outside of the UCL context to other fraud-based claims requiring a showing of reliance. See, e.g., Stewart v. Electrolux Home Prod., Inc., 2018 WL 1784273, at *5 (E.D. Cal. Apr. 13, 2018) (applying Tobacco II to CLRA and FAL claims); Wilson v. Frito-Lay N. Am., Inc., 260 F. Supp. 3d 1202, 1208 (N.D. Cal. 2017) (same); Opperman v. Path, Inc., 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015) (applying Tobacco II to plaintiff's deceit, CLRA, and FAL claims); Hale v. Sharp Healthcare, 183 Cal. App. 4th 1373, 1385 (2010) (applying reliance theory in Tobacco II to CLRA and "unlawful" prong of UCL).

claims made on the packaging, not merely on the name or ingredients of the product); In re Brazilian Blowout Litig., No. CV 10-8452-JFW MANX, 2011 WL 10962891, at *4 (C.D. Cal. Apr. 12, 2011) (named plaintiffs were typical of a consumer class where they explicitly relied on packaging misrepresentation, even where they first heard of product from other sources); Saeidian v. Coca Cola Co., No. CV0906309SJOJPRX, 2015 WL 12803783, at *8 (C.D. Cal. July 6, 2015) (plaintiff in product misrepresentation case raised a genuine issue of material fact as to reliance where she testified that she relied on both TV advertising and product labeling to understand juice's contents).

Woodard raises a genuine issue of material fact as to whether she relied on the alleged misrepresentations to purchase Labrada GC. Instead, her deposition establishes that the portion of the Labrada GC Label upon which she relied was the portion alleging that it contained the ingredients Dr. Oz recommended. Woodard testified that she had decided to purchase some product that aligned with Dr. Oz's recommendations before entering the store or reading any product labels. (5th Woodard Depo. at 315:6-25.) Woodard further testified that she "look[ed] for [a] product… based off of [her] notes [of the DOS]… read the label [of Labrada GC] and [] bought it" because it "matched at least some of the information in [her] notes[.]" (Id.) In other words, Woodard's testimony establishes that the crucial information for her on the Labrada GC Label was that it matched the ingredients the DOS recommended. Plaintiffs admit as much in the Plaintiffs' Supplement: "Plaintiff Woodard testified that she relied on the product labels to ensure the garcinia cambogia product had the correct amount of hydroxycitric acid." (Plaintiffs' Supplement at 2 (internal citations omitted).)

However, Woodard also testified that she relied on the labels not merely for the amount of active ingredient the products contained, but also for the affirmative misrepresentations on the labels as well. She testified that she purchased at least one product because "it has a dual action fat buster on [the label]." (5th Woodard Depo. at 349:6-20.) This is not strong evidence on which to base an entire claim. It does, however, raise at least a genuine issue of material fact as to whether Woodard relied on the product labels' affirmative misrepresentations as well as the ingredient lists.

However, Morrison and Rizzo-Marion did not rely on the product labels to purchase Labrada GCBE. Morrison testified that she purchased Labrada GCBE online after viewing an unidentified episode of the DOS. (5th Morrison Depo. at 74:8-15.) While Morrison asserted that she read the label on Labrada GCBE, she did so only after she had purchased the product. (Id. at 77:12-78:2.) Moreover, she could not remember the label claims and recalled representations like "weight loss [and] curb hunger," but qualified that "that's pretty much on all diet pills." (Id. at 77:21-78:2.) Morrison testified that she later purchased Labrada GCBE in-store and brought her "notes from [the DOS]… [to] ma[k]e sure [she] got… exactly what [Dr. Oz] said"—but never identified what information provided by Dr. Oz was written in her notes or whether she purchased Labrada GCBE because of the similarities between his advice and the label claims. (Id. at 78:8-16.) In fact, Morrison was asked if she "pick[ed the product] up and read it, or… [just] pick[ed] it up and t[ook] it to the checkout?" (Id. at 79:6-10.) Morrison responded that she

"pick[ed] it up and took it [to check out]… because I believed what [Dr. Oz] said." (Id. at 79:13-15.) No other evidence suggests Morrison relied on the label to purchase Labrada GCBE.[27]

Likewise, Rizzo-Marino testified that the DOS motivated her to find a GCBE supplement with "no by-product… [and] no fillers" and that she purchased Labrada GCBE after seeing its label claim that it contained "no by-products [and] no fillers[.]" (5th Rizzo-Marino Depo. at 81:3-18, 84:1-25.) Critically, Plaintiffs' expert, Dr. Allison, does not discuss whether Labrada GCBE contains by-products, fillers, or artificial ingredients. (See generally Allison Report; Allison Rebuttal.) Plaintiffs' laboratory analysis of the chemical content of the Labrada Products does not reveal whether Labrada GCBE contains by-products or fillers. Plaintiffs submit no evidence that Labrada GCBE contains by-products, fillers, or artificial ingredients and Rizzo-Marino did not testify that she relied on any other statement on the label. Consequently, while Rizzo-Marino might have substantially relied on one claim on the Labrada GCBE Label, Plaintiffs have not submitted evidence to suggest that claim was a misrepresentation.

Morrison and Rizzo-Marino do not raise triables issue as to their reliance on the Labrada GCBE Label misinterpretation. The Court thus GRANTS MSJ 2 and DISMISSES Morrison and Rizzo-Marino's fraud and negligent misrepresentation claims against LBN.

b. Puffery

Next, LBN argues that some of the alleged misrepresentations on the labels of the Labrada Products are mere puffery. (MSJ 2 at 13.) "'Puffing' has been described by most courts as involving outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers." Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990) (internal quotations omitted). Puffery is often "expressed in broad, vague or commendatory language.... Puffery is distinguishable from misdescription or false representations of specific characteristics of a product." In re Century 21-RE/MAX Real Estate Advert. Claims Litig., 882 F. Supp. 915, 926 (C.D. Cal. 1994) (hereinafter "Century 21"); see also Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173

[27] Morrison responded affirmatively when asked if she "expect[ed] to lose 10 to 15 pounds based on… the label of the products she bought" because the label claimed that the product was a "fat burner, abdomizer, [and induced] appetite control." (5th Morrison Depo. at 186:16-21.) However, that testimony is insufficient to raise a triable issue for two reasons. First, Morrison's testimony that she "expected to lose 10 to 15 pounds" as a result of the label does not indicate that she relied on the label to purchase the product in the first place. Second, and perhaps more importantly, it is unclear which Labrada Product label Morrison identified in her testimony. Neither Labrada Product label uses the exact phrases "abdomizer" or "appetite control." The Labrada GC Label does use the phrases "fat burning" and "curb appetite"—but as established above, no rational trier of fact could find that Morrison purchased Labrada GC. (See Labrada GC Label at 2 (depicting Labrada GC Label and claims that the product "increases fat burning" and "curbs appetite").) As a result, Morrison's testimony is insufficient to raise a triable issue as to her reliance on the label claims.

F.3d 725, 731 (9th Cir. 1999) (explaining that statement is puffing when it is "vague and subjective" and "not a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact").

While some Labrada Products' labels' statements are puffery, others are "misdescriptions or false representations of specific characteristics[.]" Century 21, 882 F. Supp. at 926. The labels assert at least two non-specific and immeasurable claims: that the product is (1) a "dual action fat buster"; and (2) a "fat loss optimizer." (Labrada GC Label at 2; Labrada GCBE Label at 2.) However, other labeling statements are "factual [] representations," rather than "general assertions of superiority." Johnson v. Triple Leaf Tea Inc., 2014 WL 4744558, at *4 (N.D. Cal. Sept. 23, 2014). For example, Labrada GC claims it "increases fat burning," "curbs appetite and food intake," "reduce[s] body weight," "boost[s] fat burning during exercise," and "enhances glycogen synthesis." (Labrada GC Label at 2.) Labrada GCBE claims to "help[] support significant fat loss." (Labrada GCBE Label at 3.) These claims are specific, measurable, and could reasonably be read as statements of objective fact. Consequently, most of the alleged misrepresentations on the label do not constitute puffery and summary judgment is not warranted for those label claims. To the extent Plaintiffs premise any cause of action on the label claims that the Products are "dual action fat buster[s]" and "fat loss optimizer[s]," the Court GRANTS MSJ 2 and DISMISSES those theories of liability with prejudice.

c. Economic Loss Rule

LBN also argues that Woodard's California negligent misrepresentation claim is barred by the economic loss rule. According to LBN, Woodard impermissibly seeks recovery for economic harm under tort and contract theories that encompass identical conduct. (MSJ 2 at 15.) California law is clear, however, that "when one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort." Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 990 (2004) (citing Harris v. Atl. Richfield Co., 14 Cal. App. 4th 70, 78 (1993)) (internal quotations omitted). As described above, allegedly fraudulent misrepresentations on the labels induced Woodard to purchase the Labrada Products. The economic loss rule thus does not apply to her negligent misrepresentation claim.

2. Claims Three, Four, and Five: UCL, CLRA, and CFAL

a. Reliance

LBN moves the Court for summary judgment on Woodard's UCL, CLRA, and CFAL claims. (MSJ 2 at 16.) LBN argues that Woodard's claims require evidence of "actual reliance" in order raise a triable issue as to standing. (Id.); see also Stewart v. Electrolux Home Prod., Inc., 2018 WL 1784273, at *4 (E.D. Cal. Apr. 13, 2018) ("The UCL, FAL, and CLRA have independent requirements for standing, which mandate… actual reliance."). As explained in Part VI.B.1.a, actual reliance in the California consumer protection context merely means that "the [allegedly false] representation has played a substantial part, and so has been a substantial factor, in influencing [plaintiff's] decision." Whiteley, 117 Cal. App. 4th at 678; see also

Chapman v. Skype Inc., 220 Cal. App. 4th 217, 229 (2013) (explaining that actual reliance merely requires that a false advertisement or statement be a substantial factor, and not the sole or even decisive factor, in causing economic loss). For the reasons described above, Woodard has raised a triable issue as to whether the label claims were a substantial factor in her purchase of the Labrada Products. The Court therefore DENIES MSJ 2 to the extent it argues that her consumer protection claims must be dismissed for lack of actual reliance.

b. Lack of Substantiation

LBN contends that Woodard's California consumer protection claims fail because they are not premised on representations that are actually false or misleading. (MSJ 2 at 17.) Instead, LBN asserts that Woodard's claims are premised on a lack of scientific substantiation—a theory of liability private litigants are prohibited from pursuing under California's consumer protection statutes. (Id.) The Court disagrees.

Under the UCL, CLRA, and CFAL, "[c]laims that rest on a lack of substantiation, instead of provable falsehood, are not cognizable" when alleged by a private plaintiff. Bronson v. Johnson & Johnson, Inc., 2013 WL 1629191, at *8 (N.D. Cal. Apr. 16, 2013). In the false advertising context, a claim lacks substantiation when it is premised on the absence of evidence or inconclusive evidence; a claim is provably false when evidence contradicts or conflicts with the claim. Id.; see also Nathan v. Vitamin Shoppe, Inc., 2019 WL 1200554, at *3 (S.D. Cal. Mar. 14, 2019) ("In the false advertising context, an advertising claim is false if it has actually been disproved, that is, if the plaintiff can point to evidence that directly conflicts with the claim. By contrast, an advertising claim that merely lacks evidentiary support is said to be unsubstantiated.") (internal citations and quotations omitted).

Woodard's claims rest on provable falsehoods and not a lack of substantiation. First, each Labrada Products label claim contain asterisks leading to a "references" section purporting to establish the validity of each claim. (Labrada GC Label at 2; Labrada GCBE Label at 2-3.) When a defendant "puts the clinical proof for its product at issue," and the clinical proof does not support the claims about the product, the claims are best characterized as false rather than unsubstantiated. McCrary v. Elations Co., LLC, 2013 WL 6403073, at *9 (C.D. Cal. July 12, 2013); see also Hughes v. Ester C Co., 930 F. Supp. 2d 439, 460 (E.D.N.Y. 2013) (finding alleged study showing lack of scientific support to be allegation of falsity where expert claimed he took supplement daily "because of all the clinical research that supports the use of th[e] product"). In other words, a defendant's scientifically unsupported representation is false if the defendant asserts it is supported by scientific proof. Here, the Labrada GC and GCBE labels provide published studies as references for their claims that each product "increases fat burning," "curb[s] appetite and food intake," "reduce[s] body weight," "helps support significant fat loss," and serves as a "fat loss aid." (Labrada GC Label at 2; Labrada GCBE Label at 2-3.) In so doing, the Products imply that each claim is founded in various studies that establish the efficacy of GC and GCBE as weight loss supplements. Yet, as Dr. Allison explains, one of the studies cited by the label has been disproven and retracted. (Allison Report ¶ 80.) Dr. Allison further opines that many of the referenced studies are methodologically flawed and do not produce

results consistent with the claims on the labels. (Id. ¶¶ 81, 84, 85.) His report points out that the Labrada GC Label recommends a smaller dosage than the dosage utilized in the referenced studies. (Id. ¶ 63.) He concludes that "any statements that the specific papers cited on the product labels support the efficacy statements made are, in my opinion, false and misleading." (Id. ¶ 87.) Altogether, Dr. Allison's report raises a triable issue as to the falsity of the purportedly scientifically-supported claims on the label.

Second, the Allison Report identifies studies that could lead a reasonable trier of fact to find that the weight loss claims on the labels are false. In the report, Dr. Allison cites to one study that concluded that GC "failed to produce significant weight loss and fat mass loss beyond that observed with [a] placebo." (Heymsfield Study at 2; Allison Report ¶ 77.) Another recent study cited by Dr. Allison similarly concluded that "the current evidence is insufficient to recommend green coffee as an adjuvant within weight management therapy." (Allison Report ¶ 88.) Dr. Allison's citations to studies questioning the efficacy of GC and GCBE, in addition to his own independent opinion of their lack of efficacy, offer evidence that "directly conflicts" with the Products labels' weight loss claims.[28] Nathan v. Vitamin Shoppe, Inc., 2019 WL 1200554, at *3. In response to the Allison Report, LBN points out that Dr. Allison identifies studies with conclusions that arguably support GC and GCBE's efficacy for weight loss. (MSJ 2 at 19-20.) But Dr. Allison distinguishes those studies throughout his report for failing to include placebo groups, utilizing small sample sizes, and suffering from other methodological issues that biased the results. Moreover, to the extent some scientific evidence of the efficacy of GC and GCBE exists, sufficient evidence of its inefficacy exists to raise a triable issue. The Court thus DENIES MSJ 2 as to Claims Three, Four, and Five alleged by Woodard.

3. Claims Twelve and Thirteen: Unfair Trade Practices and False Advertising

LBN seeks summary judgment on Claims Six and Seven for unfair trade practices and false advertising under New York law. (MSJ 2 at 24.) Under New York's false advertising

[28] LBN contends that Plaintiffs' failure to provide scientific studies that the Labrada Products, unlike GCBE and GC as raw ingredients, lack efficacy is fatal to Woodard's consumer protection claims. (Reply 2 at 13.) The Court disagrees. As LBN admits, the sole active ingredient in the Labrada Products is a proprietary version of GC and GCBE. (Id.) Scientific studies demonstrating the lack of efficacy of GC and GCBE are therefore sufficient to raise a triable issue as to whether the Labrada Products are ineffective. Cf. Aloudi v. Intramedic Research Grp., LLC, 729 F. App'x 514, 516 (9th Cir. 2017) (affirming dismissal of false advertisement claim against allegedly ineffective weight loss product because "[n]one of the[] allegations involves scientific testing of the actual [weight loss] product or a product with the same active ingredients as [the weight loss product], in a dose similar to [it]"). Moreover, the Court is unconvinced by LBN's argument that the differences in the Labrada Products' recommended dosage and the dosage of GC and GCBE utilized in the studies is so dissimilar as to render the studies meaningless. LBN fails to identify which studies utilize differing dosage, whether the difference in dosage in the studies is greater or less than the Products' recommended dosage, and whether the differences are significant enough to result in reduced efficacy.

statutes, a plaintiff must establish "actual injury" from a deceptive trade practice. Orlander v. Staples, Inc., 802 F.3d 289, 301 (2d Cir. 2015). To establish actual injury, "a plaintiff must [demonstrate] that, on account of a materially misleading practice, she purchased a product and did not receive the full value of her purchase." Id. at 302. To establish causation for the injury, an unfair trade practices claim requires a plaintiff to "demonstrate a causal connection between [the] injury to the plaintiff and some misrepresentation made by the defendant." Davis v. Avvo, Inc., 345 F. Supp. 3d 534, 543 (S.D.N.Y. 2018). In slight contrast, a false advertisement claim requires the plaintiff's actual reliance on a defendant's alleged misrepresentation. Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005).

Claims Twelve and Thirteen warrant summary judgment because Morrison and Rizzo-Marino cannot raise a triable issue as to reliance or a causal connection between the label claims and their purchase of Labrada GCBE. False advertising claims under New York law require actual reliance on the allegedly deceptive advertisement. Id.; see also Nationwide CATV Auditing Servs., Inc. v. Cablevision Sys. Corp., 2013 WL 1911434, at *8 n.1 (E.D.N.Y. May 7, 2013). Similarly, New York unfair trade practices claims require evidence of a "causal connection" between the purchase of a product and the allegedly deceptive advertisement. Davis, 345 F. Supp. 3d at 543. At the very least, this requires evidence that "suggest[s] that the statements [] identifie[d] as misleading… led to [the] decision to purchase the [product]." Tears v. Bos. Sci. Corp., 344 F. Supp. 3d 500, 516 (S.D.N.Y. 2018). As described above, neither Morrison nor Rizzo-Marino has submitted evidence to suggest that LBN's allegedly false label claims induced them to purchase Labrada GCBE. The Court therefore GRANTS MSJ 2 and DISMISSES their false advertising and unfair trade practices claims with prejudice.

4. Claims Six through Eleven: Breach of Warranty Claims[29]

Last, LBN seeks summary judgment on Plaintiffs' breach of warranty claims. (MSJ 2 at 23-26.) LBN's arguments urging summary judgment are two-fold: (1) that Woodard failed to provide timely notice of her breach of warranty claims; and (2) that Rizzo-Marino and Morrison cannot establish the requisite privity with LBN under New York law. (Id.) The Court addresses each contention in turn.

a. Notice

LBN seeks summary judgment on Woodard's breach of warranty claims for failure to provide timely notice. (Id. at 23.) "To avoid dismissal of a breach of… warranty claim in California, [a] buyer must [establish] that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach." Alvarez v. Chevron Corp., 656 F.3d 925,

[29] Plaintiffs' breach of warranty claims include Claim Six (breach of express warranty under California law), Claim Seven (breach of implied warranty of merchantability under California law), Claim Eight (breach of express warranty under New York law), Claim Nine (breach of implied warranty under New York law), Claim Ten (breach of express warranties to intended third party beneficiaries).

932 (9th Cir. 2011) (internal quotations omitted); see also Cal. Com. Code § 2607(3)(A) ("The buyer must, within a reasonable time after he or she discovers or should have discovered any breach [of warranty], notify the seller of breach or be barred from any remedy[.]"). However, this notice requirement does not apply to suits against the manufacturer, rather than the seller, of a good. See Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 61 (1963) ("The notice requirement… is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt."); see also Sanders v. Apple Inc., 672 F. Supp. 2d 978, 989 (N.D. Cal. 2009) ("[T]imely notice of a breach of an express warranty is not required where the action is against a manufacturer and is brought by injured consumers against manufacturers with whom they have not dealt.") (internal quotations omitted).

Here, Woodard testified that she purchased the Labrada Products from two Vitamin Shoppe stores located in California. (5th Woodard Depo. at 26:12-24; 33:12-16, 44:25-45:1-3.) Woodard never testified that she purchased Labrada Products from LBN, who otherwise operates as the manufacturer of the Labrada Products she purchased from a third-party retail store. Because LBN is the manufacturer of the warranted goods at issue, Woodard was not required to provide them notice of the alleged breach of warranty. Greenman, 59 Cal. 2d at 61.

LBN urges that Greenman is no longer binding authority because the notice statute in Greenman has since been repealed by the California legislature. (Reply at 14.) While LBN is correct that the notice statute underlying the warranty claims in Greenman has been repealed, Greenman represents a judicially-crafted rule that broadly recognizes that "[t]he injured consumer is seldom steeped in the business practice which justifies [a notice requirement], and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings." Greenman, 59 Cal. 2d at 61 (internal quotations and citations omitted); see also Sanders, 672 F. Supp. 2d at 989 ("As applied to… notice to a remote seller, [a notice requirement] becomes a booby-trap for the unwary. [The Greenman exception] is designed to protect a consumer who would not be aware of his rights against the manufacturer[.]") (internal quotations and citations omitted). Because Greenman is premised on a policy judgment favoring the protection of unsophisticated consumers, the repeal of the underlying statute in that matter is inconsequential.[30] Reflecting the broad scope of Greenman, district courts throughout California have routinely applied the exception to section 2607(3)(A). See, e.g., Snarr v. Cento Fine Foods Inc., 2019 WL 7050149, at *9 (N.D. Cal. Dec. 23, 2019) (holding Greenman applicable when a manufacturer allegedly breaches a warranty); In re Trader Joe's Tuna Litig., 289 F. Supp. 3d 1074, 1092 (C.D. Cal. 2017) (same); Michael v. Honest Co., Inc., 2016 WL 8902574, at *27 (C.D.

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[30] The notice requirement in the repealed statute, California Civil Code section 1769, is virtually identical to the current notice requirement in section 2607(3)(A). Compare Cal. Civ. Code § 1769 ("[I]f, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."), with Cal. Com. Code § 2607(3)(A)("The buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy[.]").

Cal. Dec. 6, 2016) (same); Miller v. Fuhu Inc., 2015 WL 2085490, at *13 (C.D. Cal. May 4, 2015) (same); Rosales v. FitFlop USA, LLC, 882 F. Supp. 2d 1168, 1177–78 (S.D. Cal. 2012) (same). As a result, Greenman applies despite the repeal of the underlying statute in that matter.[31] The Court therefore DENIES MSJ 2 as to Woodard's breach of warranty claims.

b. Privity

Finally, LBN urges the Court to enter summary judgment on Rizzo-Marino and Morrison's breach of warranty claims. (MSJ 2 at 23.) According to LBN, both Plaintiffs fail to raise a triable issue as to whether they were in privity with LBN—a necessary element of a breach of warranty claim under New York law. (Id.) However, the claims succeed for a more obvious reason: Rizzo-Marino and Morrison did not rely on the express warranties that the Labrada Products' labels create. See Goldemberg v. Johnson & Johnson Consumer Companies, Inc., 8 F. Supp. 3d 467, 482 (S.D.N.Y. 2014) ("To state a claim for breach of express warranty under New York law, a plaintiff must [submit evidence of]… [her] reliance on th[e] warranty as a basis for the contract[.]"). As to the implied warranty claims, the Court agrees that Rizzo-Marino and Morrison lack the requisite privity to proceed on their claims. "New York law allows claims of implied warranty to be brought only by those in privity with the named defendant." Jackson v. Eddy's LI RV Ctr., Inc., 845 F. Supp. 2d 523, 530 (E.D.N.Y. 2012) (citing Abraham v. Volkswagen of Am., Inc., 795 F.2d 238, 248 (2d Cir. 1986)).[32] "Implied warranties include the

[31] LBN argues that a California Supreme Court overturned Greenman after the repeal of section 1769. (Reply at 14 (citing Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380 (1974).) Pollard extended the notice statute to "builders and sellers of new construction," and in so doing remarked that the "the notice requirement [] protects against stale claims. [Such] considerations are as applicable to builders and sellers of new construction as to manufacturers and dealers of chattels." Pollard, 12 Cal. 3d at 380 (emphasis added) (internal citations omitted). In addition to being best characterized as dicta, the quoted portion of Pollard is not inconsistent with Greenman: Greenman allows the notice requirement to apply to manufacturers of goods, so long as the manufacturers sell their goods directly to consumers. Pollard is thus inapposite.

[32] While the argument is unclear, Plaintiffs appear to cite Abraham and the Court's MTD Order to argue that privity exists whenever an implied warranty of fitness for a particular purpose is created. (Opp'n 2 at 24.) The MTD Order did not opined on the relationship between privity and an implied warranty of fitness under New York law. Instead, it held that Plaintiffs sufficiently alleged their implied warranty of merchantability claim under California law. (See MTD Order at 22.) Additionally, regardless of whether privity is coextensive with the implied warranty of fitness—or whether Abraham can rightly be said to stand for that proposition—Plaintiffs have failed to raise a triable issue as to whether Rizzo-Marino or Morrison's dealings with third-party retailers created an implied warranty of fitness with LBN as a manufacturer. Tears, 344 F. Supp. 3d at 513 ("An implied warranty of fitness is created when a seller knows or has reason to know the particular purpose for which a buyer requires goods, and also knows or should know that the buyer is relying on his special knowledge.") (emphasis added) (internal

implied warranty of merchantability and the implied warranty of fitness for a particular purpose." Id. Here, Rizzo-Marino and Morrison purchased Labrada GCBE from various third-party retail stores. (Rizzo Marino Declaration ¶ 3; Morrison Declaration ¶ 3.) No contractual privity exists between Rizzo-Marino or Morrison and LBN as a matter of law and summary judgment is therefore warranted for their implied warranty claims.[33]

Finally, because Rizzo-Marino and Morrison fail to raise a triable issue as to any of their warranty claims, their MMWA claims warrant summary judgment as well. The Court thus GRANTS MSJ 2 and DISMISSES Claims Eight, Nine, Ten, and Eleven with prejudice to the extent Morrison and Rizzo-Marino allege breaches of implied or express warranties.

D. MSJ 3: Mr. Labrada, LNS

1. Plaintiffs Rizzo-Marino and Morrison

Labrada Defendants move the Court to enter summary judgment against Plaintiffs to the extent they allege claims against Mr. Labrada and LNS. (See MSJ 3.) As established above, Rizzo-Marino and Morrison are unable to raise a triable issue as to at least one element of all of their claims. Because their claims against Labrada Defendants are premised on identical facts and evidence as their claims against LBN, the Court GRANTS MSJ 3 and DISMISSES the remainder of Rizzo-Marino and Morrison's claims with prejudice.

2. LNS

Labrada Defendants argue that LNS should be dismissed as a party from this matter. (Id. at 23.) In support of their contention, Labrada Defendants point out that LNS was not responsible for the sale and distribution of the Labrada Products, did not share in the profits from the sales of the Products, and ceased operations years prior to the sale of the Products. The Court agrees. The evidence indicates that LNS: (1) is a separate and financially independent corporate entity than LBN; (2) has been inactive for twenty years; (3) has no employees; (4) did

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quotations omitted). The Court also notes the well-established rule in New York that "[i]f the particular purpose for which goods are to be used coincides with their general function use, [the] implied warranty of fitness for a particular purpose merges with the implied warranty of merchantability." Id. (internal quotations omitted). Because both the particular purpose and general function of the Labrada Products is to promote weight loss, an implied warranty of fitness claim cannot arise under New York law—even if privity between LBN, Rizzo-Marino, and Morrison is disregarded. Thus, Plaintiffs' argument is unavailing.

[33] Plaintiffs argue that "when the parties lack privity, Plaintiffs' reliance on a representation by a manufacturer can form the basis of an actionable implied warranty." (Opp'n 2 at 24 (quoting Clemens, 534 F.3d at 1023).) Even if the same exception applied under New York law, Rizzo-Marino and Morrison's claims would still warrant summary judgment because neither has raised a triable issue as to their reliance on the Labrada Products' label claims.

not sell or market the Labrada Products; and (5) did not share in profits from the sale of the Labrada Products. (DSUF 4 ¶ 14; 3d Rahman Declaration ¶ 3.) As a result, there is no potential claim—either personal or secondary—that would cause LNS to incur liability. Furthermore, Plaintiffs fail to oppose dismissal of LNS as a party in the Opposition. Accordingly, the Court GRANTS MSJ 3 and DISMISSES Plaintiffs' claims against LNS with prejudice.

3. Mr. Labrada

Labrada Defendants contend that the Court should enter summary judgment on all claims against Mr. Labrada. (See MSJ 3.) Labrada Defendants assert that Plaintiffs cannot raise a triable issue as to whether Mr. Labrada is personally liable for the marketing, advertisement and sale of the Labrada Products. (Id. at 17.) Similarly, Labrada Defendants argue that the evidence is insufficient to raise a triable issue as to Mr. Labrada's secondary liability under a joint venture or joint enterprise theory.[34] (Id. at 15.) The Court addresses both arguments below and finds that most of Plaintiffs' claims against Mr. Labrada warrant summary judgment.

a. Personal Liability

Initially, the Court addresses whether Plaintiffs raise a triable issue as to Mr. Labrada's personal liability for the corporate actions of LBN. As to Plaintiffs' tort claims, the California Supreme Court has explained that "[d]irectors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done." United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970). "They are not responsible to third persons for negligence amounting merely to nonfeasance, to a breach of duty owing to the corporation alone; the act must also constitute a breach of a duty owed to the third person." Id. Moreover, "[l]iability imposed upon agents for active participation in tortious acts of the principal have been mostly restricted to cases involving physical injury, not pecuniary harm, to third persons[.]" Id. That limitation "reflect[s] the oft-stated disinclination to hold an agent personally liable for economic losses when, in the ordinary course of his duties to his own corporation, the agent incidentally harms the pecuniary interests of a third party." Frances T. v. Vill. Green Owners Assn., 42 Cal. 3d 490, 505 (1986).

The Court finds that Plaintiffs fail to raise a triable issue as to Mr. Labrada's personal liability for LBN's alleged tortious conduct. While Plaintiffs have submitted evidence of Mr.

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[34] In anticipation of Plaintiffs' arguments, Labrada Defendants contest a potential third theory of liability and posit that "Lee Labrada's surname and image creates no legal basis for liability." (MSJ 3 at 12.) Even assuming such a theory of liability could prevail, Plaintiffs appear to abandon it in the opposition and instead argue that Mr. Labrada is personally liable because Plaintiffs "relied on the misrepresentations made on the labels of the LBN Products, which Lee La[br]ada oversaw and approved." (Opp'n 3 at 10.) Because Plaintiffs do not oppose dismissal of the surname and image theory, the Court GRANTS MSJ 3 and DISMISSES any such theory of liability with prejudice.

Labrada's personal participation in the marketing, sale, and advertisement of the Labrada Products, there is no evidence that Woodard suffered personal harm or property damage as a result of the allegedly false label claims. Haidinger-Hayes, 1 Cal. 3d 595; Frances T., 42 Cal. 3d 490, 505 (1986) (explaining that pecuniary harm caused by officers or directors of a corporation does not give rise to personal liability); Casey v. Olson, 2010 WL 3516930, at *7 (S.D. Cal. Sept. 8, 2010) ("California courts have limited the imposition of liability on directors for their active participation in tortious acts to those resulting in physical injury.").

Plaintiffs primarily rely on Michaelis v. Benavides, 61 Cal. App. 4th 681 (1998) to support their contention that directors and officers can be held liable for their personal participation in torts committed by their employer-corporation. (Opp'n 3 at 7.) But in Michaelis, the California Court of Appeals distinguished Haidinger-Hayes by explaining that "in contrast to the alleged facts here, the plaintiff in Haidinger–Hayes did not experience any personal injury or injury to property, but only pecuniary harm in the form of a monetary loss under an insurance policy." Michaelis, 61 Cal. App. 4th at 686. The court ultimately permitted plaintiffs' tort claim to survive a motion to dismiss, in part because plaintiffs alleged "serious physical damage to [their] home" that warranted personal liability for the president of the company that allegedly damaged their home. Id. at 686-87. Thus, even Michaelis requires Plaintiffs to point to some evidence of physical injury or property damage to raise a triable issue as to their theory of personal liability. Plaintiffs have failed to submit evidence of physical injury or property damage. The Court thus GRANTS MSJ 3 and DISMISSES Claims One and Two alleged by Woodard against Mr. Labrada with prejudice to the extent they allege personal liability.

The Court similarly finds that Woodard's breach of warranty claims against Mr. Labrada merit summary judgment. As Labrada Defendants correctly note, Woodard's breach of warranty claims sound in contract. Freas v. BMW of N. Am., LLC, 320 F. Supp. 3d 1126, 1132 (S.D. Cal. 2018) ("Under California law, a claim for breach of express or implied warranties 'necessarily sounds in contract.'") (quoting Wyatt v. Cadillac Motor Car Division, 145 Cal. App. 2d 423, 426 (1956)). Directors and officers of corporations cannot be held personally liable for contracts entered into on behalf of the corporation unless they purport to bind themselves as a contracting party. Haidinger-Hayes, 1 Cal. 3d at 595. Plaintiffs do not address Mr. Labrada's personal liability for Woodard's breach of warranty claims in their Opposition. The Court thus GRANTS MSJ 3 and DISMISSES Claims Six, Seven, and Ten alleged by Woodard against Mr. Labrada with prejudice to the extent they allege personal liability.

Last, as to Mr. Labrada's personal liability for Woodard's false advertising claims, the Court finds sufficient evidence to deny summary judgment. Personal liability can be imposed under the CFAL, CLRA, and UCL when it is "based on [a defendant's] personal participation in the unlawful practices and unbridled control over the practices[.]" Emery v. Visa Internat. Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002) (internal quotations omitted); People v. Toomey, 157 Cal. App. 3d 1, 15 (1984) ("[I]f the evidence establishes defendant's participation in the unlawful practices, either directly or by aiding and abetting the principal, liability…can be imposed.").

Here, Plaintiffs have introduced evidence that raises a triable issue as to whether Mr. Labrada personally participated in and controlled the formation of the allegedly false label claims. Workman, the chief operating officer of LBN, testified that Mr. Labrada was "responsible for the marketing and advertising" at LBN. (Workman Depo. at 19:14-20:11.) More specifically, Workman testified that Mr. Labrada advised the content of Labrada GC (id at 46:1-5), changed promotional language on both product labels (id. at 72:1-20), and was one of several people responsible for the inclusion of the referenced studies on the labels (id. at 70:17-20). Mr. Labrada himself confirmed that he "oversaw the marketing and advertising" at the company. (Labrada Depo. at 23:19-23.) He explained that LBN employees develop advertising or marketing material and present it to him for final review. (Id. at 24:1-9.) He further testified that he was empowered to exercise his discretion to approve the proposed advertising and marketing or reject it. (Id. at 24:16-20.) As a result, there is sufficient evidence for a reasonable trier of fact to find that Mr. Labrada curated and controlled the design and content of the Labrada Products' labels. Moreover, as explained above, Woodard has raised a triable issue as to her reliance on the content of the labels to purchase the Labrada Products. The Court therefore DENIES MSJ 3 as to Claims Three, Four, and Five to the extent Woodard alleges Mr. Labrada's personal liability.[35]

b. Secondary Liability: Joint Venture[36]

Finally, Labrada Defendants move the Court to enter summary judgment on Woodard's claims to the extent she alleges Mr. Labrada's secondary liability under a joint venture theory. (MSJ 3 at 15.) A joint venture is a form of secondary liability that exists where there is "an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." Holtz v. United Plumbing & Heating Co., 49 Cal. 2d 501, 507 (1957).

Woodard's joint venture theory warrants summary judgment. Initially, the Court notes that persuasive authority holds that conduct carried out within the scope of employment and

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[35] Labrada Defendants argue that the FAC does not allege Mr. Labrada's personal liability and that Plaintiffs have waived it. Not so. Plaintiffs premise their arguments regarding Mr. Labrada's personal liability on the notion that he was responsible for the promotion, marketing, and distribution of the Labrada Products. Plaintiffs adequately alleged personal liability on that basis in the FAC. (See FAC ¶ 37 ("Defendant Lee Labrada develops, manufactures, promotes, markets, distributes, and/or sells the Labrada Products across the United States, including to hundreds of thousands of consumers in California.") (emphasis added).)

[36] In addition to Plaintiffs' joint venture theory of liability, the parties debate the viability of a "joint enterprise" theory. The Court's discussion of Plaintiffs' joint venture theory applies equally to its join enterprise theory, because as Labrada Defendants correctly note, "[w]hen used to describe a business or commercial undertaking[], California decisions draw no significant distinctions between joint ventures and joint enterprises." Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 864 n.1 (1968).

pursuant to an employer-employee relationship is mutually exclusive with joint venture liability. See Simmons v. Ware, 213 Cal. App. 4th 1035, 1049 (2013) ("[W]e note the relationships of employer-employee and joint adventurers are incompatible and cannot exist together between the same parties in relation to the same transaction.") (internal quotations omitted); see also O'Reilly v. Musk, 2010 WL 3759829, at *10 (Cal. Ct. App. Sept. 28, 2010) ("The undisputed evidence was that O'Reilly was an employee of RTI. Thus, a joint venture relationship between RTI and O'Reilly concerning the IMC would have been incompatible with the employer-employee relationship between the same parties.").

Additionally, even if the Court overlooked Mr. Labrada's employer-employee relationship with LBN, the two did not form a joint enterprise as a matter of law because Mr. Labrada did not "shar[e in the] profits and losses" of LBN's sale of the Labrada Products. Holtz, 49 Cal. 2d at 507; see also Wolf v. Superior Court, 107 Cal. App. 4th 25, 33 (2003) (finding no joint venture or joint enterprise in-part because "the [operative] contract plainly allowed an opportunity for non-mutual profit" and thus profits were not shared). Instead, the evidence indicates that Mr. Labrada is a salaried employee of LBN and does not share in the profits and losses of the company. (3d Rahman Declaration ¶¶ 5, 8-11.) Because Mr. Labrada is a salaried employee of LBN who does not share in its profits, and any of his assistance designing the allegedly misleading labels occurred in the scope of his employment, Plaintiffs' joint venture theory of liability must be dismissed.

Finally, the Court briefly notes that Plaintiffs' argument that Mr. Labrada is liable for the actions of LBN under an "alter ego" theory of liability is untimely. (See Opp'n 3 at 9-10.) The FAC makes no allegations of alter ego liability that would have placed Labrada Defendants on notice of such a theory. (See generally FAC.) Plaintiffs cannot oppose summary judgment on a theory of liability not alleged in the FAC. Cole v. CRST, Inc., 150 F. Supp. 3d 1163, 1169 (C.D. Cal. 2015) ("[C]ourts routinely hold that a plaintiff cannot oppose summary judgment based on a new theory of liability because it would essentially blindside the defendant with a new legal issue after the bulk of discovery has likely been completed.") (internal quotations omitted). As a result, the Court considers any such theory of liability waived. The Court GRANTS MSJ 3 and DISMISSES Woodard's claims against Mr. Labrada with prejudice to the extent she alleges a joint venture theory of liability.

VII. MOTION FOR CLASS CERTIFICATION

A. The Proposed Classes

Plaintiffs seek certification of six proposed classes: (1) all persons in the United States who purchased the Labrada GCBE for personal and household use and not for resale from February 2, 2012 until the date class notice is disseminated ("Class Period") to class members ("Proposed Nationwide GCBE Class"); (2) all persons in California who purchased the Labrada GCBE for personal and household use and not for resale from February 2, 2012 until the date class notice is disseminated to class members ("Proposed California GCBE Class"); (3) all persons in New York who purchased the Labrada GCBE for personal and household use and not for resale from February 2, 2012 until the date notice is disseminated to class members

("Proposed New York GCBE Class"); (4) all persons in the United States who purchased Labrada GC for personal and household use and not for resale from February 2, 2012 until the date notice is disseminated to class members ("Proposed Nationwide GC Class"); (5) all persons in California who purchased Labrada GC for personal and household use and not for resale from February 2, 2012 until the date notice is disseminated to class members ("Proposed California GC Class"); and (6) all persons in New York who purchased Labrada GC for personal and household use and not for resale from February 2, 2012 until the date notice is disseminated to class members ("Proposed New York GC Class"). Below, the Court examines whether the Proposed Classes warrant certification under Rule 23.

B. The Proposed New York Classes

As an initial matter, certification of the Proposed New York GC Class and the Proposed New York GCBE Class is unwarranted because Plaintiffs' claims under New York law have been dismissed with prejudice. See generally supra. As the claims Plaintiffs sought to certify have been dismissed, the MCC is DENIED as to the Proposed New York Classes. Cf. Wright v. Schock, 742 F.2d 541, 544 (9th Cir. 1984) (holding that courts may consider a motion for summary judgment prior to a motion for class certification to "protect both the parties and the court from needless and costly further litigation").

C. The Nationwide and California Proposed Classes

1. Rule 23(a) Requirements

a. Numerosity

Rule 23(a)(1) requires a class be so numerous that joinder of individual class members is impracticable. Fed. R. Civ. P. 23(a)(1). "There is no set numerical cutoff used to determine whether a class is sufficiently numerous; courts must examine the specific facts of each case to evaluate whether the requirement has been satisfied." Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012) (citing General Tel. Co. v. EEOC, 446 U.S. 318, 329–30 (1980)). When "the exact size of the class is unknown, but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." In re Abbott Labs. Norvir Anti-Tr. Litig., 2007 WL 1689899, at *6 (N.D. Cal. June 11, 2007) (internal quotations omitted). Here, Plaintiffs have submitted evidence that the Labrada Products have been purchased by consumers in significant quantities across the country. (See generally MCC Exhibit 35; MCC Exhibit 36.) Moreover, Labrada does not dispute that Plaintiffs' Nationwide and California Proposed Classes are sufficiently numerous. The Court thus finds that numerosity is satisfied.

b. Commonality

Prior to certification, Rule 23(a)(2) requires that there be "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). Courts have construed Rule 23(a)(2)'s commonality requirement permissively. Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003). "All questions of fact and law need not be common to satisfy the rule. The existence of shared

legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Id. (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)); see also Haley, 169 F.R.D. at 648 ("[F]or the commonality requirement to be met, there must only be one single issue common to the proposed class.").

Here, for reasons further described below, the Court finds sufficiently common questions of law or fact as to the Proposed California GC and GCBE Classes. By definition, all class members in the Proposed California Classes were exposed to the allegedly deceptive advertising at issue because they purchased the Labrada Products. Thus, there is a "common core of salient facts[]" binding Plaintiffs' Proposed California GC and GCBE Classes: the purchase of a product displaying allegedly deceptive advertising. See Astiana v. Kashi Co., 291 F.R.D. 493, 501 (S.D. Cal. 2013) (holding that exposure to label on product purchased by class members satisfied commonality). Indeed, courts "routinely find commonality in false advertising cases that are materially indistinguishable from this matter." Id. at 501–02. The Court finds commonality satisfied as to both the Proposed California Classes.

However, as to the Proposed Nationwide GC and GCBE Classes, Plaintiffs have failed to adequately demonstrate common questions of law. Plaintiffs seek nationwide certification on their claims of common law fraud and negligent misrepresentation. However, California's choice of law rules require that the law of each class members' domicile apply to their claims. The common law of the various states contain material differences that create individualized issues of law and demand distinct evidence from class members residing in those states. "Differences [in applicable law] among putative class members can impede the generation of [] common answers." Moreno v. JCT Logistics, Inc., 2019 WL 3858999, at *6 (C.D. Cal. May 29, 2019). Consequently, the Proposed Nationwide Classes fail to satisfy commonality.

c. Typicality

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Wolin v. Jaguar Land Rover North Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010). "The test of typicality 'is 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)). Thus, typicality is generally satisfied if the plaintiff's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." Caput v. NTT Sec. US Inc., 2019 WL 3308771, at *3 (C.D. Cal. Apr. 19, 2019) (quoting Hanlon v. Chrysler Corp, 150 F.3d 1011, 1020 (9th Cir. 1998)). Moreover, satisfying the typicality prong requires that "a class representative must be part of the class." General Telephone Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982).

Plaintiffs largely satisfy the typicality requirement. As to the Proposed California GC and GCBE Classes, class members have all suffered identical pecuniary harm caused by the same course of conduct: the allegedly false label claims displayed on the Labrada Products. Moreover,

Woodard's interests as class representative align with the interests of the class because the source and character of her harm is substantially identical to the class as a whole.[37] In short, class members in the Proposed California classes have suffered identical injuries caused by identical products and the same course of conduct.

As to the Proposed Nationwide GC and GCBE Classes, Plaintiffs mostly satisfy Rule 23(a)'s typicality requirement for the reasons described above. However, the typicality prong requires that "a class representative must be part of the class." Falcon, 457 U.S. at 156. Plaintiffs request that Morrison be appointed a class representative for the Proposed Nationwide GC Class. (See MCC at 4.) Because the Court has already found that Morrison did not purchase Labrada GC, she is not a member of the defined class. Thus, the Proposed Nationwide GC Class fails to satisfy typicality to the extent Morrison is the proposed representative.

d. Adequacy

Under Rule 23(a)(4), the named Plaintiffs must be deemed capable of adequately representing the interests of the entire class, including absent class members. See Fed. R. Civ. P. 23(a)(4) (requiring "representative parties [who] will fairly and adequately protect the interests of the class"). To assess the adequacy of class representatives, the Court must ask whether the class representatives have interests antagonistic to the unnamed class members. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978).

Here, the Court finds that Plaintiffs are adequate class representative for the Proposed Classes. According to declarations submitted with the MCC, Plaintiffs have no conflicts of interest with other class members, are aware of their potential obligations as class representatives, and agree to prosecute the action vigorously on behalf of the class. (Woodard MCC Declaration ¶¶ 11-13; Morrison MCC Declaration ¶ 12.) Labrada asserts that Woodard is unfit to serve as class representative because she failed to recall her status as a named plaintiff in a parallel class action filed approximately two years ago.[38] (MCC Opp'n at 41.) However,

[37] Labrada argues that because Woodard underwent gastric bypass surgery, she lacks the ability to "absorb nutrients such as dietary supplements in the normal way," and her claims are thus atypical of the class. (MCC Opp'n at 39.) The Court disagrees. Even if Labrada is correct that Woodard will be required to respond to an affirmative defense atypical to class members, the nature of her claims need not be identical to satisfy typicality. Rather, her claims must only be "reasonably co-extensive with those of absent class members." Caput, 2019 WL 3308771, at *3. Because the litigation of one unique affirmative defense is relatively insignificant, and because Labrada fails to identify any other potential dissimilarities between Woodard's and class members' claims, the Court finds typicality satisfied as to the Proposed California Classes.

[38] Labrada also contends that Morrison is unfit to serve as class representative of the Proposed Nationwide Classes for reasons largely surrounding the inconsistency of her deposition testimony. (MCC Opp'n at 40-41.) While Labrada's arguments have some merit, inconsistent

neither Woodard's fallible memory nor her unwillingness to testify regarding a separate matter bears on her adequacy as a class representative. Labrada does not introduce evidence that Woodard has failed to adequately represent class members in the separate class action, let alone that she would be unfit to serve as a class representative in this matter. The Court therefore finds that Plaintiffs are sufficiently adequate class representatives.

Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. Fed. R. Civ. P. 23(g)(1). In appointing class counsel, the court must consider (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(B). Ultimately, the adequacy of counsel turns on whether class counsel can vigorously prosecute the action on behalf of the class and whether counsel has any apparent conflicts of interest. See Ellis, 657 F.3d at 985.

Proposed class counsel is adequate to represent the class. Plaintiffs request that the Court appoint the Law Offices of Ronald A. Marron and Cohelan, Khoury, & Singer as class counsel. (MCC Memo at 21-22.) Counsel have served as class counsel on numerous consumer class actions in state and federal court. (Cohelan MCC Declaration ¶ 8; Marron MCC Declaration ¶¶ 42-60.) Counsel further agree that they will utilize their resources to vigorously represent and defend the interests of absent class members. (Cohelan MCC Declaration ¶ 11; Marron MCC Declaration ¶ 46.) In this matter, counsel have both devoted significant time to identify and conduct discovery of Plaintiffs' claims, as indicated by the voluminous evidence submitted with the MSJs and MCC. As a result, the Court finds the adequacy requirement satisfied.

2. Rule 23(b)(3) Requirements

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Here, Plaintiffs assert the proposed class satisfies the requirements of Rule 23(b)(3) (MCC Memo at 22), which requires (1) that issues common to the whole class predominate over individual issues and (2) that a class action be the superior method of adjudication. Fed. R. Civ. P. 23(b)(3). The Court examines both requirements below.

a. Predominance

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b)(3).

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deposition testimony alone is insufficient to render a class representative inadequate. Moreover, the Court need not linger long over the adequacy of Morrison as a class representative, because the Nationwide Classes fail to warrant certification for other reasons.

Rule 23(b)(3)'s requirement that common issues of law or fact predominate over individual issues is similar to, but more stringent than, Rule 23(a)'s commonality requirement. In re Countrywide Financial Corp. Securities Litigation, 273 F.R.D. 586, 596 (C.D. Cal. 2009) (quoting Windsor, 521 U.S. 609). In a predominance inquiry, the focus is "whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and "the relationship between the common and individual issues." In re Wells Fargo Home Mortg. Overtime Pay Litigation, 571 F.3d 953, 957 (9th Cir. 2009) (quoting Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001)). In a predominance inquiry, the Court must examine whether "common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. 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." Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (citations and internal quotations omitted.)

i. California Proposed Classes

a) Consumer Protection Statutes

The Court begins its predominance analysis by assessing whether common issues predominate Plaintiffs' UCL, CLRA, and CFAL claims. Plaintiffs argue that the central question as to their consumer protection claims is whether Defendants' challenged advertising is false or misleading. (MCC Memo at 23.) Plaintiffs assert that under the UCL or CFAL, they need only show that "members of the public are likely to be deceived" by a product's label, and that a product label is likely to deceive if it presents "'a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care.'" (Id. at 24 (quoting Brockey v. Moore, 107 Cal. App. 4th 86, 99 (2003)).) According to Plaintiffs, their claims under the UCL and CFAL warrant certification because "under this objective 'reasonable consumer' test, relief is available without individualized proof of deception, reliance and injury, so long as the named plaintiff[] demonstrate[s] injury and causation." (Id. at 24 (citing Guido v. L'Oreal, USA, Inc., 284 F.R.D. 468, 482 (C.D. Cal. 2012)).) Finally, Plaintiffs contend that although reliance is an element of their CLRA claim, causation can be commonly proved by evidence of a material misrepresentation. (Id. at 24-25.) Thus, Plaintiffs conclude, determinations regarding materiality and deception can be reached by utilizing objective criteria that apply classwide and do not require individualized determination. (Id. at 25.)

Labrada contends that predominance is not met because classwide reliance cannot be presumed given the lack of common proof showing uniform class exposure to both the DOS and the allegedly misleading product labels. (MCC Opp'n at 23.) Labrada posits that to invoke a presumption of reliance and causation, "a plaintiff must show that all of the members of the putative class were exposed to the same representation and were likely to have been deceived by it." (Id. at 24.) Labrada reasons that Plaintiffs are not entitled to a presumption of classwide reliance and causation because there is a lack of evidence of classwide exposure to both the

alleged misrepresentations on the DOS and the alleged misrepresentations on the label. (Id. at 25.) The Court finds that Plaintiffs have satisfied predominance as to their California consumer protection claims. Initially, the Court notes that Woodard has standing to pursue certification of her UCL and CFAL claims. To establish statutory standing to seek classwide relief for fraud-based UCL claims and CFAL claims, a plaintiff "must demonstrate that at least one of the named plaintiffs actually relied on Defendants' allegedly deceptive or misleading statements." Allen v. Hyland's Inc., 300 F.R.D. 643, 666 (C.D. Cal. 2014) (citing Gutierrez v. Wells Fargo Bank, NA, 704 F.3d 712, 728 (9th Cir. 2012)). As discussed above, demonstrating actual reliance in the UCL and CFAL context does not require that "the allegedly deceptive or misleading statement… be the *only* cause for the plaintiffs' purchase of the products," id. (emphasis in original), but instead requires that the allegedly deceptive advertising was a "substantial factor" in the purchase of a product. Whiteley, 117 Cal. App. 4th at 678. Moreover, Woodard has submitted sufficient evidence for purposes of class certification to establish that the allegedly deceptive product labels were a substantial factor in her purchase of the Labrada Products. (5th Woodard Depo. at 26:12-19, 315:22-316:1.) Thus, Woodard has standing to request classwide relief under the UCL and CFAL.

Turning to the merits of Plaintiffs' claims, the UCL and CFAL require Plaintiffs to offer evidence that Labrada's allegedly deceptive labels are "likely to [] deceive[]" members of the public. Allen v. Hyland's Inc., 300 F.R.D. 643, 667 (C.D. Cal. 2014). "'Likely to deceive'… indicates that the ad[vertisement] is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." Id. (citing Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508 (2003)). Here, Plaintiffs have submitted evidence that the labels of the Labrada Products made allegedly false statements and remained uniform during the class period. (Labrada GC Label at 2-4; Labrada GCBE Label at 2-4; MCC Exhibit 5 ¶¶ 8, 28.) Additionally, the evidence suggests that all class members were exposed to the same allegedly misleading label statements because "[w]here the alleged misrepresentation appears on the label or packaging of each item being sold, class-wide exposure to it may be inferred." Zakaria v. Gerber Prod. Co., 2016 WL 6662723, at *8 (C.D. Cal. Mar. 23, 2016). Thus, Plaintiffs' UCL and CFAL claims are subject to classwide proof and satisfy the predominance requirement.

Similarly, common issues susceptible to common proof predominate Plaintiffs' CLRA claim. To obtain relief under the CLRA, a plaintiff must establish that they are a consumer who "suffer[ed] any damage as a result of the use or employment of any unlawful method, act, or practice." Astiana, 291 F.R.D. at 504 (citing Cal. Civ. Code § 1780(a)) (internal quotations omitted). In the class certification context, "causation [under the CLRA] is shown through the materiality of the misrepresentations. If materiality is shown, reliance and causation may be presumed as to the entire class." Parkinson v. Hyundai Motor Am., 258 F.R.D. 580, 596 (C.D. Cal. 2008) (internal citations omitted). "A misrepresentation is judged to be material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question[.]" Tobacco II, 46 Cal. 4th at 327 (internal quotations omitted).

Plaintiffs have sufficiently established that the alleged label misrepresentations were material for purposes of class certification. The evidence indicates that the Labrada Products represent that they "increase[] fat burning," "curb appetite and food intake," "reduce body weight," "help[] support significant fat loss," and serve as a "fat loss aid." (Labrada GC Label at 2; Labrada GCBE Label at 2-3.) These alleged misrepresentations are likely material to consumers because a reasonable consumer of weight loss supplements could find representations of superior weight loss efficacy important to their purchase choice. Tobacco II, 46 Cal. 4th at 327. Furthermore, because Plaintiffs have submitted sufficient evidence of uniform material misrepresentations on the labels of the Labrada Products, "reliance and causation may be presumed as to the entire class." Parkinson, 258 F.R.D. at 596; Weisberg v. Takeda Pharm. U.S.A., Inc., 2018 WL 4043171, at *5 (C.D. Cal. Aug. 21, 2018) ("Relief under the UCL and FAL is available to unnamed class members where materially misleading representations were made to all potential class members."). Consequently, Plaintiffs have established that the alleged label misrepresentations are material and thus that causation and reliance for their CLRA claim can be established on a classwide basis.

In the MCC Opposition, Labrada contends that certification is unwarranted because Plaintiffs have failed to submit evidence of their reliance or classwide reliance on Dr. Oz's purported misrepresentations on the DOS. (MCC Opp'n at 28.) But Labrada's argument ignores the applicable standard of causation. Plaintiffs' and class members' purported reliance on other sources of information is immaterial so long as the alleged label misrepresentations were a "substantial factor" in their decision to purchase the Labrada Products. For that reason, several California district courts have held that the fact "[t]hat [the proposed class representatives] may have considered other factors in their purchasing decisions does not make them atypical." Zakaria, 2016 WL 6662723, at *6; see also Allen, 300 F.R.D. at 668 (rejecting defendants' predominance argument that consumers had a primary motivation for purchasing product other than the allegedly deceptive packaging because although the evidence suggested other motivations it did not indicate "*all* the reasons why consumers purchase the products") (emphasis in original); Astiana, 291 F.R.D. at 502 (holding that "[v]ariation among class members in their motivation for purchasing the product[]" did not defeat commonality). Accordingly, any lack of common proof or individualized issues regarding reliance on the alleged misrepresentations on the DOS does not impact Plaintiffs' ability to establish classwide reliance on the alleged label misrepresentations.

b) Fraud and Negligent Misrepresentation

Plaintiffs also move to certify their common law fraud and negligent misrepresentation claims. In California, the elements of negligent misrepresentation are "(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." Broomfield v. Craft Brew All., Inc., 2018 WL 4952519, at *13 (N.D. Cal. Sept. 25, 2018) (internal quotations omitted). "These elements are the same as those for a claim of fraud, with the exception that there is no requirement of intent to induce reliance." Id. (internal quotations omitted).

In this matter, Plaintiffs satisfy predominance for their fraud and negligent misrepresentation claims for identical reasons as their consumer protection claims. Like claims under the CLRA, common law fraud and negligent misrepresentation claims benefit from a presumption of classwide reliance under California law. Brickman v. Fitbit, Inc., 2017 WL 5569827, at *7 (N.D. Cal. Nov. 20, 2017) (citing Collins v. Rocha, 7 Cal. 3d 232, 237 (1972) and Vasquez v. Superior Court, 4 Cal. 3d 800, 814 (1971)). In other words, classwide reliance and causation are presumed where, like here, the evidence establishes that an advertisement's alleged misrepresentations were material. Id. Moreover, because Plaintiffs' claims for fraud and negligent misrepresentation will require proof of reliance on and the materiality of the alleged misrepresentations on the Labrada Products' labels, resolution of each element will require proof common to the class. The Court thus finds that common issues susceptible to common proof predominate Plaintiffs' fraud and negligent misrepresentations claims.

c) Breach of Warranty

Plaintiffs move to certify their California breach of warranty claims because common evidence establishes the existence of affirmations and statements serving as warranties on the Labrada Products' labels. (MCC Memo at 28.) Labrada does not dispute that assertion. Instead, Labrada argues that Plaintiffs have failed to "meet their burden of showing that various states' warranty laws do not vary such that common legal issues would predominate." (MCC Opp'n at 29.) However, Plaintiffs do not seek nationwide class certification on their California breach of warranty claims. (See MCC at 2-3, 4-5 (seeking certification of breach of warranty claims as to persons in California who purchased the Labrada Products during the Class Period).) Plaintiffs therefore need not analyze the warranty laws of various other states to establish predominance. Instead, Plaintiffs' breach of warranty claims warrant certification because they rely on common proof of deceptive conduct by Labrada in marketing its products. In particular, the FAC alleges that the Labrada Products did not induce weight loss despite statements on the label to the contrary. (See generally FAC.) The Court will need to examine common evidence to determine whether Labrada misrepresented the efficacy of the Labrada Products and breached the alleged warranties on the label, including the Labrada Products' labels and expert testimony regarding the efficacy of the Labrada Products. As a result, "[d]eterminations of whether Defendant misrepresented its products and[]… whether warranties were breached[] are common issues appropriate for class treatment." Astiana, 291 F.R.D. at 505 (internal citations omitted); see also Zakaria, 2016 WL 6662723, at *13 (finding breach of implied and express warranty claims susceptible to common proof because claims could be proved with evidence that defendant did not "conform to the promises or affirmations of fact made on the container or label"). Because the breach of warranty claims are susceptible to common proof and Labrada fails to dispute Plaintiffs' warranty claims on other grounds, the Court finds predominance satisfied.

d) Damages

Plaintiffs seek classwide damages of full refunds of the purchase price of the allegedly deceptive Labrada Products. (MCC Memo at 28.) A plaintiff seeking damages on a classwide

basis must show that their damages calculation is susceptible to common proof. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013). "[I]ndividualized damages issues do not alone defeat certification. But Comcast requires that plaintiffs [ ] be able to show that their damages stemmed from the defendant's actions that created the legal liability." Nguyen v. Nissan N. Am., Inc., 932 F.3d 811, 817 (9th Cir. 2019) (internal quotations and citations omitted). Under California law, the standard for "[c]lass wide damages calculations under the UCL, FAL, and CLRA are particularly forgiving." Lambert v. Nutraceutical Corp., 870 F.3d 1170, 1183 (9th Cir. 2017). To obtain certification, Plaintiffs must merely establish "some reasonable basis of computation of damages… and the damages may be computed even if the result reached is an approximation." Nguyen, 932 F.3d at 818 (internal quotations omitted). Likewise, Plaintiffs' other claims require damages calculations that are functionally identical to California's consumer protection statutes. Fraud and negligent misrepresentation require that Plaintiffs' damages are "limited to the [a]mounts actually and reasonably expended in reliance upon the fraud." Delarosa v. Boiron, Inc., 275 F.R.D. 582, 592 (C.D. Cal. 2011) (citing Cal. Civ. Code § 3343(a)(1)). Similarly, "[t]he measure of damages for breach of warranty is the difference… between the value of the goods as accepted and the value… [as] warranted[.]" Cal. Com. Code § 2714.

Here, the Court is satisfied that Plaintiffs' full refund measure of damages is susceptible to common proof and a reasonable basis for computation of damages. Plaintiffs' theory of liability is that the Labrada Products are worthless because they are not effective for their advertised use as weight-loss supplements and otherwise lack inherent value. (FAC ¶¶ 159, 161, 164; MCC Memo at 29.) "Plaintiffs' contention that they are entitled to full restitution is linked to their theory that the products they paid for are worthless because they did not provide any of the advertised benefits and had no ancillary value[.]" Allen, 300 F.R.D. at 671; Lambert, 870 F.3d at 1183 ("[Plaintiff] presented evidence that the product at issue was valueless and therefore amenable to full refund treatment. We agree with the district court that the full refund model is consistent with [Plaintiff's] theory of liability."). Furthermore, classwide damages for out-of-pocket costs paid for the Labrada Products can be reasonably calculated by common evidence of Labrada's own sales data, actual pricing, and average retail prices during the Class Period. (See MCC Exhibit 36 (depicting sales records of the Labrada Products); see also MCC Exhibit 35 ¶¶ 9-10 (depicting expert's calculation of Labrada's profits and amounts paid by the Proposed Classes for the Labrada Products).) Accordingly, a full refund model of damages is appropriate for Plaintiffs' theory of liability and is predominated by common evidence.

In rebuttal, Labrada asserts that Plaintiffs' full refund damages measure is improper because they "cannot credibly argue, much less prove, that there was no benefit they and other class members received from the LBN Products." (MCC Opp'n at 37.) As support for that assertion, Labrada cites evidence that Woodard only "weighed herself 'periodically[,]" "does not know what her weight was when she started taking the products or her weight after three months," "and kept no written account of her weight during that time." (Id. at 36.) But to obtain certification of their theory of damages, Plaintiffs need not establish that the Labrada Products failed to result in weight loss. Instead, they must only establish that the proposed method of calculating damages will be a "reasonable basis of computation of damages[]" if they prevail on their theory of liability. Nguyen, 932 F.3d at 818 (internal quotations omitted). To the

extent Labrada argues that a full refund of damages is unreasonable because class members may have obtained some value from the Labrada Products, their argument is unavailing because damages could easily be reduced to account for any observed benefit from the Products. If Labrada is correct that the Labrada Products offer some potential for weight-loss, damages can still be calculated by "identify[ing] a comparable clinically-proven product which could serve to offset damages." Id. "[A] reduction in allowable damages [] is not fatal to class certification." McCrary, 2014 WL 1779243, at *15. Thus, the Court is satisfied that damages for Plaintiffs' claims under California law are susceptible to common proof.

ii. Nationwide Proposed Classes

Plaintiffs seek to certify a nationwide class for their fraud and negligent misrepresentation claims. (MCC Memo at 26.) When seeking to certify a nation-wide class for claims arising under the forum state's law, a plaintiff must show that the forum state has "a significant contact or aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests, in order to ensure that the choice of [state] law is not arbitrary or unfair." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985) (internal quotations omitted). "Such a showing is necessary to ensure that application of [the forum state's] law is constitutional." Mazza v. Am. Honda Motor Co., 666 F.3d 581, 589–90 (9th Cir. 2012). Once a plaintiff establishes sufficient contacts with the forum state, the burden shifts to the defendant to demonstrate "that foreign law, rather than California law, should apply to class claims.'" Id. at 590 (internal citation omitted). When determining which law should apply classwide, California courts look to a three-step governmental interest test and inquire whether: (1) the relevant law of each affected jurisdiction is materially different; (2) if there is a material difference, whether each jurisdiction has an interest in the application of its own law; and (3) if each jurisdiction has an interest in the application of its own law, which state's interest would be most impaired if its law were subordinated to the law of another state. Id. (citing McCann v. Foster Wheeler LLC, 48 Cal. 4th 68, 81–82 (2010)).

To defeat class certification, Labrada contends that common law fraud and negligent misrepresentation claims materially differ from state-to-state and require the application of each state's law.[39] (MCC Opp'n at 35.) In support, Labrada cites cases nationwide pointing to material differences in state law claims for fraud and negligent misrepresentation. For example, Labrada points out that South Carolina fraud claims require ignorance (Ardis v. Cox, 431 S.E.2d 267, 269 (S.C. Ct. App. 1993)), Tennessee requires intentional deception (Kincaid v. SouthTrust Bank, 221 S.W.3d 32, 40 (Tenn. Ct. App. 2006)), and Pennsylvania requires knowledge or reckless disregard of falsity (Milliken v. Jacono, 60 A.3d 133, 140 (Pa. Super. 2012)). As to negligent misrepresentation, Labrada notes that Alaska requires a misrepresentation to be made in the course of business and does not require intent to induce reliance (Miller v. State, Dep't of

[39] Labrada also offers a cursory contention that California lacks "a significant contact or aggregation of contacts" to the claims asserted by the class. Shutts, 472 U.S. at 821–22. Because the Court finds that the Nationwide Proposed Classes fail to warrant certification for other reasons, it does not address whether California lacks sufficient contacts to the class claims.

Envtl. Conservation, 353 P.3d 346, 348 (Alaska 2015)), Georgia requires the representation to be supplied to a foreseeable person (Marquis Towers, Inc. v. Highland Grp., 593 S.E.2d 903, 906 (Ga. Ct. App. 2004)), and Wisconsin demands belief in the truth of the misrepresentation (Novell v. Migliaccio, 724 N.W.2d 703 (Wis. Ct. App. 2006)). Labrada accurately notes that states have a "strong interest" in applying their own laws to companies conducting business within their borders and that California has no interest in applying their common law to protect foreign consumers harmed in foreign states.[40] (MCC Opp'n at 35 (citing Mazza, 666 F.3d at 592).) Labrada asserts that because of material differences in state law, and in light of California's lack of a competing interest in applying its own law, the law of the state of domicile of each class member—not California law—must be applied to Plaintiffs' classwide fraud and negligent misrepresentation claims. (MCC Opp'n at 35-36.)

Plaintiffs muster little response to Labrada's argument. Instead, Plaintiffs contend that "[a]lthough Defendants have identified trivial differences in state laws for the common law fraud and negligent misrepresentation claims[], they have failed to satisfy their burden of showing why these differences would matter in this particular case." (Reply at 13 (internal citations omitted).) There are two issues with Plaintiffs' argument. First, the materiality of the cited differences in state law and their differing application to this case is self-evident. One need not conduct a comprehensive legal analysis to realize that requiring Plaintiffs to submit evidence of Labrada's intent to deceive, knowledge of falsity, or Plaintiffs' belief in the alleged misrepresentation are crucial and potentially outcome-determinative differences in law. Second, Labrada has identified numerous material variations in state law, meaning it is Plaintiffs' burden—not Labrada's burden—to discuss why the identified variations in law are immaterial. Cf. Mazza v. Am. Honda Motor Co., 666 F.3d 581, 591 (9th Cir. 2012) (reversing district court that "found that [Defendant] had not met its burden of demonstrating that any of the[] differences [in state laws] were material[]" because "we are persuaded that at least some differences that [Defendant] identifies are material") (emphasis added); see also Washington Mut. Bank, 24 Cal. 4th at 924 ("[T]he court cannot accept 'on faith' an assertion that variations in state laws relevant to the case do not exist or are insignificant; rather, the party seeking certification must affirmatively demonstrate the accuracy of the assertion.").[41] Because Plaintiffs have failed to satisfy their

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[40] Indeed, the Court has already recognized as much in this Order. See supra, Part VI.A.

[41] The two cases cited by Plaintiffs in the Reply regarding the burden of persuasion are unpersuasive. In the first cited case, the district court held that defendants did not shoulder their burden of conducting a government interest analysis because they "d[id] not even discuss the differences between the consumer protection laws of New Jersey and California," a failure not replicated by Labrada. See Forcellati v. Hyland's, Inc., 876 F. Supp. 2d 1155, 1160 (C.D. Cal. 2012). To be sure, the defendants in Forcellati also failed to apply to New Jersey law to the facts of the case. Id. But it would be entirely unreasonable to expect Labrada to apply the law of fifty states to the facts of this case to carry its burden to identify material changes in law, particularly when the impact of the identified differences is self-evident. The other case Plaintiffs cite, Ebin v. Kangadis Family Mgmt. LLC, 45 F. Supp. 3d 395, 399 (S.D.N.Y. 2014), is also inapposite.

burden, the Court agrees with Labrada that the law of the various states must apply to Plaintiffs' fraud and negligent misrepresentation claims.

Given that the differing laws of each state will apply to class members' claims, the Court finds that Plaintiffs fail to satisfy predominance as to their Proposed Nationwide Classes. Certification of a nationwide class would require the Court to resolve the claims of different class members by analyzing unique elements of various states' laws that require distinct evidence. Plaintiffs' claims do not involve common issues of law and common proof; they are predominated by individualized issues demanding isolated evidence. Consequently, individual issues preclude certification of a nationwide class alleging claims under the various states' common law of fraud and negligent misrepresentation. See, e.g., Mazza, 666 F.3d at 596 ("Because the law of multiple jurisdictions applies here to any nationwide class… variances in state law overwhelm common issues and preclude predominance for a single nationwide class."); Stockinger v. Toyota Motor Sales, U.S.A., Inc., 2020 WL 1289549, at *12 (C.D. Cal. Mar. 3, 2020) ("Accordingly, Plaintiffs' consumer protection claims will require applying the law of all 50 states. The Court is convinced this vast undertaking would make a class action unmanageable."); Gianino v. Alacer Corp., 846 F. Supp. 2d 1096, 1103 (C.D. Cal. 2012) ("The claims of members from California raise significantly different legal issues from those of members from other states. Those different legal issues eclipse any common issues of law that exist. Certification of the entire nationwide class under California law therefore would be improper.").

b. Superiority

Certification under 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." Fed. R. Civ. P. 23(b)(3). Considerations pertinent to this finding include:

> "(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

That court held that while some variation existed among states in the common law of fraud and negligent misrepresentation and whether reliance was required, "when applied to the facts of this particular case any such variation is unlikely to lead to actual variation in adjudication of liability." Ebin, 45 F. Supp. 3d at 399. But other than conclusory statements, Plaintiffs fail to meaningfully discuss why the differences in law Labrada cites—which often relate to proof of requisite intent and not reliance—are "unlikely to lead to actual variation in adjudication of liability." Id. To the contrary, the differences in law Labrada cites are potentially outcome-determinative. For example, as evidence of Labrada's alleged misrepresentations on the Labrada Products' labels, Plaintiffs' expert testified that a study referred to on the label was retracted for inaccuracy in 2014. (Allison Report ¶ 80.) But if a claim requires intent to deceive or knowledge of falsity, evidence that a study was retracted years after it was first printed on the Labrada Products' labels lacks probative value toward proving intent or knowledge. Thus, the facts in Ebin are not analogous and Plaintiffs' cited cases are unavailing.

(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)(A)-(D). The superiority requirement tests whether "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." Valentino v. Carter–Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" Zinser v. Accuflix Research Inst., Inc., 253 F.3d 1180, 1192 (9th Cir. 2001).

The Court's analysis of superiority is largely guided by its analysis of predominance. On the one hand, a class action is a superior means of resolving Plaintiffs' California-based claims. Because common issues and common evidence predominate Plaintiffs' California claims, collective resolution is the most efficient and logical method of adjudication. Furthermore, the Proposed California Classes consist entirely of persons from California, making this forum in the Central District of California a desirable forum to resolve the claims. Finally, class members have no apparent interest in individually controlling the prosecution of separate actions and there is no pending litigation concerning the class claims.

In contrast, the Court finds that a class action is not the superior method of resolving Plaintiffs' nationwide claims for fraud and negligent misrepresentation. Plainly, resolving a class action while applying the laws of fifty different states would create significant trial manageability issues. Tylka v. Gerber Prod. Co., 178 F.R.D. 493, 498 (N.D. Ill. 1998) (declining to certify nationwide class because "Plaintiffs fail[ed] to meet their burden and demonstrate that the nuances of 50 consumer fraud statutes and 50 common laws are manageable"). Divergent legal issues would require different proof, with evidence admissible for one class member inadmissible or even prejudicial for another. Witnesses would be required to testify as to a broad diversity of subjects relevant to one class member but irrelevant to the next. Jurors would be obliged to assess the facts in light of numerous different jury instructions or verdict forms and "apply[] th[e] instructions and verdicts to a nationwide class encompassing millions of consumers." Gianino, 846 F. Supp. 2d at 1104. Certification of the nationwide claims would inevitably result in tremendous inefficiency, prejudicing the Court, the parties, and class members, while condemning jurors to observe the most discordant, lengthy, and boring brand of public theater imaginable. Put simply, a nationwide class action "would be a very unfair and inefficient method for adjudicating this case." Id.; see also Rai v. CVS Caremark Corp., 2013 WL 10178675, at *9 (C.D. Cal. Oct. 11, 2013) ("If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'").

Accordingly, the Court finds that Plaintiffs' Proposed California Classes and the relevant California claims satisfy Rule 23(a) and Rule 23(b)(3)'s requirements. However, Plaintiffs have

failed to demonstrate that their nationwide classes and claims create sufficiently predominant issues of law and fact, or that a class action is the superior means of resolving their fraud and negligent misrepresentation claims. Therefore, the Court GRANTS the MCC as to the Proposed California Classes. The MCC is DENIED to the extent it seeks certification of the Proposed Nationwide Classes under Rule 23(b)(3).

3. Rule 23(b)(2)

Plaintiffs contend the nationwide class should be certified under Rule 23(b)(2) if class certification is denied under Rule 23(b)(3). (MCC Memo at 32.) Plaintiffs contend that that certification under Rule 23(b)(2) is appropriate where a defendant acts 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.'" (Id. (quoting Fed. R. Civ. P. 23(b)(2)).) However, as Labrada accurately notes, certification under Rule 23(b)(2) is inappropriate when "monetary relief is not incidental to the injunctive or declaratory relief" sought. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011). Thus, at least one court has held that certification under Rule 23(b)(2) is not warranted where, like here, "the common injury is the overpayment of the purchase price of [a product] [because]… monetary damages is the [most] appropriate form of damages." Victorino v. FCA US LLC, 326 F.R.D. 282, 307 (S.D. Cal. 2018). Notably, Plaintiffs provide no response to the contention that monetary relief is more than an incidental remedy for Plaintiffs' claims. Equally as important in light of the application of various states' common law, Plaintiffs fail to identify whether injunctive relief or declaratory relief is a permissible remedy for fraud and negligent misrepresentation in every state, and if so, when it is warranted. Accordingly, the Court declines to certify the Proposed Nationwide GC and GCBE Classes under Rule 23(b)(2). The MCC is DENIED as to the Proposed Nationwide Classes.

VIII. CONCLUSION

For the reasons described above, the Court:

- GRANTS the Applications to Seal;
- DENIES AS MOOT the Oz MSJ;
- GRANTS MSJ 1 and DISMISSES all claims alleged by Plaintiffs against InterHealth WITH PREJUDICE. InterHealth is dismissed as a party and judgment shall be entered in its favor;
- GRANTS-IN-PART and DENIES-IN-PART MSJ 2;
    - All claims alleged by Plaintiffs Rizzo-Marino and Morrison are DISMISSED WITH PREJUDICE;
    - As to Woodard's claims, any theory of liability premised on the label statements "dual action fat buster[s]" and "fat loss optimizer[s]" is DISMISSED WITH PREJUDICE;
- GRANTS-IN-PART and DENIES-IN-PART MSJ 3;
    - All claims alleged by Plaintiffs Rizzo-Marino and Morrison are DISMISSED WITH PREJUDICE;

  - All claims alleged against LNS are DISMISSED WITH PREJUDICE;
  - Claims One, Two, Six, Seven, and Ten alleged by Woodard against Mr. Labrada are DISMISSED WITH PREJUDICE to the extent they allege personal liability;
  - All claims alleged by Woodard against Mr. Labrada are DISMISSED WITH PREJUDICE to the extent they allege a joint venture or joint enterprise theory.
- GRANTS-IN-PART and DENIES-IN-PART the MCC;
  - The MCC is DENIED as to the New York and Nationwide Proposed Classes;
  - The MCC is GRANTED as to the California GCBE and California GC Proposed Classes;
  - The Court certifies the following classes with respect to Plaintiffs' claims under the CLRA, CFAL, UCL, fraud, negligent misrepresentation, breach of express warranty, and breach of implied warranty:
    1) All persons in California who purchased the Labrada Green Coffee Bean Extract Product for personal and household use and not for resale from February 2, 2012 until the date class notice is disseminated;
    2) All persons in California who purchased the Labrada Garcinia Cambogia Product for personal and household use and not for resale from February 2, 2012 until the date notice is disseminated;
  - The Court appoints the Law Offices of Ronald A. Marron and Cohelan, Khoury, & Singer as class counsel and Woodard as the class representative for each class;
  - The notice plan submitted by Plaintiffs is approved. Defendants are ORDERED to provide all e-mail and postal mail addresses of persons who may be class members to Plaintiffs' counsel within twenty-one (21) days of the date of this Order. Defendants are further ORDERED to post the summary notice on all web sites they own or operate, with a link to the notice website, as indicated in the notice plan.

IT IS SO ORDERED.