SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department7@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: APRIL 4, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV387956	Patton v. Home Depot U.S.A., Inc. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	19CV352557	Csupo, et al. v. Alphabet, Inc. (Class Action)	See Line 2 for tentative ruling.
LINE 3	20CV369179	Hone Capital LLC, et al. v. Wu, et al. (Lead Case; Consolidated With 20CV369308)	Rescheduled to May 20, 2024 at 1:30 p.m.
LINE 4	20CV369179	Hone Capital LLC, et al. v. Wu, et al. (Lead Case; Consolidated With 20CV369308)	Rescheduled to May 20, 2024 at 1:30 p.m.
LINE 5	22CV403117	LVNV Funding LLC v. Deluna (Class Action)	See Line 5 for tentative ruling.
LINE 6	19CV345045	VanCleave, et al. v. Abbott Laboratories (Class Action)	See Line 6 for tentative ruling.
LINE 7			
LINE 8			

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LAW AND MOTION TENTATIVE RULINGS

LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Douglas Patton, et al. v. Home Depot U.S.A., Inc.*
Case Nos.: 21CV387956

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Douglas Patton and Salvador Reynosa, Jr. (collectively, "Plaintiffs") allege that defendant Home Depot U.S.A., Inc. ("Home Depot" or "Defendant") failed to pay overtime and minimum wages, failed to provide meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

Before the Court is Plaintiffs' motion for preliminary approval of settlement, which is unopposed. As discussed below, subject to the changes in the notice, the Court GRANTS the motion.

I. BACKGROUND

According to the allegations of the operative Second Amended Class and Representative Complaint ("SAC"), Mr. Patton has been employed by Defendant since August 2017 as a non-exempt, hourly associate, while Mr. Reynosa was employed in a similar role from January 2018 to October 2018. (SAC, ¶¶ 2-3.) Plaintiffs allege that Defendant failed to pay them for all hours worked by requiring them to perform work off the clock. (*Id.*, ¶ 8.) Plaintiffs would clock out of Defendant's timekeeping system for meal periods but would continue to work at Defendant's direction. (*Id.*) As a result, Plaintiffs forfeited minimum wages and overtime wage compensation by working without their time being correctly recorded and without compensation at the applicable rates. (*Id.*) Defendant also failed to include Plaintiffs' non-discretionary incentive compensation as part of their "regular rate of pay," underpaid Plaintiffs' sick wages, and failed to provide them with meal and rest periods during which they were fully relieved from work. (*Id.*, ¶¶ 11-14.) Additionally, Plaintiffs were not reimbursed for business expenses incurred as a result of their employment. (*Id.*, ¶¶ 15-16.)

Based on the foregoing allegations, the SAC asserts the following causes of action: (1) unfair business practices; (2) failure to pay overtime wages; (3) failure to pay minimum wages; (4) failure to provide required meal periods; (5) failure to provide required rest periods; (6) failure to reimburse required business expenses; (7) failure to provide required rest periods; (8) failure to provide accurate itemized wage statements; and (9) violation of PAGA.

Plaintiffs now seek an order: preliminarily approving the proposed settlement; conditionally certifying the proposed class for settlement purposes only; appointing Plaintiffs as class representatives; appointing Norman B. Blumenthal, Kyle R. Nordrehaug, Aparajit Bhowmik, Nicholas J. DeBlouw, and Christine T. LeVu of Blumenthal Nordrehaug Bhowmik De Blouw LLP as class counsel; approving the form and method for providing class-wide notice; appointing ILYM Group as the settlement administrator; and setting a final approval hearing date.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba, supra,* 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra*, 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT PROCESS

On January 26, 2021, Mr. Reynosa filed a putative class action against Defendant in Riverside County Superior Court on behalf of all non-exempt employees of Defendant who worked in a California Distribution Center based on the same claims similar to those asserted in the instant action. This case was then removed to federal court, specifically the Eastern District of California.

On October 13, 2021, Mr. Patton filed a representative PAGA action against Defendant, followed by an amended version of the complaint on August 17, 2022. Mr. Reynosa filed a first amended complaint on October 25, 2021, that added Mr. Patton as the first named plaintiff, as well as additional factual allegations pertaining to the various Labor Code violations Plaintiffs experienced.

During the course of the litigation, Plaintiffs' counsel engaged in investigation of the various claims, with the parties participating in both formal and informal discovery. Plaintiffs and corporate representatives of Defendant were deposed, and Defendant produced documents and information pertaining to: the composition of the class; payroll data; its wage and hour policies and job descriptions; Plaintiffs' personnel files; and samples of wage statements provided to employees. Based on this information, Plaintiffs' counsel, in concert with their expert, was able to prepare, monetary valuations of all of the claims asserted in these actions.

On November 14, 2022, the parties participated in mediation with Jeff Ross, Esq., an experienced mediator of wage and hour class actions. While the parties were not able to resolve their dispute that day, they were able to reach a global settlement in the following months after engaging in further negotiations involving Mr. Ross. The parties executed memorandum of understanding regarding the material settlement terms on April 14, 2023.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $1,112,500. Attorney fees of up to one-third of the gross settlement ($370,333), litigation costs of up to $50,500, and administration expenses not to exceed $60,000 will be paid from the gross settlement. $20,000 will be allocated to PAGA penalties, 75% of which ($15,000) will be paid to the LWDA, with the remaining 25% ($5,000) paid to "PAGA Group Members," who are defined as "any non-exempt, hourly associate employed by Home Depot in the State of California at a supply chain facility at any point during [January 26, 2020 through April 16, 2023], excluding those associates who worked at the Tracy RDC prior to June 17, 2021." Plaintiffs will each seek a service award of $10,000.

The net settlement amount will be allocated to class members- defined as "any non-exempt, hourly associate employed by [Home Depot] (and its past and present Affiliates) in the State of California at a California supply chain facility at any point during [January 26, 2017 through April 16, 2023], excluding those associates who worked at the Tracy RDC prior to June 17, 2021"- on a pro-rata basis based on the number of weeks worked during the class period. For tax purposes, settlement payments will be allocated 25% to wages and 75% to interest and penalties. The employer side payroll taxes will be paid by Defendant separately from the gross settlement amount. 100% of the PAGA payment to PAGA Group Members will be allocated to penalties. Funds associated with checks uncashed after 180 days will be transmitted to the State of California to be held pursuant to Unclaimed Property Law.

In exchange for settlement, class members who do not opt out will release:

> [A]ny claim for restitution, penalties, civil, damages, or any other form of relief asserted or pleaded (or that could have been pleaded based on the factual allegations) in the Operative Complaint and/or notice provided to the LWDA by any Named Plaintiff that accrued during the Class Period, including claims for (1) unpaid wages; (2) unpaid overtime (included alleged violations of Labor Code Sections 210, 221, 510, 558, 1194, 1198 and similar provisions of the California Wage Orders); (3) minimum wage violations (including alleged violations of Labor Code Sections 210, 221, 1194, 1197, 1197.1, and similar provisions of the California Wage Orders); (4) failure to provide meal and/or rest breaks in accordance with Labor Code Section 512 (and/or the applicable California Wage Order); (5) failure to properly calculate and/or pay break premiums as required by Labor Code Section 226.7 (and/or the applicable California Wage Order); (6) violations of California's sick leave laws (including COVID-related emergency sick leave); (7) miscalculation of the regular rate and/or rate for payment of sick leave and/or emergency sick leave; (8) failure to reimburse for work-related expenditures in violation of Labor Code Section 2802 (and/or the applicable California Wage Order); (9) failure to provide accurate wage statements or otherwise keep accurate payroll records (alleged violations of Labor Code Section 226 and similar provisions of the California Wage Orders); (10) failure to timely pay wages (including wages due upon termination and waiting time penalties) as required by Labor Code Sections 201, 202, 203, 204, and 227.3 (and/or the applicable California Wage Order).

PAGA Group Members will release:

> [C]laims arising during the PAGA Period made on behalf of the LWDA and/or State of California included in any notice provided to the LWDA by any Named Plaintiffs or as pleaded in any Complaint or that could have been pled based on factual allegations contained in the Operative Complaint or any written notice provided to the LWDA, including PAGA claims for or predicated on (1) unpaid wages; (2) unpaid overtime (included alleged violations of Labor Code Sections 210, 221, 510, 558, 1194, 1198 and similar provisions of the California Wage Orders); (3) minimum wage violations (including alleged violations of Labor Code Sections 210, 221, 1194, 1197, 1197.1, and similar provisions of the California Wage Orders); (4) failure to provide meal and/or rest breaks in accordance with Labor Code Section 512 (and/or the applicable California Wage Order); (5) failure to properly calculate and/or pay break premiums as required by Labor Code Section 226.7 (and/or the applicable California Wage Order); (6) violations of California's sick leave laws (including COVID-related emergency sick leave); (7) miscalculation of the regular rate and/or rate for payment of sick leave and/or emergency sick leave; (8) failure to reimburse for work-related expenditures in violation of Labor Code Section 2802 (and/or the applicable California Wage Order); (9) failure to provide accurate wage statements or otherwise keep accurate payroll records (alleged violations of Labor Code Section 226 and similar provisions of the California Wage Orders); (10) failure to timely pay wages (including wages due upon termination and waiting time penalties) as required by Labor Code Sections 201, 202, 203, 204, and 227.3 (and/or the applicable California Wage Order); (11) any alleged failure to comply with California's Wage Orders including provisions regulating conditions of employment including temperature and suitable seating; and (12) civil penalties pursuant to PAGA based on any of the foregoing alleged violations.

Consistent with the statute, PAGA Group Members will not be able to opt out of the PAGA portion of the settlement. The foregoing releases are both appropriately tailored to the allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.)

V. FAIRNESS OF SETTLEMENT

Utilizing the data and information obtained from Defendant through formal and informal discovery, Plaintiffs' counsel and its retained expert, Berger Consulting, calculated the maximum amount of recovery for each claim as follows: $0 (regulate rate claim); $700,134 (unpaid wages due rounding practices); $0 (underpaid meal periods); $3,378,955 (missed rest periods); $834,310 (failure to reimburse expenses); $0 (waiting time penalties); $0 (wage statement violations); and $8,784,900 to $17,569,800 (PAGA penalties). Counsel reduced the foregoing amounts by: the risk of class certification being denied due to individualized issues; the difficulty of establishing class-wide liability on all claims; the release of certain claims due to settlements reached in other class actions against Home Depot (including the *Barragan* and *Utne* actions); the strength of Defendant's defenses to Plaintiffs' claims (e.g., its practices complied with all applicable labor laws, all work time was properly recorded and compliant rest and meal periods provided, it provided reimbursement for business expenses or such reimbursement was not required because the expenses were voluntarily incurred and any non-compliance was inadvertent and not willful); and with respect to the PAGA penalties, the same risks underlying the class claims and the likelihood any penalties would be drastically reduced to fall within the range of .27% to 2% of the total settlement amount typically approved in

similar cases. The settlement amount represents more than 22% of the potential maximum damages.

Considering the portion of the case's value attributable to uncertain penalties, claims that could be difficult to certify for class treatment, and the multiple, dependent contingencies that Plaintiffs would have had to overcome to prevail on their claims, the settlement achieves a good result for the class. For purposes of preliminary approval, the Court finds that the settlement is fair and reasonable to the class, and the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's purposes.

Of course, the Court retains an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127–128.) Counsel shall submit lodestar information prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].)

VI. PROPOSED SETTLEMENT CLASS

Plaintiffs requests that the following settlement class be conditionally certified:

> All non-exempt, hourly associates employed by Home Depot U.S.A., Inc. (and its past and present Affiliates) in the State of California at a California supply chain facility at any point during the Class Period, excluding those associates who worked at the Tracy RDC prior to June 17, 2021.

A. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class

determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel*, *supra*, 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel*, *supra*, 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel*, *supra*, 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, the estimated 12,000 class members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores*, *supra*, 34 Cal.4th at pp. 326, 332.)

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also examine evidence of any conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so

numerous or substantial that the maintenance of a class action would be good for the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks*, *supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiffs' claims all arise from Defendant's wage and hour practices applied to the similarly-situated class members.

As for the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Like other members of the class, Plaintiffs were employed by Defendant as non-exempt employees and allege that they experienced the violations at issue. The anticipated defenses are not unique to Plaintiffs, and there is no indication that Plaintiffs' interests are otherwise in conflict with those of the class.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba, supra,* 91 Cal.App.4th at p. 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid*., internal citations and quotation marks omitted.)

Plaintiffs have the same interest in maintaining this action as any class member would have. Further, they have hired experienced counsel. Plaintiffs have sufficiently demonstrated adequacy of representation.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a

class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id*. at pp. 120–121, internal quotation marks omitted.)

Here, there are an estimated 12,000 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually and it is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. NOTICE

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid*.) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

The parties have selected ILYM Group ("ILYM") as the settlement administrator. Within thirty days of preliminary approval, Defendant will provide a list of all class members along with pertinent identifying information (including last known address) to the administrator. Within an additional 30 days of receiving this data, ILYM will mail the notice packet to class members and PAGA Group Members after updating their addresses through appropriate tracing methods, including skip tracing.

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement (except the PAGA component) or object. The gross settlement amount and estimated deductions are provided. Class members are informed of their qualifying pay periods as reflected in Defendant's records and are instructed how to dispute this information, and are given 60 days to request exclusion from the class or submit a written objection to the settlement. Returned notices will be re-mailed to any forwarded address provided or an updated address located though a skip trace, and these individuals will have an additional 14 days to opt out or object.

The foregoing notice procedures are appropriate and are approved.

The form of notice is generally adequate, but must be modified to instruct class members that they may opt out of or object to the settlement simply by providing their name, without the need to provide their phone number or other personal information, including the final four digits of their social security number.

Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

The judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the toll free conference call number for Department 7. Any class member who wishes to appear in person should check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort him or her to the courtroom for the hearing.

VIII. CONCLUSION

Presuming changes to the notice concerning the information a class member requesting to be excluded from the settlement is required to provide are made, the Court GRANTS the motion for preliminary approval.

The final approval hearing shall take place on **September 26, 2024** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

> All non-exempt, hourly associates employed by Home Depot U.S.A., Inc. (and its past and present Affiliates) in the State of California at a California supply chain facility at any point during the Class Period, excluding those associates who worked at the Tracy RDC prior to June 17, 2021.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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Calendar Line 2

Case Name: *Attila Csupo, et al. v. Alphabet, Inc.*
Case No.: 19CV352557

This is a putative class action for conversion and quantum meruit, alleging that defendant Alphabet, Inc.'s ("Google") Android operating system and mobile phone applications passively transfer data using class members' cellular data allowances without their consent.

Before the Court is Google's motion to seal materials filed in connection with briefing regarding the scope of discovery, which is unopposed. For the reasons discussed below, the Court GRANTS the motion.

I. MOTION TO SEAL

A. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) Confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285–1286.)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian*, *supra*, 96 Cal.App.4th at p. 309.)

B. Discussion

Google moves to seal portions of materials filed on December 1, 2023 in connection with Plaintiffs "Brief Regarding Class Notice and Scope of Post-Certification Discovery," particularly specific portions of Exhibits C, G, I and J to the Declaration of Marc A. Wallenstein, and the entirety of Exhibit K. These materials have either already been sealed by

the Court in previous contexts (i.e., Google's Omnibus Motion to Seal, granted on November 3, 2023) or are substantially overlapping and similar with such materials.

As Google maintains, courts routinely seal the type of information contained in the foregoing exhibits, i.e., highly confidential and proprietary information regarding internal systems, technologies, practices, and metrics related to Netstats and GMS Core, the disclosure of which would unfairly advantage its competitors or pose security risks. (See, e.g., *See, e.g., In re Google RTB Consumer Priv. Litig.* (N.D. Cal. 2022) 2022 U.S. Dist. LEXIS 227834, at *3-4 [sealing sensitive information regarding Google's internal logs and data sources]; *In re Google Inc. Gmail Litig.*, (N.D. Cal. 2013) 2013 U.S. Dist. LEXIS 138910, at *3 [sealing information about structures that Google has in place and the order in which emails go through these structures].) In line with these authorities, and its prior sealing order, the Court concludes that sealing the aforementioned materials is warranted because: there exists an overriding interest that overcomes the right of public access to the record; the overriding interest supports sealing the record; a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; the proposed sealing is narrowly tailored; and no less-restrictive means exist to achieve the overriding interest. (See Cal. Rules of Court, rule 2.550(d).) Therefore, Google's motion to seal is granted.

II. CONCLUSION

Google's motion to seal is GRANTED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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Calendar Line 3

Case Name:
Case No.:

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Calendar Line 4

Case Name:
Case No.:

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Calendar Line 3

Case Name: *LVNV Funding, LLC v. Robert DeLuna*
Case Nos.: 22CV403117

This action is comprised of a collection lawsuit by plaintiff/cross-defendant LVNV Funding LLC ("LVNV") and putative class action cross-complaint by defendant/cross-complainant Robert DeLuna alleging that LVNV engaged in unfair debt buying practices in violation of the California Fair Debt Buying Practices Act, (Civ. Code, §§ 1788.50-1788.64) ("CFDBPA").

Before the Court is Mr. DeLuna's motion to conduct discovery pursuant to Code of Civil Procedure section 425.16, subdivision (g), which is opposed by LVNV. As discussed below, the Court GRANTS the motion.

III. BACKGROUND

According to the allegations of the operative complaint ("Complaint"), filed on August 12, 2022, LVNV is the owner of debt owed by Mr. DeLuna. (Complaint at 2, ¶ 10.) In its judicial form complaint, LVNV asserts common counts for open book account, money had and received, money lent by plaintiff to defendant at defendant's request and money paid, laid out, and expended to or for defendant at defendant's special instance and request.

On June 30, 2023, Mr. DeLuna filed a putative class action cross-complaint ("Cross-Complaint") against LVNV asserting a single cause of action for violation of the CFDBPA. According to the allegations of the Cross-Complaint, Mr. DeLuna is alleged to have incurred a financial obligation in the form of a consumer credit account issued by WebBank, which is evidenced by an electronic promissory note created and maintained by LendingClub Corporation ("LendingClub"). (Cross-Complaint, ¶¶ 10-11.) The alleged debt and electronic promissory note (the "Note") were transferred by WebBank to LendingClub within two business days after June 20, 2017. (*Id.*, ¶ 12.)

On information and belief, Mr. DeLuna pleads that the debt and Note were thereafter allegedly transferred to an investor, Golden Caps Trust ("Golden Caps"), for whom LendingClub acted as an agent. (Cross-Complaint, ¶ 13.) LendingClub received the last payment on the alleged debt on December 2, 2019, with no further payments made after that point. (*Id.*, ¶ 14.)

On July 31, 2019, Golden Caps removed the alleged debt from its books as an asset and treated the alleged debt as a loss or expense, and as a result was the "charge-off creditor at the time of charge off" within the meaning of Civil Code section 1788.58, subdivision (a)(6), and the alleged debt was thereafter a "charged-off consumer debt" within the meaning of Civil Code section 1788.50, subdivision (a)(2). (Cross-Complaint, ¶ 15.)

Cross-Complainant alleges that on April 30, 2020, the alleged debt was sold or resold to LVNV for collection purposes, but possession or control of the Note was never transferred to it. (Cross-Complaint, ¶ 16.) On August 12, 2022, LVNV filed the underlying Complaint in an attempt to collect on the alleged debt. (*Id.*, ¶ 18.) Mr. DeLuna alleges that LVNV falsely pleads in the Complaint that it complied with the applicable provisions of the CFDBPA and

alleges common counts instead of breach of contract because it does not possess or control the Note. (Cross-Complaint, ¶¶ 20-22.)

On September 6, 2023, LVNV filed a special motion to strike the Cross-Complaint in its entirety pursuant to Code of Civil Procedure section 425.16 ("Section 425.16"). Approximately a month later, the parties engaged in an informal discovery conference ("IDC") in which Mr. DeLuna informed the Court that he would need to conduct limited discovery pursuant to subdivision (g) of Section 425.16 in order to oppose the special motion to strike, and shortly after its conclusion, the Court issued a briefing schedule for such a motion.

IV. MOTION TO CONDUCT DISCOVERY

A. Legal Standard

Unless the court orders otherwise for "good cause shown," the filing of a notice of motion under Section 425.16 operates to stay all discovery proceedings until notice of entry of order ruling on the motion. (Code Civ. Proc., § 425.16, subd. (g); see *Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1129.) Because a special motion to strike may be made within 60 days after service of the pleading to which it is directed (and must be heard within 30 days thereafter), a plaintiff may need additional discovery to oppose the motion, and *cannot* merely oppose the motion for lack of opportunity to obtain the necessary information. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867.)

"Good cause" is required for discovery while an anti-SLAPP motion is pending, and in order to satisfy this requirement, a plaintiff must make a prima facie showing at least as to the elements of the claim for which no discovery should be needed. (*Paterno v. Superior Court* (2008) 163 Cal.App.4th 1342, 1349.) If discovery is permitted, it will be limited to the issues raised by the anti-SLAPP motion, i.e., matters that may help the plaintiff establish a "reasonable probability of prevailing" on the claim, rather than merely matters to impeach the defendant's credibility. (See *Sipple v. Foundation for Nat'l Progress* (1999) 71 Cal.App.4th 226, 247.)

B. Discussion

In the instant motion, Mr. DeLuna maintains that good cause exists to permit him to conduct limited discovery relating to the second prong of the anti-SLAPP analysis,[1]

[1] Code of Civil Procedure section 425.16 provides a summary procedure by which defendants may dispose of "strategic lawsuits against public participation" or "SLAPP" lawsuits, i.e., lawsuits brought "primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for redress of grievances." (See Code Civ. Proc., § 425.16, subd. (a).) Courts are to broadly construe the anti-SLAPP statute to further the legislative intent of "encouraging continued participation in matters of public significance by preventing the chilling of such participation through abuse of the judicial process." (See *Kimbler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal. 4th 192, 199, internal citations omitted.)

The court's approach to ruling on a special motion to strike has been summarized thusly:

explaining that he has yet to conduct *any* discovery relating to LVNV or his allegations regarding the creation, maintenance, and transfer of the Note. He notes that prior to the filing of LVNV's special motion to strike, he served a third-party subpoena on LendingClub, but LendingClub has now refused to comply due to the discovery stay.

In the Cross-Complaint, Mr. DeLuna alleges that LVNV violated the CFDBPA, particularly Civil Code sections 1788.52 ('Section 1788.52"), subdivision (b), and 1788.58 ("Section 1788.58"), subdivisions (a)(9) and (b), by: falsely stating in the Complaint that it complied with Section 1788.52; and by failing to attach to the Complaint a "copy of the contract or other document described in subdivision (b) of Section 1788.52" as required by Section 1788.58, subdivision (b).

Section 1788.52, subdivision (b) states, in pertinent part:

> A debt buyer shall not make any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt. If the claim is based on debt for which no signed contract or agreement exists, the debt buyer shall have access to a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor.

Section 1788.58, subdivision (a)(9) and subdivision (b), provide that:

> In an action brought by a debt buyer on a consumer debt: (a) The complaint shall allege all of the following: … (9) That the debt buyer has complied with Section 1788.52. (b) A copy of the contract or other document described in subdivision (b) of Section 1788.52 shall be attached to the complaint.

A violation the foregoing sections gives rise to a private right of action. (See Civ. Code, §1788.62, subd. (a) ["In the case of an action brought by an individual or individuals, a debt buyer that violates any provision of this title with respect to any person shall be liable to that person in an amount equal to the sum of the following: (1) Any actual damages sustained by that person as a result of the violation, including, but not limited to, the amount of any

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> Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from the protected activity. The moving defendant's burden is to demonstrate that the act or acts of which Plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue" as defined in the statute. (§ 425.16, subd. (b)(1.) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers "the pleadings, and supporting and opposing affidavits stating facts upon which the liability or the defense is based.

(See *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 67.)

judgment obtained by the debt buyer as a result of a time-barred suit to collect a debt from that person. (2) Statutory damages in an amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000).”].)

Mr. DeLuna explains that as argued in LVNV’s special motion to strike, he has the burden on the second prong[2] to affirmatively demonstrate that LVNV did not have access to and control over the Note because this is an essential element of his CFDBPA cause of action and he cannot establish that he has a probability of prevailing on the claim without such a showing. Because *no discovery* has yet been conducted regarding the creation, maintenance and transfer of the Note that is the subject of the Cross-Complaint, and such evidence is undoubtedly in the possession, custody, or control of LVNV and/or LendingClub, he maintains, there is good cause to obtain this discovery. The Court agrees.

It is clear that the evidence necessary to establish Mr. DeLuna’s prima facie case, and thus successfully oppose LVNV’s special motion to strike, is most likely in the possession, custody, or control of LVNV, and not likely to be readily available to Mr. DeLuna from other sources. It is, as Mr. DeLuna argues in his supporting memorandum, hypocritical for LVNV to attempt to tie his hands by arguing that he must demonstrate that it does not have control of or access to the Note, while simultaneously refusing to produce said Note or clarify that it is not in its possession.

None of the arguments asserted by LVNV in its opposition are well taken. Without citation to any authority, LVNV first asserts that “some courts have said, in the context of a Special Motion to Strike, a plaintiff has to oppose the motion with what they had when they filed the complaint.” But if this were the case, there would be no need for the mechanism provided by subdivision (g) of Section 425.16, and while it is true, as LVNV explains, that the purpose of the discovery stay effectuated by the filing of an anti-SLAPP motion is to “protect defendants from the potential costs of protracted litigation and the burden of traditional discovery pending resolution of the motion” (Opp. at 3:5-6), a SLAPP defendant is not excused from any and all discovery where there exists clear good cause for it, as is the case here.

LVNV next contends that given the statement by Mr. DeLuna’s counsel in his declaration submitted in support of Mr. DeLuna’s successful motion for leave to file the Cross-Complaint that “based on [his] experience with debt buyers attempting to collect assigned WebBank loans that were originated and serviced by LendingClub Corporation,” it was clear that LVNV does not have possession or control of, the authoritative copy of the electronic promissory note evidencing the alleged debt LVNV seeks to collect, Mr. DeLuna “should already have sufficient evidence to establish his prima facie face.” (Opp. at 3:16-17.) But as Mr. DeLuna responds, there is nothing to suggest that the declaration of his counsel attesting to his own experience in similar cases is sufficient to meet his burden in *this* particular case based on a note that is specific to Mr. DeLuna. The same applies to LVNV’s argument that discovery is not necessary in this case because “[t]here are also at least seven other matters wherein [Mr.] DeLuna’s counsel has obtained discovery from LendingClub” because what is

[2] Because the Cross-Complaint is predicated on LVNV’s filing of the Complaint, it is undisputed that the first prong has been met. (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [holding that a cause of action arising from a defendant’s litigation activity may appropriately be the subject of a special motion to strike.].)

needed here to oppose the pending anti-SLAPP motion is discovery pertaining to *Mr. DeLuna's specific Note*, not simply similar discovery from LendingClub in other cases.

LVNV's remaining argument goes to the merits of Mr. DeLuna's claim, with it asserting that because it has access to the Borrower Agreement, a document it argues is required by subdivision (b) of Section 1788.52 and attached as Exhibit 2 to the Complaint, there is no need for him to obtain any other documents. But Mr. DeLuna's claim is not limited to LVNV's purported violation of the foregoing section, and further, there may be merit in his contention that the document contemplated by subdivision (b) of Section 1788.52 is the contract- here, an electronic promissory note- and not any "other document" like the Borrower Agreement. The Court does not believe the instant motion is the appropriate place to resolve the legal question of the meaning and scope of the phrase "contract or other document evidencing the debtor's agreement to the debt" and whether the Borrower Agreement falls within it. In any event, the gravamen of the Cross-Complaint is based in large part on whether the Note was ever transferred to LVNV. As such, there is good cause to permit Mr. DeLuna to obtain discovery on this issue. Accordingly, Mr. DeLuna's motion is GRANTED.

V. CONCLUSION

Mr. DeLuna's motion to conduct discovery pursuant to Section 425.16, subdivision (g), on the creation, maintenance and transfer of the electronic promissory note that formed the purported obligation under which LVNV filed suit against him is GRANTED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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Calendar Line 6

Case Name: *VanCleave, et al. v. Abbott Laboratories*
Case No.: 19CV345045

Plaintiffs Elizabeth J. VanCleave and Katharine Hassan (collectively, Plaintiffs) bring this putative class action arising out of the alleged deceptive and misleading business practices of defendant Abbott Laboratories, Inc. (Defendant) with respect to the labeling and advertising of its PediaSure products in California. (First Amended Class Action Complaint (FAC), ¶ 1.) According to the allegations of the FAC, Defendant is a health care company that manufactures, markets, and distributes pediatric nutrition shakes for consumption by children ages one to thirteen under its PediaSure brand. (*Id*. at ¶ 3.) By placing statements such as "Complete, Balanced Nutrition," "Balanced Nutrition to Help Fill Gaps," "Nutrition to Help Kids Grow," "Use as part of a healthy diet," and "Clinically Proven to Help Kids Grow" on the PediaSure labeling, Defendant represents to consumers that PediaSure is a healthy option that provides balanced nutrition. (*Id*. at ¶ 5.) Defendant's representations are false and misleading because the pediatric nutrition shakes are neither healthy nor balanced – they are highly processed, sugar sweetened beverages. (*Id*. at ¶ 8.)

The FAC sets forth the following causes of action: (1) Violation of the California Commercial Code, § 2313, Breach of Express Warranty; (2) Violation of the California Commercial Code, § 2314, Breach of Implied Warranty of Merchantability; (3) Violations of the Consumers Legal Remedies Act (CLRA), California Civil Code § 1750, et seq.; (4) Violations of California Business & Professions Code, § 17500, et seq. (False Advertising Law or FAL); (5) Violations of California Business & Professions Code, § 17200, et seq., Unlawful, Unfair and Fraudulent Business Acts and Practices (Unfair Competition Law or UCL); and (6) Unjust Enrichment.

Plaintiffs previously moved for class certification of a single proposed class. On September 28, 2023, the Court entered an order denying Plaintiffs' class certification motion without prejudice. The Court found that typicality and adequacy were satisfied, but the class was not ascertainable and common issues did not predominant because class membership could not be readily determined, and class members were exposed to different products and alleged misrepresentations.

Now before the Court are: (1) Plaintiffs' renewed motion for class certification (Motion)[3] challenging four statements: "Complete Balanced Nutrition," "Nutrition to help kids

[3] Defendant filed an objection to Plaintiffs' Reply in Support of Renewed Motion for Class Certification (Reply) challenging the Reply's references to the tentative on Plaintiffs' earlier class certification motion. Defendant believes it is misleading for Plaintiffs to cite to language from the tentative that was omitted from the order ultimately issued. Plaintiffs filed a response and Defendants filed a reply. Plaintiffs' Reply attributes the language quoted as being from the tentative and is not misleading in this regard, though Plaintiffs cite to the tentative in lieu of the order at their own risk particularly as the parties may not be fully aware of why language from the tentative was ultimately omitted from the order. That said, the Court is certainly free to consider its earlier reasoning, whether from the tentative or order denying Plaintiffs' class certification motion *without prejudice*, in deciding this *renewed* motion for class certification. The Court also notes that a trial court has inherent authority to reconsider its prior interim

grow," "Use as part of a healthy diet" and "Balanced Nutrition to Help Fill Gaps"; (2) Defendant's motion to exclude expert opinion of Derek Rucker; (3) Defendant's motion to exclude expert opinions of Steven Gaskin and Colin Weir; (4) Plaintiffs' motion to exclude portions of the declaration of Dr. Bruce Strombom; (5) Plaintiffs' motion to exclude the expert report of Dr. Ran Kivetz in support of Defendant's opposition to the motion for class certification and in response to the declaration of Dr. Derek Rucker; and (6) Plaintiffs' request for judicial notice in support of the Motion.[4]

The Court GRANTS IN PART and DENIES IN PART Plaintiffs' Motion for the reasons discussed below.

DISCUSSION

I. MOTION FOR CLASS CERTIFICATION

A. Legal Standard

As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, internal quotation marks, ellipses, and citations omitted (*Sav-on Drug Stores*).)

"Indeed, 'at the class certification stage, as long as the plaintiff's posited theory of liability is amenable to resolution on a classwide basis, the court should certify the action for class treatment even if the . . . theory is ultimately incorrect at its substantive level[.]' " (*ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 307-308.)

Code of Civil Procedure section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court[.]" As interpreted by the

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orders and "to change its decision at any time prior to the entry of judgment. [Citation.]" (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156; *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108 ["If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief."].)

[4] Plaintiffs request judicial notice of numerous California state and federal court documents. Plaintiffs' request for judicial notice in support of the Motion is DENIED as these documents are not necessary to resolve the Motion. (*Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 51, fn. 6 (*Duarte*) [denying request where judicial notice is not necessary, helpful, or relevant].)

California Supreme Court, Code of Civil Procedure section 382 requires: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing. [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

The plaintiff has the burden of establishing that class treatment will yield " 'substantial benefits . . . both to litigants and the courts. [Citations.]' " (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) The court must examine all the evidence submitted in support of and in opposition to the motion "in light of the plaintiffs' theory of recovery." (*Department of Fish and Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1349.) The evidence is considered "together": there is no burden-shifting as in other contexts. (*Ibid.*)

B. Merits of the Motion

i. Numerous and Ascertainable Class

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class[.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) Plaintiffs contend that numerosity is met because the amount of Defendant's sales of PediaSure suggest there are thousands of class members. Defendant does not argue that the proposed class is not sufficiently numerous. The Court therefore finds the numerosity requirement satisfied.

A class is ascertainable "when it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.' [Citation.]" (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).)

A class definition satisfying these requirements:

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel, supra*, 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel, supra*, 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified . . . by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932, disapproved of on another ground by *Noel, supra*, 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

After the Court denied their last class certification motion without prejudice, Plaintiffs narrowed the proposed class to exclude consumers who purchased based on a doctor's prescription, certain internet purchasers, and those who purchased for resale or distribution. Plaintiffs now seek to certify the following Class:

> All persons in California who, from March 22, 2015 through the date of class certification (the "Class Period"), purchased for household use and not for resale or distribution, any of the following products in any flavor:
>
> PediaSure Grow and Gain 8-fluid-oz. bottle in a 6 count, 16 count, or 24 count package bearing at least one of the following statements: "Complete, Balanced Nutrition," "Nutrition to help kids grow," and "Use as part of a healthy diet."
>
> PediaSure Grow and Gain with Fiber 8-fluid-oz. bottle in a 6 count, 16 count, or 24 count package bearing at least one of the following statements: "Complete, Balanced Nutrition," "Nutrition to help kids grow," and "Use as part of a healthy diet."
>
> PediaSure Grow and Gain Shake Mix 14.1 ounce, single can bearing at least one of the following statements: "Complete, Balanced Nutrition," "Nutrition to help kids grow," and "Use as part of a healthy diet."
>
> PediaSure SideKicks 8-fluid-oz. bottle in a 6 count package bearing at least one of the following statements: "Complete, Balanced Nutrition," "Balanced Nutrition to Help Fill Gaps," and "Use as part of a healthy diet."
>
> Excluded from the class are: (1) purchases made due to a doctor's prescription (2) purchases of PediaSure Grow and Gain Fiber from October 31, 2019–July 1, 2021; (3) all internet purchases, except for purchases of products sold directly from Abbott, Amazon, Walmart, Target, Meijer, CVS Pharmacy, Walgreens, Sam's Club or BJ's that bore the front of the label claims "Complete Balanced Nutrition" or "Balanced Nutrition to Help Fill Gaps;" and (4) Abbott's agents, legal representatives, current and former employees, Plaintiffs' counsel, any judge and staff to whom this case has been assigned, and any member of the judges' immediate family.

Alternatively, Plaintiffs seek to certify the following Subclasses[5] based on purchases made within a range of specific time periods, as set forth in more detail in their Motion:

[5] Plaintiffs indicate that "[t]aken together, the products covered by these four subclasses are identical to those in the unitary class." (Motion at p. 2, fn. 1.)

Subclass 1: All persons in California who purchased one or more of the following products in any flavor bearing the statement "Complete, Balanced Nutrition" during the time frames listed, for personal or household use and not for retail or distribution.

Product	Dates
Grow & Gain – 6 Pack 8-fluid oz. bottle	March 22, 2015 – July 31, 2015 July 1, 2017 – date of class certification
Grow & Gain – 16 Pack 8-fluid oz. bottle	July 1, 2017 – date of class certification
Grow & Gain – 24 Pack 8-fluid oz. bottle	March 22, 2015 – August 31, 2015 October 1, 2018 - date of class certification
Grow & Gain Shake Mix – one 14.1 oz. can	March 22, 2015 – May 31, 2016
Grow & Gain w/ Fiber – 6 Pack 8-fluid oz. bottle	March 22, 2015 – August 31, 2015 July 1, 2021 – date of class certification
Grow & Gain w/ Fiber – 24 Pack 8-fluid oz. bottle	March 22, 2015 – August 31, 2015 March 1, 2019 – October 31, 2019 July 1, 2021 – date of class certification
SideKicks – 6 Pack 8-fluid oz. bottle	March 22, 2015 – June 30, 2015

Subclass 2: All persons in California who purchased one or more of the following products in any flavor bearing the statements "Nutrition to help kids grow" and "Use as part of a healthy diet" during the time frames listed, for personal or household use and not for retail or distribution.

Product	Dates
Grow & Gain – 6 Pack 8-fluid oz. bottle	August 1, 2015 – June 30, 2017
Grow & Gain Shake Mix – one 14.1 oz. Can	June 1, 2016 – April 30, 2018
Grow & Gain w/ Fiber – 6 Pack 8-fluid oz. bottle	September 1, 2015 – September 30, 2019

Subclass 3: All persons in California who purchased one or more of the following products in any flavor bearing the statement "Use as part of a healthy diet"

during the time frames listed, for personal or household use and not for retail or distribution.

Product	Dates
Grow & Gain 16 Pack 8-fluid oz. bottle	September 1, 2015 – June 30, 2017
Grow & Gain 24 Pack 8-fluid oz. bottle	September 1, 2015 - September 30, 2018
Grow & Gain Shake Mix – one 14.1 oz. can	May 1, 2018 – date of class certification
Grow & Gain with Fiber 24 Pack 8-fluid oz. bottle	September 1, 2015 – Feb 28, 2019
SideKicks 6 Pack 8-fluid oz. bottle	July 1, 2015 – June 30 2018

Subclass 4: All persons in California who purchased the following product in any flavor bearing the statement "Balanced Nutrition to Help Fill Gaps" during the time frames listed, for personal or household use and not for retail or distribution.

Product	Date
SideKicks – 6 Pack 8-fluid oz. bottle	July 1, 2018 – date of class certification

Subclasses 1 and 4 consist of purchasers of PediaSure products with the alleged misrepresentations on the front of the label. Excluded from Subclasses 1 and 4 are: (1) purchases that were made due to a doctor's prescription (2) internet purchases of products not sold directly from Abbott, Amazon, Walmart, Target, Meijer, CVS Pharmacy, Walgreens, Sam's Club or BJ's and (3) Abbott's agents, legal representatives, current and former employees, Plaintiffs' counsel, any the judge and staff to whom this case has been assigned, and any member of the judge's immediate family.

Subclasses 2 and 3 consist of purchasers of products with the alleged misrepresentations on the side of the label. Excluded from Subclasses 2 and 3 are: (1) purchases that were made due to a doctor's prescription (2) all internet purchases; and (3) Abbott's agents, legal representatives, current and former employees, Plaintiffs' counsel, and any judge and staff to whom this case has been assigned, and any member of the judge's immediate family.

Defendant argues that the class is not ascertainable because Plaintiffs have not shown how class members will be identified without records and self-identification is not appropriate under the circumstances of this case. Plaintiffs respond that the class is objectively defined, and that is all that ascertainability requires.

The Court previously found that the class was not ascertainable because it was unclear how class membership could be determined, but having considered the matter further, the Court agrees with Plaintiffs that the ascertainability requirement is met in this case because the class is objectively defined and allows potential class members to identify themselves. *Noel* noted that the Courts of Appeal and federal courts had adopted two basic views or approaches to ascertainability. The first view focuses on whether the class definition "identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." (*Noel*, *supra*, 7 Cal. 5th at p. 974.) The second view requires examining "(1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Ibid.*) Some courts adopting the second approach have required "a class plaintiff to make a specific factual or evidentiary showing in order to show an ascertainable class." (*Id.* at p. 975.) *Noel* explained that "a court's choice between the two views can be critical" because "class certification may be denied on ascertainability grounds due to expected complexities in the provision of notice, or in distinguishing class members from nonmembers—without close consideration necessarily being given to whether these difficulties are actual, as opposed to merely hypothetical, or whether they are so intransigent and pervasive that they would make a class proceeding unmanageable, or undesirable in light of the plausible alternatives." (*Id.* at pp. 975-976.)

Notably, our Supreme Court favorably cited at length the Seventh Circuit's decision in *Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654 (*Mullins*) rejecting the more stringent view of ascertainability in a case involving misrepresentations about a dietary supplement. (*Noel*, *supra*, 7 Cal.5th at p. 977.) *Mullins* explained that the more demanding view of ascertainability led courts to look at the difficulties in identifying class membership "in a vacuum" when courts must consider "both the costs and benefits of the class device" and that while manageability concerns can preclude class certification, "refusing to certify on manageability grounds alone should be the last resort." (*Noel*, *supra*, 7 Cal.5th at p. 979 [quoting *Mullins*, *supra*, 795 F.3d at pp. 663-664].) The Seventh Circuit also rejected the argument that a more stringent ascertainability standard was required to ensure that notice could be provided to all members, since "construing the ascertainability requirement as anticipating personal notice in all cases could provide absent class members with a pyrrhic victory" because, especially in class actions involving low value claims, it was unlikely class members would opt out and requiring stringent ascertainability ignored "that the types of notice that courts require correspond to the value of the absent class members' interests." (*Ibid.* [quoting *Mullins*, *supra*, 795 F.3d at pp. 665-666].)

Thus, *Noel* rejected the second and more stringent view of ascertainability adopted by some Courts of Appeal and some federal courts, holding that the requirement is met when the class is defined "in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (7 Cal.5th at p. 980, citation and quotation marks omitted; see *Sarun v. Dignity Health* (2019) 41 Cal.App.5th 1119, 1133 (*Sarun*) [following *Noel*, ascertainability only requires a class definition that is "straightforward on its face" and "defined in objective terms" and the trial court therefore erred in holding that the class could not be ascertained without unreasonable time and expense]; *Moran v. Prime Healthcare Mgmt., Inc.* (2023) 94 Cal.App.5th 166, 171, fn. 2 [*Noel* disapproved of cases holding "that a proposed class must be ascertainable without unreasonable expense or time"].)

Defendant cites various cases holding that ascertainability is not met in cases involving low-cost consumer goods (Defendant's Opposition to Plaintiffs' Renewed Motion for Class Certification (Opp.) at p. 18), but these federal decisions predate *Noel* and are now inconsistent with California law. Defendant also argues that this case involves hundreds of products across different time periods instead of a single product in a single time period in *Noel* but cites no authority suggesting this is a relevant distinction. (Opp. at pp. 16-17.) Defendant also argues that the "vast majority of class members would not still have years-old receipts, particularly for an inexpensive product like PediaSure" (Opp. at p. 18), but this concern served as a basis for denying class certification under the more stringent ascertainability standard our Supreme Court explicitly rejected. (See *Noel*¸ *supra*¸ 7 Cal.5th at p. 976 [noting the Third Circuit's heightened ascertainability requirement makes it difficult to certify consumer cases where purchasers were unlikely to have retained receipts or proofs of purchase and the defendant did not have a list of purchasers].)

The Court finds ascertainability satisfied. Defendant's arguments regarding the difficulties of providing class notice and self-identification are more appropriately addressed as part of the superiority inquiry (more specifically, in the manageability analysis below).

ii. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) It must be shown that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In its prior Order, the Court found that the adequacy and typicality requirements were met. Defendant does not challenge adequacy or typicality and the Court sees no reason to revisit its prior conclusion and therefore turns its focus to predominance and superiority.

1. *Predominant Questions of Law or Fact*

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.[]" (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) " 'The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104-1105.) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.[]" (*Hicks*, *supra*, 89 Cal.App.4th at p. 916.)

Plaintiffs seek to certify a class with respect to their claims under the UCL, FAL, and CLRA. "The UCL defines unfair competition to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL].' (Bus. & Prof. Code, § 17200.) In turn, the FAL prohibits the dissemination of any advertising 'which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.' (Bus. & Prof. Code, § 17500.)" (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 129 (*Vioxx*).) Meanwhile, "[t]he CLRA declares numerous practices in the sale of goods or services to consumers to be unlawful" including representing goods as having characteristics, users, or benefits for which they do not have. (*Id*. at p. 128.) "In order to obtain a remedy for deceptive advertising, a UCL plaintiff need only establish that members of the public were likely to be deceived by the advertising" based on an objective "reasonable consumer" standard. (*Id.* at p. 130.) As to the CLRA, "[c]ausation, on a classwide basis, may be established by *materiality*. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." (*Id.* at p. 129.)

Defendant's main arguments are: (1) that common questions do not predominate because whether class members were exposed to and relied on the challenged label statements is too individualized; (2) reliance on the challenged statements requires individualized inquiries; and (3) Plaintiffs have not established a viable classwide damages model.

a. Uniform Exposure

"[W]here plaintiffs seek to certify a class aimed solely at recovering restitution under the unfair competition law or false advertising law and define the members of the class as anyone who purchased the good or service to which the advertisement pertains, those plaintiffs must prove that (1) the class members were exposed to the advertisement, (2) the advertisement was deceptive, and (3) the deception was material." (*Downey v. Public Storage, Inc.* (2020) 44 Cal.App.5th 1103, 1115 (*Downey*).)[6]

This is a case about allegedly misleading claims made on the labels of Defendant's PediaSure products. The Court previously found that the single proposed class included products containing multiple different statements that only appeared in small font, on the back or side of the package, and with other text. Plaintiffs have since slightly narrowed the proposed class and now advance four alternative subclasses based on products containing specific statements. This is generally consistent with the approach permitted by federal courts in similar cases. (See *Hadley v. Kellogg Sales Co.* (N.D. Cal. 2018) 324 F.Supp.3d 1084, 1097 (*Hadley*) [listing various cases].) Defendant argues that there are 116 label variations, but the Court is not persuaded that these variations as to the exact product, flavor, and size detract from the common question of whether the four challenged statements are deceptive. (See *Zeiger v. WellPet LLC* (N.D. Cal. 2021) 526 F.Supp.3d 652, 696 (*Zeiger*) ["Because these variations happened over time, they happened at the same time for the entire class, give or take the time for each product to be phased out. Put another way, the alleged misrepresentations would be the same for the class at any given time."].)

[6] Defendant does not assert that Plaintiffs' injunction claims require similar exposure, only that members of the public are likely to be deceived by the challenged statements. (Opp. at p. 5.)

Plaintiffs suggest that what consumers saw "is a question of materiality" and that prominence of a label is not a requirement under California law (Reply in Support of Plaintiffs' Renewed Motion for Class Certification (Reply) at pp. 5-6). They maintain that how they defined the Class and Subclasses assures that class members were exposed to the challenged statements. But California law recognizes the commonsense point that "one who was not exposed to the alleged misrepresentations and therefore could not possibly have lost money or property as a result of the unfair competition is not entitled to restitution." (*Pfizer Inc. v. Superior Court* (2010) 182 Cal.App.4th 622, 631.) And, "[c]ommon issues do not predominate (and class certification is properly denied) when the evidence demonstrates variations in how—and, critically, whether—class members were exposed to an allegedly deceptive advertisement. [Citations.]" (*Downey, supra*, 44 Cal.App.5th at p. 1117.)

Downey analyzed the questions of classwide exposure and reliance or materiality separately. (*Downey, supra*, 44 Cal.App.5th at pp. 1115-1116.) The plaintiffs in that case alleged that Public Storage's $1 first rent promotion was deceptive because customers actually paid more than $1 for a variety of reasons. (*See id*. at p. 1111.) The record reflected that the promotion rate appeared "in a variety of different media"—on television, banners oat storage facilities, internet advertisements, social media, and YouTube—and that the wording of the promotion also varied over times, sometimes stating that it did not include applicable fees and taxes. (*Id.* at pp. 1109-1110.) Moreover, the promotional was automatically applied regardless of whether the renter knew about the rate. (*Id.* at p. 1110.) Under those circumstances, the *Downey* court held that common issues did not predominate as to class members' exposure to the allegedly deceptive $1 promotional rate because, while class membership was defined by those who obtained the defendant's promotional rate, "membership in the class is not a proxy for exposure to the advertisement." (*Id.* at p. 1117.) In addition, it was not a "practical inevitability" that class members would have seen the advertisement since the evidence showed that some made in-person or online reservations without seeing the advertised rate. (*Ibid.*)

Even cases cited by Plaintiffs recognize that even if a plaintiff defines their class or subclass as limited to only those who purchased products with the challenged statements, this still does not foreclose the possibility of exposure presenting an individualized inquiry. *Hadley*, for instance, held that statements appearing on the back, in small font and in a middle block of text, were not sufficiently prominently "to warrant an inference of class-wide exposure." (324 F.Supp.3d at p. 1100.) Plaintiffs point to other federal courts disagreeing with *Hadley*'s focus on a statement's prominence on a label because "[w]here, as here, there is evidence that the representation was consistently made on a product's label, the only question is whether it was objectively material to a reasonable consumer." (*Krommenhock v. Post Foods, LLC* (N.D. Cal. 2020) 334 F.R.D. 552, 565 (*Krommenhock*); *Prescott v. Reckitt Benckiser LLC* (N.D. Cal. July 14, 2022) 2022 U.S.Dist.LEXIS 135329 (*Prescott*).) In *Krommenhock*, *supra*, 334 F.R.D. at p. 563, the defendant argued that "because there are 45 Challenged Statements that were made in varying combinations for 31 varieties of cereal, the impact of the Challenged Statements is highly individualized" and, therefore, the common issues would not predominate over individualized issues.

Krommenhock explained:

> Post mischaracterizes the pertinent, predominant questions that arise under the California consumer protection statutes. The

> relevant analysis under California law does not consider whether each class member saw and relied on each of the Challenged Statements and in what combination, but instead whether the Challenged Statements were used consistently through the Class Period, supporting an inference of classwide exposure, and whether the Challenged Statements would be material to a reasonable consumer. *Hadley v. Kellogg Sales Co.*, 324 F.Supp.3d 1084, 1095 (N.D. Cal. 2018) (*Hadley I*) (the question is how an objective 'reasonable consumer' would react to a statement, and not whether individual class members saw or were deceived by statements). Those are common questions, supported at this juncture by plaintiffs' experts and subject to attack at trial by defendant's experts.

(*Krommenhock*, *supra*, 334 F.R.D. at pp. 563-564.) *Krommenhock* concluded that, "under California law prominence goes only to the inapposite question of whether significant numbers of prospective class members saw or interacted with the statement." (*Id.* at p. 565.) The *Prescott* court agreed with *Krommenhock* that "California law does not support a requirement that an alleged misrepresentation must be prominently displayed on the label or packaging before classwide exposure may be inferred." (*Prescott, supra*, 2022 U.S.Dist.LEXIS 135329, at *16.)

Plaintiffs argue that based on these federal cases California law does not require the misleading statements at issue to be prominently displayed. But as set forth in *Downey*, exposure and materiality are distinct under California law, and the Court fails to see how a statement can be material to a reasonable consumer when it was unlikely that the consumer even saw the statement in the first place. Moreover, other cases Plaintiffs cite also focused on whether a statement on a label was prominent. (See *Banks v. R.C. Bigelow, Inc.* (C.D. Cal. July 31, 2023) 2023 U.S.Dist.LEXIS 135167, at *16 [statement was "set off to the side in bold type"].) Consistent with *Downey* and California law, the Court concludes that the prominence of the labels goes to how and whether class members were exposed to the alleged misrepresentations, and therefore Plaintiffs bears the burden of showing that the challenged statements were sufficiently prominent to warrant an inference of classwide exposure. (See *Zakaria v. Gerber Prods. Co.* (C.D. Cal. Mar. 23, 2016) 2016 U.S.Dist.LEXIS 184861, at *24-25, 51-52 [proposed class was overbroad where it included products containing labels consumers were unlikely to have seen, but concluding a narrower class could be certified].)

Turning to the labels at issue, the Court agrees with Defendant that Plaintiffs have not shown classwide exposure can be inferred for all the products in the Proposed Class or the products in Subclasses 2 and 3. The label printouts that the Plaintiffs submit in support of their Motion show that the challenged statements appear in relatively small font on the side of the label. For instance, the challenged statements "Nutrition to help kids grow" and "Use as part of a healthy diet" appear in the same-sized font and color as other statements that are not being challenged on the side of the label. While the Court agrees with Plaintiffs that being on the side of a label is not dispositive, nothing draws attention to these challenged statements (unlike other statements). (See, e.g., Declaration of Laura L. Ho in Support of Plaintiffs' Renewed Motion for Class Certification (Ho Decl.), Exh. A at pp. 68, 70). For Subclass 3 and the statement "Use as part of a healthy diet" that appears on the side of the label, the statement again does not stand out as it appears only in smaller font when compared to other statements

on the same side of the label . (See, e.g., *id.* at pp. 72, 75, 77, 80, 82, 85, 87, 88, 91, 93, 96, 98.) Thus, exposure to the products included in Subclasses 2 and 3 are not susceptible to classwide proof. Accordingly, the Court DENIES Plaintiffs' Motion with respect to Subclasses 2 and 3 except to the extent they seek injunctive relief.[7]

However, the Court, reaches a different conclusion with respect to the products included in Subclasses 1 and 4.

Subclass 1 involves the challenged statement "Complete, Balanced Nutrition" and the evidence shows this alleged misrepresentation was placed relatively prominently on the front of the label. (See, e.g., Ho Decl., Exh. A at pp. 3, 29. In some instances, the statement is not as prominent but at least appears in larger font and a different color from the surrounding text, making it noticeable to consumers. (See, e.g., *id.* at pp. 4-5). In other instances, the statement is prominently featured and also appears multiple times on the same package. (See, e.g., *id.* at pp. 7, 12, 15, 17, 22, 27, 32, 42.) For Subclass 4, the statement "Balanced Nutrition to Help Fill Gaps" appears quite prominently on the front label. (*Id.* at pp. 100-101.) Since the evidence shows that all the challenged statements on the products in these Subclasses were at least somewhat prominent, the Court is satisfied that exposure does not present individualized issues with respect to Subclass 1 and Subclass 4. (See *Hadley*, *supra,* 324 F.Supp.3d at p. 1100 [statement in "relatively small font" was sufficiently prominent where it appeared in the center and front panel of the package].)

Defendant also argues the proposed Subclasses still improperly includes some internet purchasers. The Court previously expressed concern that internet purchasers may not have been exposed to the statements and directed Plaintiffs to either explain how internet purchasers were exposed or to define the class to exclude them. Although Plaintiffs generally now exclude internet purchasers from the proposed Subclasses, the Subclasses still include purchasers from Defendant, Amazon, Walmart, Target, Meijer, CVS Pharmacy, Walgreens, and Sam's Club or BJ's. Plaintiffs assert this is justified because one of Defendant's deponents testified that purchasers would see an image of the bottle when purchasing and because they presented evidence showing that the front of the labels are clearly legible on the retailer websites. (Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Class Certification at pp. 3-4.) But as Defendant persuasively points out, it is unclear how the products were presented to consumers dating back to 2015 and Plaintiffs only present evidence of how the products currently appear on these retailers' websites. Furthermore, variations in screen size, especially for purchasers who used a mobile device, suggest the exposure issue for internet purchasers is individualized. The Court remains unpersuaded that internet purchasers warrant the same inference of classwide exposure. (See *Schoonover v. Iovate Health Sciences U.S.A. Inc.* (C.D. Cal. Aug. 21, 2023) 2023 U.S.Dist.LEXIS 147647, at *10 ["The court agrees with Defendant that the different methods of purchase involve significant dissimilarities

[7] The parties largely ignore the propriety of certifying the Subclasses with respect to injunctive relief. For instance, the word "injunction" appears only a single time in Defendant's Opposition. (Opp. at p. 5; see Reply at p. 1.) Since injunctive relief does not require exposure, only proof that "members of the public are likely to be deceived[,]" Subclasses 2 and 3 can be certified for purposes of injunctive relief. (*Downey*, *supra*, 44 Cal.App.5th at p. 1114, internal quotation marks omitted.)

preventing a cohesive class. While in-store consumers—like Plaintiff—may physically hold and examine a container, online consumers are only presented with an image."].)

This conclusion, however, does not require denying the Motion outright. As Plaintiffs note (Reply at p. 7, fn. 15), the Court may redefine the proposed Class and Subclasses. (See *Sarun, supra*, 41 Cal.App.5th at pp. 1137-1138 [noting that court may "redefine the class" when "necessary to preserve the case as a class action"].) The Court therefore exercises its discretion to limit the Subclasses to in-store purchasers only.

b. Reliance/Materiality

As noted in *Downey*, "once the plaintiffs establish that the class has been exposed to a deceptive advertisement, the sole remaining element is proof that the falsity or omission that makes the advertisement deceptive is 'material,' at least when plaintiffs define the class as those who have purchased the good or service to which the advertisement pertains." (*Downey, supra*, 44 Cal.App.5th at p. 1116.) "[P]roof that the advertisement is material *itself* satisfies the element of reliance." (*Ibid.*, emphasis original.) This is also true for the CLRA. (See *Vioxx, supra*, 180 Cal.App.4th at p. 129 ["Causation, on a class-wide basis, may be established by materiality. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class."].)

Regarding materiality, "statements need not have had identical subjective meanings to each consumer because California applies an objective reasonable consumer test." (*Zeiger, supra*, 526 F.Supp.3d at p. 693.) "[T]hat a consumer may consider many factors in determining whether to purchase a product does not mean that misrepresented or omitted information cannot be material." (*In re JUUL Labs, Inc., Mktg. Sales Pracs. & Prods. Liab. Litig.* (N.D. Cal. 2022) 609 F.Supp.3d 942, 991 (*In re JUUL*).) "Because materiality is an objective question based on the reasonable consumer, it is common to the class and 'ideal for certification.' [Citation.]" (*Broomfield v. Craft Brew Alliance, Inc.* (N.D. Cal. Sept. 25, 2018) 2018 U.S.Dist.LEXIS 177812, at *34.) Survey evidence is not required to establish materiality. (*Capaci v. Sports Rsch. Corp.* (C.D. Cal. Apr. 14, 2022) 2022 U.S.Dist.LEXIS 72856, at *32-33 (*Capaci*).)

Here, Defendant only briefly argues in a footnote that the statements are immaterial. (Opp. at p. 11, fn. 4.) Plaintiffs, however, have adduced evidence suggesting that whether the challenged statements are material is susceptible to common proof, including from Defendant's internal documents. (Reply at p. 5; see *Fitzhenry-Russell v. Pepper Snapple Grp. Inc.* (N.D.Cal. 2018) 326 F.R.D. 592, 614 (*Fitzhenry-Russell*) ["[P]laintiffs are aided in demonstrating materiality by defendant's internal documents, which demonstrate that 'Made From Real Ginger' proved to be valuable in selling Canada Dry. . . . [Defendant] cannot walk back evidence contained in its own documents."]; *Mullins v. Premier Nutrition Corp.* (N.D. Cal. Apr. 15, 2016) 2016 U.S.Dist.LEXIS 51140, at *17 [the defendant's "own marketing research and surveys tend to show that numerous consumers cite joint pain, stiffness, and function as the reasons behind their purchase"].)

The Court previously expressed concern that consumers who purchased PediaSure products based on a prescription likely did not rely on the challenged statements. In response, Plaintiffs have excluded purchasers who bought a PediaSure product based on a doctor's prescription from the proposed Subclasses. The Court disagrees with Defendant that this

concern extends to purchasers who bought PediaSure based on a doctor's recommendation and finds Plaintiffs' authorities more persuasive on this question. (See *Mullins v. Premier Nutrition Corp.* (N.D. Cal. Apr. 15, 2016) 2016 U.S.Dist.LEXIS 51140, at *9; *Elkies v. Johnson & Johnson Servs.* (C.D. Cal. Oct. 18, 2018) 2018 U.S.Dist.LEXIS 241197, at *18-19.) Defendant relies on *Akkerman v. Mecta Corp.* (2007) 152 Cal.App.4th 1094 but that case concerned physical harms resulting from the use of a electro-convulsive therapy machine sold by the defendant and implicated highly individualized issues as to informed consent for the medical treatment. (*Id.* at p. 1103 [noting that informed consent is a complex issue based on the specific situation of each patient].) Moreover, it is not as clear as Defendant suggests that a large portion of class members purchased based on the recommendation of a doctor (Reply at pp. 9-10) and materiality is not defeated simply because a consumer purchases a product for more than one reason. (*In re JUUL*, *supra*, 609 F.Supp.3d at p. 991.)

Defendant argues that individualized inquiries will be necessary to ensure that uninjured class members are not compensated (Opp. at p. 9), but the only case Defendant cites was subsequently overruled to the extent it suggested that a class action cannot have more than a de minimis number of uninjured class members. Moreover, Defendant does not show that the narrowed subclasses will have more than a de minimis number of uninjured class members. (See *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC* (9th Cir. 2022) 31 F.4th 651, 669 (*en banc*) ["[W]e reject the dissent's argument that Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members."].)

c. Damages Model

"As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks*, *supra*, 89 Cal.App.4th at p. 916.) The law does not require that calculation of damages be made with precision. (See *Marsu, B.V. v. Walt Disney Co.* (9th Cir. 1999) 185 F.3d 932, 938-939 [quoting *GHK Assoc. v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873].) Here, Plaintiffs present "full refund" and "price premium" models.

A full refund is recoverable upon a showing that the products had no value to consumers. (See *Capaci*, *supra*, 2022 U.S.Dist.LEXIS 72856, at *7; *Allen v. Hyland's Inc.* (C.D. Cal. 2014) 300 F.R.D. 643, 671 [full refund damages model consistent with liability theory that products had no value].) Plaintiffs argue that the PediaSure products have no value because they are actually detrimental to children's health due to excessive sugar content. Defendant does not address the proposed full refund model in its Opposition and since Plaintiffs presented common evidence in support of this theory, the Court concludes that Plaintiffs have presented a viable classwide damages model to support their full refund theory.

Defendant focuses its arguments on the damages model for Plaintiffs' price premium theory. "It is well-established that the ' "price premium" attributable to' an alleged misrepresentation on product labeling or packaging is a valid measure of damages in a mislabeling case under the FAL, CLRA, and UCL." (*Hadley*, *supra*, 324 F.Supp.3d at p. 1104.) The "conjoint analysis" Plaintiffs propose "is generally accepted as a means of measuring damages[.]" (*Testone v. Barlean's Organic Oils, LLC* (S.D. Cal. Sep. 28, 2021) 2021 U.S.Dist.LEXIS 185896, at *45; *Bailey v. Rite Aid Corp.* (N.D. Cal. 2021) 338 F.R.D. 390, 409 ["In mislabeling cases where the injury suffered by consumers was in the form of an

overpayment resulting from the alleged misrepresentation at issue, such as here, courts routinely hold that choice-based conjoint models that are designed to measure the amount of overpayment satisfy *Comcast*'s requirements."].)

Defendant argues that Gaskin's survey methodology does not consider the "interplay" between the challenged statements or the price effect of non-challenged statements or non-label advertising. The Court is not persuaded since this assumes an interaction effect and Defendant may challenge Plaintiffs' model as inflating the price premium at trial. (*Fitzhenry-Russell*, *supra*, 326 F.R.D. at p. 604.) Conjoint analysis as proposed by Plaintiffs is well-accepted and capable of measuring price premia attributable to the challenged statements consistent with Plaintiffs' theory of liability and Defendant's criticisms about the failure to account for other factors or variables go to weight rather than admissibility. (*Hadley*, *supra*, 324 F.Supp.3d. at pp. 1108-1109.) The Court is therefore satisfied that Plaintiffs have presented a viable classwide damages model to support their price premia theory.

iii. Superiority

"[A] class should not be certified unless 'substantial benefits accrue both to litigants and the courts' [citation]." (*Basurco v. 21st Century Insurance Co.* (2003) 108 Cal.App.4th 110, 120.) The question is whether a class action would be superior to individual lawsuits. (*Ibid*.) "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid*.) " 'Although predominance of common issues is often a major factor in a certification analysis, it is not the only consideration. In certifying a class action, the court must also conclude that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. [Citation.]' " (*McCleery v. Allstate Ins. Co.* (2019) 37 Cal.App.5th 434, 449-450.) " 'In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class.' " (*Id*. at p. 450; see *Duran v. U.S. Bank Nat'l Assn.* (2014) 59 Cal.4th 1, 29.)

Defendant's arguments against superiority focus on the purported lack of manageability due to the problems of self-identification. The Court finds these arguments unpersuasive. Defendant repeats arguments regarding exposure and reliance the Court previously rejected. While Defendant further argues that self-identification is not workable in this case, *Noel* disapproved of Court of Appeal cases rejecting self-identification. (See, e.g., *Hefczyc v. Rady Children's Hospital-San Diego* (2017) 17 Cal.App.5th 518, 539.) Defendant cites various cases declining to allow self-identification that pre-date *Noel* but cites no California cases decided after *Noel* holding that self-identification is impermissible under California law. Moreover, numerous federal courts have permitted self-identification in a variety of contexts, including those involving relatively low-cost consumer products. (See *Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1129; *Melgar v. CSK Auto, Inc.* (9th Cir. 2017) 681 F.Appx. 605, 607; *Nevarez v. Forty Niners Football Co., LLC* (N.D. Cal. 2018) 326 F.R.D. 562, 576-577; *Aldapa v. Fowler Packing Co., Inc.* (E.D. Cal. 2018) 323 F.R.D. 316, 344.)

Allowing self-identification is also consistent with our Supreme Court's recognition that " '[n]ot only do class actions offer consumers a means of recovery for modest individual damages, but such actions often produce "several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business

enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims." ' [Citations.]" (*Noel*, *supra*, 7 Cal.5th at p. 980.) It is also consistent with our Supreme Court's recognition that:

> Thus the true choice in this case is not between a single class action challenging the packaging of the Ready Set Pool and multiple individual actions pressing similar claims; it is between a class action and no lawsuits being brought at all. Under the circumstances, due process may not demand personal notice to individual class members, and to build a contrary assumption into the ascertainability requirement would be a mistake.[]

(*Noel*, *supra*, 7 Cal.5th at p. 985; see also *id.* at p. 982 ["Our case law has adopted a similarly practical approach, in which the circumstances of each case determine what forms of notice will adequately address due process concerns. [Citation.]"].) Federal courts are in accord. (*Allen v. Hyland's Inc.* (C.D. Cal. 2014) 300 F.R.D. 643, 659 [" 'If class actions could be defeated because membership was difficult to ascertain at the class certification stage, "there would be no such thing as a consumer class action." [Citation.]' "]; *In re ConAgra Foods, Inc.* (C.D. Cal. 2015) 90 F.Supp.3d 919, 970-971.) Plaintiffs also persuasively posit that "major retailers maintain contact information for individual class members, and retailers can be subpoenaed after certification." (Reply at p. 14.)

Defendant also argues that Plaintiffs would appear to be members of more than one subclass but does not why that is impermissible. (See *Wert v. United States Bancorp* (S.D. Cal. Nov. 7, 2017) 2017 U.S.Dist.LEXIS 185428, at *19 ["Class members may receive payouts from more than one subclass."].)

Finally, in light of the vast number of potential class members and the relatively low value of each individual claim, it is clear that a single class action would be superior to a multitude of individual lawsuits. Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Basurco*, *supra*, 108 Cal.App.4th at pp. 120-121, internal citations and quotation marks omitted; see *Fitzhenry-Russell*, *supra*, 326 F.R.D. at p. 616 [class action superior where individual class members were unlikely to bring suit "because the amounts at issue for each class member would likely be a few dollars"].) Plaintiffs also present a trial plan, which is sufficient at this point.

Accordingly, the Court finds that the superiority requirement is met.

C. Conclusion

Plaintiffs' request for judicial notice in support of the Motion is DENIED.

Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART. The Court certifies Subclasses 1 and 4 but limits these Subclasses to include in-store purchasers only, and Subclasses 2 and 3 but only with respect to injunctive relief. The Subclasses are certified as set forth below in § IV.

II. MOTIONS TO EXCLUDE

"Under California law, trial courts have a substantial 'gatekeeping' responsibility." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769.) "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony.[]" (*Id.* at pp. 771-772.)

Defendant moves to exclude the expert opinions of Steven Gaskin and Colin Weir[8] on the basis that the proposed methodology is: 1) unreliable because it fails to account for supply-side factors; and 2) irrelevant to Plaintiffs' theory of liability because it fails to test the interaction or interplay between the challenged statements.

On the first point, "conjoint analyses can adequately account for supply-side factors . . . when (1) the prices used in the surveys underlying the analyses reflect the actual market prices that prevailed during the class period; and (2) the quantities used (or assumed) in the statistical calculations reflect the actual quantities of products sold during the class period." (*Hadley*, *supra*, 324 F.Supp.3d at p. 1105.) Mr. Gaskin sufficiently outlines that his conjoint methodology will account for supply side factors in the manner stated in *Hadley*, e.g., using actual prevailing market prices and quantities sold during the Class Period. (Gaskin Decl., ¶ 27.)

Defendant challenges the adequacy of using real-world data and points to Plaintiffs' acknowledgement of split authority on this issue. (Defendant's Reply in Support of Motion to Exclude Gaskin and Weir at p. 7.) *Hadley* is persuasive on this issue as "[r]eal-world price and quantity data is reliable for these purposes because, put simply, it is what the supplier firm actually did. The new price that emerges—and the resulting price premium—reliably captures what it set out to capture: a change in price as a result of a change in consumer behavior. [Citation.] [Defendant] is capable of explaining and a jury is capable of understanding that the precise figure this model produces is based on the assumption that supply would remain fixed. [Citation.]" (*Maldonado v. Apple, Inc.* (N.D. Cal. May 14, 2021) 2021 U.S.Dist.LEXIS 92483, at *70-71 (*Maldonado*).)

As *Maldonado* explains:

> Damages calculations have long been understood to involve a degree of approximation; because of the economic complexities of the real world, it could not be otherwise or recovery could rarely be had. [Citation.] California law reflects that principle. [Citation.] To be sure, these models must be tethered to theories of liability, fit the case, have a reliable basis, and avoid

[8] Plaintiffs filed a request for judicial notice in support of their opposition to Defendant's motion to exclude Messrs. Gaskin and Weir's opinions. Plaintiffs request judicial notice of two orders issued in Los Angeles County Superior Court. Plaintiffs' request for judicial notice in support of this opposition is DENIED. (*Duarte*, *supra*, 13 Cal.App.5th at p. 51, fn. 6 [denying request where judicial notice is not necessary, helpful, or relevant].)

> guesswork. But they will, as any economic model inevitably will, simplify the world. [Citations.] One reasonable assumption—that can be cross-examined, rebutted, and argued over—is the use of historical supply-side data.

(2021 U.S.Dist.LEXIS 92483, at *71-72.)

On the second point, Defendant's argument assumes there will be interaction effects but such effects are not a given. (See Plaintiffs' Opposition to Defendant's Motion to Exclude the Expert Opinions of Steven Gaskin and Colin Weir at p. 12.) Moreover, "just because the conjoint survey may result in overestimating the value consumers placed on [one] claim because some respondents may have selected [the product] on the survey due to [another] claim does not necessarily render the survey excludable. [Defendant] will be free to attack [the expert's] conjoint study as inflating the price premium at trial. [Citation.]" (*Fitzhenry-Russell*, *supra*, 326 F.R.D. at p. 604; see *Hadley*, *supra*, 324 F.Supp.3d at p. 1109.)

The Court is not persuaded Messrs. Gaskin and Weir's opinions warrant exclusion. Accordingly, Defendant's motion to exclude expert opinions of Steven Gaskin & Colin Weir is denied.

It was not necessary for the Court to consider the expert reports of Plaintiff's expert Dr. Derek Rucker and Defendant's experts Drs. Bruce Strombom and Ran Kivetz in conjunction with the Motion, and therefore declines to rule on these motions to exclude at this time. (*Apple Inc. v. Superior Court* (2018) 19 Cal.App.5th 1101, 1120 ["A court may find that it need not rule on the admissibility of certain expert opinion evidence offered in connection with class certification because it is irrelevant or unnecessary for its decision."].)

III. MOTION TO SEAL

On July 17, 2023, Defendant initially moved to seal multiple documents and portions of documents filed in connection with Plaintiff's initial motion for class certification, contending that publically revealing the information it sought to redact or seal, constituted protected trade secrets. On September 28, 2023, the Court denied the motion for class certification without prejudice. With respect to the motion to seal, it found that the declaration in support of the motion was insufficient because it was made by Defendant's outside counsel and not by someone with personal knowledge of the facts therein and the allegations regarding the confidentiality of the documents at issue and the potential harm to Defendant if they were to be disclosed were conclusory. Thereafter, Defendant filed a renewed omnibus motion to seal, which it later withdrew pursuant to stipulation.

The version of the omnibus motion to seal currently before the Court was filed on February 15, 2024. It requests to seal certain documents and portions of documents filed in connection with the initial motion for class certification and Plaintiff's renewed motion for class certification currently before the Court. The omnibus motion also seeks to strike 35 documents filed by Plaintiff in support of her initial motion for class certification on the ground that they are not mentioned in the motion for class certification and are therefore irrelevant. Alternatively, it seeks to seal those documents.

Plaintiff does not oppose the portion of the motion seeking to seal the documents,

indicating that, with certain exceptions, she takes no position on whether Defendant's new showing is sufficient to meet the required standard.[9] (Opposition to Renewed Omnibus Motion to Seal ("Seal Opp.") at p. 1, lns. 16-18.) Plaintiff opposes the request to strike the documents filed in connection with her motion for class certification.

A. Legal Standard

"Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, rule 2.550(c).) However, "[t]he rules [Cal. Rules of Court, rule 2.550 and 2.551] 'recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.' [Citation.]" (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 84 (*Mercury Interactive*).) "Rule 2.550(a)(2) provides that the 'rules do not apply to records that are required to be kept confidential by law.' The sealed records rules are also inapplicable to 'discovery motions and records filed or lodged in connection with discovery motions or proceedings.' (Rule 2.550(a)(3).) But the rules 'do apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.' (*Ibid*.)" (*Id.* at p. 85.)

The right of public access to materials filed with the court "applies only to discovery materials that are relevant to the matters before the trial court. [Citations.]" (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 497 (*Overstock*).) The *Overstock* court rejected "the narrow definition of the phrase 'submitted as a basis for adjudication' [in Cal. Rules of Court, rule 2.550(a)(3) defendants urge[d] and conclude[d] it embraces discovery materials submitted in support of and in opposition to substantive pretrial motions, regardless of the ground on which the trial court ultimately rules." (*Ibid*.)

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d), formatting omitted.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*In re Providian*).) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court (Unity Pictures Corp.)* (2003) 110 Cal.App.4th 1273, 1285-1286.)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (d)(5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-

[9] Plaintiffs also state that they "reserve the right to argue about the weight of public interest should these documents be submitted with future motions or at trial." (Seal Opp. at p. 1, fn. 2.)

nothing basis. (*In re Providian, supra*, 96 Cal.App.4th at p. 309.)

"A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551(a).)

B. Merits of the Motion

As mentioned above, Defendant seeks to seal dozens of documents filed in connection with Plaintiff's initial and renewed motions for class certification. Defendant also seeks to strike 35 documents filed by Plaintiff in connection with her initial motion for class certification.

i. Motion to Strike

The Court will discuss the motion to strike first. Defendant movies to strike the following exhibits from the declaration of Grace E. Parasmo in support of Plaintiffs' original motion for class certification, filed March 15, 2023: Exhibits 10, 11, 12, 16, 18, 21, 26, 27, 30, 40, 43, 44, 45, 46, 47, 52, 56, 59, 60, 62, 64, 65, 72, 74, 87, 90, 94, 96, 98, 101, 103, 105, 106, 108, and 111. (Renewed Omnibus Motion to Seal at p. 10, fn. 2.)[10] Defendant contends that these documents are irrelevant because they were not cited by any party in connection with Plaintiffs' original motion for class certification.

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper…[s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a); see also *Mercury Interactive, supra*, 158 Cal.App.4th at p. 104, fn. 35 [irrelevant exhibits may be stricken pursuant to Code of Civil Procedure section 436].).) Defendant relies mainly on *Overstock.com, supra*, 231 Cal.App.4th at p. 500, in which the Court of Appeal explained that, in the case before it, "the trial court could have stricken thousands of pages of the confidential discovery materials plaintiffs submitted but never referenced in their opposing papers (or during the hearing on the motions). Had it done so, these irrelevant materials would have effectively been removed from the court's file, eliminating the need to address any sealing issues as to these materials." (Footnote omitted.)

Plaintiffs oppose the motion to strike. They have provided the Declaration of Stephanie E. Tilden in Support of Plaintiffs' Opposition to Abbott's Renewed Omnibus Motion to Seal ("Tilden Seal Decl."), in which their counsel explains that these challenged documents were cited in its experts' declarations and reports. (Tilden Seal Decl. at ¶ 5.)

Tilden also declares that one of the challenged documents, a PediaSure label (Exhibit 56), was attached as Exhibit A to the Declaration of Laura L. Ho in Support of Plaintiffs' Renewed Motion for Class Certification filed November 2, 2023. She also asserts that one of the documents, an email designated Exhibit 62, was referenced in the Memorandum of Points and Authorities in Support of Plaintiffs' Renewed Motion for Class Certification filed

[10] These documents are among the documents included in Exhibit F to the Glick Seal Declaration.

November 2, 2023.

With respect to Exhibit 56, which Defendant labels F56, the Court finds that the fact that the PediaSure label was mentioned in a list of labels included in a subclass attached to counsel's declaration in support of Plaintiffs' Renewed Motion for Class Certification renders it sufficiently relevant to avoid a motion to strike. Notably, Exhibit 56 is one of dozens of labels attached to the Declaration of Laura L. Ho in Support of Plaintiffs' Renewed Motion for Class Certification filed November 2, 2023, which explains which version of the PediaSure packaging is included in the subclasses for which Plaintiffs seek class action certification. The Court declines to strike Exhibit 56.

With respect to Exhibit 62, which Defendant labels F62, Defendant has withdrawn that exhibit from its motion to strike. (Reply in Support of Renewed Omnibus Motion to Seal at p. 1, fn. 2.)

With respect to all remaining exhibits Defendant seeks to strike, these exhibits were mentioned exclusively in Plaintiffs' expert declarations in support of its Motion for Class Certification. Neither party cites to any authority indicating whether the mention of exhibits in an expert's declaration or report renders it relevant for the purposes of surviving a motion strike. Plaintiffs cite *Pettit v. P&G* (N.D.Cal. Aug. 3, 2017, No. 15-cv-02150-RS) 2017 U.S.Dist.LEXIS 122668, at *10, fn. 3 for the proposition that materiality for the purposes of class certification can be shown from "market research showing the importance of such representations to purchasers." (Opposition to Renewed Omnibus Motion to Seal at p. 4, lns. 8-13.)

Abbott contends that Plaintiffs in this case "submitted a veritable mountain of confidential materials" in connection with their initial motion for class certification. (See *Overstock, supra*, 231 Cal.App.4th at p. 498.) In *Overstock*, "[t]he parties made no mention at all of hundreds of the exhibits." (*Id.* at p. 499.) The *Overstock* court concluded that, "Inundating the trial court with this deluge of confidential materials was brute litigation overkill. [Citation.]" (*Ibid*.) Thus, the *Overstock* court explained that the trial court could have stricken those irrelevant confidential materials by striking them pursuant to Code of Civil Procedure section 436, obviating the need to address sealing them. (*Id.* at p. 500.)

While both Plaintiffs and Defendant have submitted "a veritable mountain of confidential materials, the Court does not find that the materials attached to be irrelevant. The exhibits were used by Plaintiffs' experts to form the basis of their opinions in support of Plaintiffs' initial motion for class certification. Either the court or an opposing party may inquire into the basis for an expert opinion. (See *San Francisco Print Media Co. v. The Hearst Corp.* (2020) 44 Cal.App.5th 952, 962; *Brancati v. Cachuma Village, LLC* (2023) 96 Cal.App.5th 499, 504.)

Notably, Defendant makes no specific argument as to any of the exhibits in question. The exhibits speak to whether class certification is appropriate. Accordingly, the Court declines to strike the challenged exhibits attached to the declaration of Grace E. Parasmo in support of Plaintiffs' original motion for class certification, filed March 15, 2023. The motion to strike is DENIED in its entirety.

ii. Motion to Seal

The specific documents are listed in the Declaration of Michael Glick in Support of Abbott's Renewed Omnibus Motion to Seal ("Glick Seal Decl.") pages two through 30. The items sought to be sealed or redacted are labeled B5, B12, B13 through B19, B28, B29, C1, C2, C4, C6, C7, D2, D11, D16, E3, E4, E6, F3, F6 through F112, G2, G9, H7, I8, I9, J1, J2, J4, J5, J7, K9, K17, K20 through K23, and K29.

Plaintiffs do not oppose the requests to seal, with two exceptions. First, Plaintiffs contend that a PediaSure label proof (F56) should not be sealed because labels themselves are public information and the label proofs are already in the public record as discussed above in connection with the motion to strike. Defendant argues that the PediaSure label should not be made public because the label is found in Plaintiffs' documents that are the subject of the motion to strike. (Reply in Support of Renewed Omnibus Motion to Seal at p. 1, fn. 1.) However, if the motion to strike is denied, it agrees to make the label public. (*Ibid*.) Here, the motion to strike has been denied. Accordingly, the motion to seal is denied as to item F56.

Second, Plaintiffs object to the sealing of "PediaSure-Superboy Neuroscience TV Ad Testing" (F43) should not be fully sealed because portions of it are already public. But, Plaintiffs do not explain in their opposition which portions have been made public or in what filing they have been made public. Defendant contends that this is an internal Abbott presentation with confidential information included. (Reply in Support of Renewed Omnibus Motion to Seal at p. 1, fn. 1.) The document itself appears to contain consumer responses to questions asked by Abbott researchers in a focus group type of setting. Accordingly, the court will allow item F43 to remain under seal.

With respect to the remaining documents, "Courts have found that the protection of trade secrets is an interest that can support sealing records in a civil proceeding. (*In re Providian, supra*, 96 Cal.App.4th at pp. 298-299 & fn. 3.) ' "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) Derives independent economic value, actual or potential from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."' (Civ. Code, § 3426.1, subd. (d).)" (*McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 988.)

Marketing strategies and plans and consumer marketing research exploring the needs of diverse buyers can be trade secret protected material. (*Whyte v. Schlage Lock Co*. (2002) 101 Cal.App.4th 1443, 1456.) "Cases have recognized that information related to cost and pricing can be trade secret. [Citations.]" (*Id.* at p. 1455.) Business strategies, internal decisionmaking, and confidential research, development, and "product formulations" are also protected. (*Hadley v. Kellogg Sales Co.* (N.D.Cal. Sep. 5, 2018, No. 16-cv-04955-LHK) 2018 U.S.Dist.LEXIS 224314, at *4, *6-7.)

To support its assertion that the documents at issue contain material protected by the trade secret privilege, Defendant has provided the declaration of Kevin Stephan, Brand Director for PediaSure at Abbott ("Stephan Decl."), which is attached to the Glick Seal Declaration as Exhibit A. Stephan contends that the materials sought to be sealed or redacted contain confidential information. (Stephan Decl. at ¶ 6.) Abbott restricts access to its confidential material by employing a "private network", requiring key card entry to its business

offices, and providing its employees with privacy training, including building and document security. (*Ibid*.) Abbott requires its employees to enter into agreements to abide by its building and security protocols. (*Ibid*.)

Stephan asserts that the documents at issue include those related to marketing research and consumer insights, marketing and sales strategy, and product and labelling development. (Stephan Decl. at pp. 2-3.) With respect to marketing research and consumer insights, Stephan explains that "[i]f this information were disclosed to the public, Abbott would be at substantial risk of losing competitive advantage over other manufacturers of child nutrition drinks and similar products." (Stephan Decl. at ¶ 9.) He states that Abbott invests significant resources into marking research, spending thousands of dollars in this area each year. (*Id.* at ¶ 10.) He contends that disclosing the marking research information would allow Abbott's competitors to use the information to gain insight into and emulate Abbott's marketing and research strategies without expending the resources Abbott has expended. (*Id.* at ¶ 11.)

With respect to marketing and sales strategy, Stephan declares that the documents in this category include valuable information and insights about Abbott's target audience, purchasing drivers, and relevant market segments. (Stephan Decl. at ¶ 13.) He asserts that, if competitors were to encounter this information, they could use it to "understand Abbott's business and pricing strategies, as well as predict its future strategies and practices." (*Id.* at ¶ 14.) Disclosure would harm Abbott because its competitors could pursue its marketing targets, exploit weaknesses in its marketing and branding efforts, or "develop marketing strategies that contrast their own product concepts with Abbott's to undermine Abbott's market position." (*Id.* at ¶ 15.)

Product and labeling development documents evidence product and label changes and their effect on PediaSure's market position, including information regarding the "specific advantages and disadvantages of Abbott's products and labels compared to alternatives that were evaluated (including from competitors' products)." (Stephan Decl. at ¶¶ 16-17.) Disclosure of this information would harm Abbott because "competitors could use the information in the development of their own products and labels, without incurring the costs of performing the necessary research, analysis, testing, and evaluation." (*Id.* at ¶ 18.)

Further, the Court recognizes that Defendant has made significant efforts to narrow its requests for sealing and redaction from its initial omnibus motion to seal. The Court notes that Defendant has agreed to make public many of the documents it initially sought to seal and it has made some of its requests for redaction narrower.

Based on Stephan's declaration, the Court finds that the records it issue contain protected trade secrets. The Court finds that, in weighing the public's right to access against Defendant's right to maintain the confidentiality of its trade secrets, the right to privacy and confidentiality outweighs the public's right to access. Defendant's interest supports sealing the records in question as there is a substantial probability that its interest will be prejudiced if the records are not sealed. The proposed sealing of the records in question is narrowly tailored and no less restrictive means exists to achieve the overriding interest. The motion to seal is granted, with the exception of item F56.

C. Conclusion

The motion to strike is DENIED in its entirety. The motion to seal is DENIED as to item F56. The motion to seal is GRANTED as to all remaining items. The items Abbott has designated as public that were previously lodged under seal or redacted, namely items B6, B21, B27, D1, D10, E1, E5, F4, F5, G3, G4, H1 through H6, I1 through I3, I6, I7, J3, J6, and J8 through J12 shall be publically filed. The items previously lodged under seal that Abbott has agreed to redact, including B5, B18, B19, D11, D16, E3, E4, F3, F6 through F8, F77, G2, and J7, shall be publically filed in redacted form.

IV. CONCLUSION

Defendant's motion to exclude expert opinions of Steven Gaskin & Colin Weir is DENIED. Plaintiffs' request for judicial notice in support of their opposition to this motion is DENIED.

The Court DECLINES TO RULE at this time on the motions to exclude expert reports of Plaintiffs' expert Dr. Derek Rucker and Defendant's experts Drs. Bruce Strombom and Ran Kivetz.

Plaintiffs' request for judicial notice in support of the Motion is DENIED.

Plaintiffs' Motion is GRANTED IN PART and DENIED IN PART. The Court certifies Subclasses 1 and 4 but limits these Subclasses to include in-store purchasers only, and Subclasses 2 and 3 but only with respect to injunctive relief. The Subclasses are certified as follows:

> **Subclass 1**: All persons in California who purchased one or more of the following products in any flavor bearing the statement "Complete, Balanced Nutrition" during the time frames listed, for personal or household use and not for retail or distribution:
>
> > Grow & Gain – 6 Pack 8-fluid oz. bottle
> > (March 22, 2015 – July 31, 2015; July 1, 2017 – date of class certification)
> >
> > Grow & Gain – 16 Pack 8-fluid oz. bottle
> > (July 1, 2017 – date of class certification)
> >
> > Grow & Gain – 24 Pack 8-fluid oz. bottle
> > (March 22, 2015 – August 31, 2015; October 1, 2018 - date of class certification)
> >
> > Grow & Gain Shake Mix –one 14.1 oz. can
> > (March 22, 2015 – May 31, 2016)
> >
> > Grow & Gain w/ Fiber – 6 Pack 8-fluid oz. bottle
> > (March 22, 2015 – August 31, 2015; July 1, 2021 – date of class certification)

Grow & Gain w/ Fiber – 24 Pack 8-fluid oz. bottle
(March 22, 2015 – August 31, 2015; March 1, 2019 – October 31, 2019; July 1, 2021 – date of class certification)

SideKicks – 6 Pack 8-fluid oz. bottle|
(March 22, 2015 – June 30, 2015)

Subclass 2: All persons in California who purchased one or more of the following products in any flavor bearing the statements "Nutrition to help kids grow" and "Use as part of a healthy diet" during the time frames listed, for personal or household use and not for retail or distribution:

Grow & Gain – 6 Pack 8-fluid oz. bottle
(August 1, 2015 – June 30, 2017)

Grow & Gain Shake Mix – 1 14.1 oz. can
(June 1, 2016 – April 30, 2018)

Grow & Gain w/ Fiber – 6 Pack 8-fluid oz. bottle
(September 1, 2015 – September 30, 2019)

Subclass 3: All persons in California who purchased one or more of the following products in any flavor bearing the statement "Use as part of a healthy diet" during the time frames listed, for personal or household use and not for retail or distribution:

Grow & Gain 16 Pack 8-fluid oz. bottle
(September 1, 2015 – June 30, 2017)

Grow & Gain 24 Pack 8-fluid oz. bottle
(September 1, 2015 – September 30, 2018)

Grow & Gain Shake Mix – one 14.1 oz. can
(May 1, 2018 – date of class certification)

Grow & Gain with Fiber 24 Pack 8-fluid oz. bottle
(September 1, 2015 – Feb 28, 2019)

SideKicks 6 Pack 8-fluid oz. bottle
(July 1, 2015 – June 30, 2018)

Subclass 4: All persons in California who purchased the following product in any flavor bearing the statement "Balanced Nutrition to Help Fill Gaps" during the time frames listed, for personal or household use and not for retail or distribution:

SideKicks – 6 Pack 8-fluid oz. bottle
(July 1, 2018 – date of class certification)

> Excluded from all Subclasses are: (1) purchases that were made due to a doctor's prescription (2) all internet purchases; and (3) Abbott's agents, legal representatives, current and former employees, Plaintiffs' counsel, and any judge and staff to whom this case has been assigned, and any member of the judge's immediate family.

The parties shall meet and confer regarding a procedure for providing notice to the class and a form of notice. If they come to agreement, Plaintiffs shall file a stipulation along with a statement and proposed order pursuant to California Rules of Court, rule 3.766. If there is any dispute regarding these issues, the parties shall advance their next case management conference to a mutually agreeable date so that the issues may be promptly addressed.

The motion to strike is DENIED in its entirety. The motion to seal is DENIED as to item F56. The motion to seal is GRANTED as to all remaining items. The items Abbott has designated as public that were previously lodged under seal or redacted, namely items B6, B21, B27, D1, D10, E1, E5, F4, F5, G3, G4, H1 through H6, I1 through I3, I6, I7, J3, J6, and J8 through J12 shall be publically filed. The items previously lodged under seal that Abbott has agreed to redact, including B5, B18, B19, D11, D16, E3, E4, F3, F6 through F8, F77, G2, and J7, shall be publicly filed in redacted form.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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