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Attorneys for Plaintiff Joseph Mier and the Putative Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

JOSEPH MIER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CVS HEALTH, a Rhode Island limited liability company; and DOES 1 to 100, inclusive,

Defendants.

CASE NO. 8:20-cv-01979-DOC-ADS

PLAINTIFF JOSEPH MIER'S MOTION FOR CLASS CERTIFICATION AND FOR APPOINTMENT OF CLASS COUNSEL

Hon. David O. Carter

Date: April 26, 2021
Time: 8:30 a.m.
Room: 9D

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on April 26, 2021, at 8:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the Honorable David O. Carter, located in the Ronald Reagan Federal Building and United States Courthouse, 411 West Fourth Street, Courtroom 9D, Santa Ana, California, 92701-4516, Plaintiff Joseph Mier will and hereby does move for an order granting class certification in this matter, on the grounds that all the prerequisites of Rule 23, including both Rule 23(b)(2) and Rule 23(b)(3) have been satisfied.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Justin F. Marquez, the Declaration of Joseph Mier, all the pleadings, files and records in this matter, any argument or evidence that may be presented to the Court prior to its ruling, and all other matters of which the Court may take judicial notice.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on March 8, 2021.

Dated: March 15, 2021

Respectfully Submitted,

WILSHIRE LAW FIRM

/s/ Justin F. Marquez
Justin F. Marquez
Thiago M. Coelho
Robert J. Dart
Cinela Aziz

Attorneys for Joseph Mier and the Putative Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Joseph Mier has filed a class action against Defendant CVS Health ("CVS") alleging that its product labeling for hand-sanitizer—that it "kills 99.99% of germs"—is misleading to consumers. In fact, science proves that alcohol-based hand-sanitizers do not in fact kill 99.99% of all known germs. Plaintiff seeks class certification on the grounds that the primary issues in this case—whether the hand-sanitizer does, in fact, kill 99.99% of germs, and whether the statement at issue would be material to a reasonable consumer—are classwide issues. And, in fact, all of the Rule 23 prerequisites have been met. The class is clearly numerous, as Defendant had $7,144,480.50 in sales in California during the class period. Joseph Mier is adequate, having shown that he understands his case and has no conflicts with the Class Members. Mr. Mier is also typical of the class members, in that he purchased the hand-sanitizer under the false impression that it would in fact kill 99.99% of germs. And there are, as shown above, at least two major issues in common for all class members, which are apt to drive a resolution of the litigation. Common issues predominate because, as shown by the expert testimony of Dr. Philip M. Tierno, Jr., the falsity of the statement can be shown by common evidence, as shown by the expert testimony of Bruce Silverman and Dr. Jon A. Krosnick, the materiality of the statement on consumers' buying decisions can be shown by class-wide evidence, and also, as shown by Dr. Krosnick's testimony, a consumer survey may be conducted to determine the lost benefit of the bargain suffered by the Class Members who did not get what they paid for. This is, quite simply, a great case for class certification. Plaintiff's motion should be granted.

II. PERTINENT FACTS

On or about August 1, 2019, Plaintiff purchased a bottle of CVS's Advanced Formula Hand Sanitizer, an alcohol-based hand-sanitizer, from a CVS store in Santa Ana, CA. (Complaint, ¶ 7). When Plaintiff purchased the hand-sanitizer, the

front label of the bottle stated prominently that the product would "kill[] 99.99% of germs." (*Id*., ¶ 14). Yet many studies show that alcohol-based hand-sanitizer does not kill many types of germs, such as norovirus, bacterial spores, protozoan cysts, some parasites like Giardia, and the diarrhea-causing bacterium Clostridium difficile. (*Id*., ¶ 4). Moreover, studies have shown that bacteria are becoming alcohol-resistant. (*Id*.) According, "kills 99.99% of germs" is a false statement. (*Id*., ¶ 22). The front label of each bottle of CVS's hand-sanitizer contains an asterisk which leads to a statement on the back label, in miniscule font. (*Id*. at ¶ 15). That statement reads, "Effective at eliminating 99.99% of many common harmful germs and bacteria in as little as 15 seconds." (*Id*.) This language plainly does not take back the promise on the front label, but merely provides an ancillary promise that the product will kill 99.99% of a subset of germs in a specific time period. (*Id*.) Regardless, Plaintiff did not read that language on the back label. (*Id*.) Plaintiff did read the promise on the front label that the product "kills 99.99% of germs" and relied on it in purchasing the hand-sanitizer. (*Id*., ¶ 23). Plaintiff received a product that did not kill 99.99% of germs. (*Id*.) Plaintiff did not receive his benefit of the bargain. (*Id*.)

Dr. Philip M. Tierno Jr., Plaintiff's microbial expert, has testified that CVS's handsanitizer does not in fact kill 99.99% of germs. (*See* Marquez Decl., Exh. 1, Declaration of Dr. Philip M. Tierno Jr. ("Tierno Decl."), ¶ 8) ("Because the alcohol-based-sanitizers being discussed do not kill more than 0.01% of known germs, including many germs that were not tested, CVS's statement that their product 'kills 99.99% of germs' is inherently false."). Bruce Silverman, Plaintiff's marketing expert, has testified that the statement would be material to a reasonable consumer making a purchasing decision. Mr. Silverman states that, "[a] reasonable consumer would rely on the veracity of the Challenged Claim, i.e., that the Challenged Products kill 99.99% of germs," that "[i]t is unreasonable to expect consumers to proactively determine whether the Challenged Statement that appears on the front

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surface of Defendants' packaging is true . . ." that "[h]ad Defendants' packaging disclosed that the Challenged Products were incapable of killing 99.99% of all germs, such disclosure would have adversely affected consumers' willingness to purchase the Challenged Products," and that "[a]ssuming Plaintiff's allegations are true, a reasonable consumer would be misled and deceived by [Defendant's] packaging as a whole." (Marquez Decl., Exh. 2, Declaration of Bruce Silverman ("Silverman Decl."), ¶ 32).

[redacted]

III. ARGUMENT

A. This Is a Strong Case for Class Certification.

Plaintiff will seek to certify the following Class: "All persons residing in the State of California who purchased CVS brand hand-sanitizer during the period beginning four years from the date of the filing of this Complaint to the date of class certification." (Complaint, ¶ 24.) As shown below, class certification in this case is proper, both under Rule 23(b)(2), and Rule 23(b)(3) of the Federal Rules of Civil Procedure.

To certify the class Plaintiff must satisfy the four prerequisites enumerated in Rule 23(a), as well as at least one of the requirements of Rule 23(b). Plaintiff submits that he has satisfied both Rule 23(b)(2) and Rule 23(b)(3). Under Rule 23(a), the party seeking class certification must establish: (1) that the class is so

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large that joinder of all members is impracticable (i.e., numerosity); (2) that there are one or more questions of law or fact common to the class (i.e., commonality); (3) that the named parties' claims are typical of the class (i.e., typicality); and (4) that the class representatives will fairly and adequately protect the interests of other members of the class (i.e., adequacy of representation). Fed. R. Civ. P. 23(a).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where the party opposing the class "has acted or refused to act on grounds generally applicable to the class." Rule 23(b)(2). Rule 23(b)(3) requires a finding that both (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," (i.e. predominance), and (2) "a class action is superior to other methods for fairly and efficiently adjudicating the controversy," (i.e. superiority) including the following considerations: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against the class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

1. Plaintiff Can Show Numerosity.

Under Rule 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). As a general rule, a class of over 40 individuals satisfies this prerequisite. *See* 5 James Wm. Moore et al., Moore's Federal Practice § 23.22 [1] [b] (3d ed.2004); *see also Celano v. Marriott Intern., Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007) ("[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer.") (citing *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995)). Here, Plaintiff has clearly showed that the class exceeds the number at which joinder becomes impracticable. According to Defendant, there were $7,144,480.50

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in sales of CVS brand hand sanitizer in California during the class period. (*See* Declaration of Justin F. Marquez ("Marquez Decl."), ¶ 15, Ex. 4.) Clearly, more than 40 Class Members purchased CVS brand hand sanitizer during this period. Accordingly, numerosity has been shown. *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 533 (C.D. Cal. 2011) ("Where the exact size of the proposed class is unknown, but general knowledge and common sense indicate it is large, the numerosity requirement is satisfied."); *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013) (numerosity satisfied merely by pleading that "hundreds" of consumers were affected).

2. Plaintiff Can Show Adequacy.

Plaintiff can fairly and adequately protect the interests of the Class as required by Rule 23(a)(4). The adequacy requirement is satisfied where, as here, the class representative: (1) has common, and not antagonistic, interests with unnamed class members; and (2) will vigorously prosecute the interests of the Class through qualified counsel. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Hanlon*, 150 F.3d at 1021.

Here, Plaintiff's declaration demonstrates that he clearly understands his responsibilities as a class representative and has no conflicts. (*See* Declaration of Joseph Mier, ¶ 2.) Plaintiff has actively participated in the case, including reviewing and declarations, participating in discovery, sitting for deposition, and being available for consultation. He has also prosecuted this matter diligently through his counsel.

Plaintiff has also retained experienced counsel to represent him and the other Class Members. Wilshire Law Firm, PLC, has prosecuted hundreds of class actions in recent years, and is experienced in prosecuting specifically consumer class actions. Wilshire Law Firm's attorneys on this case in particular are experienced in class action litigation, making them well-qualified and capable of prosecuting

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this action. *See* Declaration of Justin F. Marquez, filed herewith. Adequacy is satisfied.

3. Plaintiff Can Show Commonality.

To meet commonality, the Plaintiff must show that there are questions of law or fact common to the class as a whole. Fed. R. Civ. P. 23(a)(2). The class claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 131 S. Ct. at 2551. "These common questions may center on 'shared legal issues with divergent factual predicates [or] a common core of salient facts coupled with disparate legal remedies.'" *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998)). "This analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims." *Id*.

"This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single *significant* question of law or fact." *Abdullah v. U.S. Sec. Associates, Inc.,* 731 F.3d 952, 957 (9th Cir. 2013) (internal quotation omitted) (emphasis in original). "The requirements of Rule 23(a)(2) have been construed permissively, and all questions of fact and law need not be common to satisfy the rule." *Ellis v. Costco Wholesale Corp.,* 657 F.3d 970, 981 (9th Cir. 2011) (internal quotation omitted); *Wang v. Chinese Daily News*, 737 F.3d 538, 544 (9th Cir. 2013) ("Plaintiffs need not show that every question in the case, or even a preponderance of questions, is capable of classwide resolution.")

Notably, the Ninth Circuit has held that commonality does "not require complete congruence." *In re First All. Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006). This is particularly true in the context of fraud class actions like this one.

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As the Ninth Circuit further explains, "[t]he Advisory Committee on Rule 23 considered the function of the class action mechanism in the context of a fraud case" and found that a "'fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action.'" *Id.* (quoting Advisory Committee Notes to 1966 Amendments, Subdivision (b)(3)). For this reason, "[the Ninth Circuit] has followed an approach that favors class treatment of fraud claims stemming from a 'common course of conduct.'" *Id.* (quoting *Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir. 1975)).

Common questions of law and fact lie at the heart of this action because each member of the Class was uniformly exposed to CVS' packaging at the point of purchase. *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1096–97 (C.D. Cal. 2015) ("There is no question that all class members were exposed to the product packaging; this suffices to show commonality."); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 569 (C.D. Cal. 2014) ("Because all class members were exposed to the statement and purchased [the] products, there is 'a common core of salient facts.'"). In numerous misleading advertising cases, courts have held that the commonality element was met where the plaintiffs showed common issues existed as to the misleading nature of the statement, and the materiality of that statement on consumers' buying decisions. For instance, in *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 562 (N.D. Cal. 2020), the court held that the plaintiff had adequately identified "common legal questions subject to common proof, including whether the Challenged Statements were material and misleading." *See also McVicar v. Goodman Global, Inc.*, No SA CV 13-1223-DOC (RNBx), 2015 WL 4945730 at *6-7 (C.D. Cal. Aug. 20, 2015) (common questions as to a common product defect satisfy commonality); *Reitman v. Champion Petfood USA, Inc.*, No. CV 18-1736-DOC (JPRx), 2019 WL 7169792 at *5-6 (C.D. Cal. Oct. 30, 2019) (holding that common questions as to the misleading nature of the product

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statement and the materiality of that statement on consumers was sufficient to satisfy commonality).

In fact, "California has recognized that an injury exists under the UCL, FAL, and CLRA where a consumer has purchased a product that is marketed with a material misrepresentation, that is, in a manner such that 'members of the public are likely to be deceived.'" *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 535 (C.D. Cal. 2011) (quoting *In re Tobacco II Cases*, 46 Cal.4th 298, 312 , 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009)); *see also Yumul v. Smart Balance, Inc.*, 733 F.Supp.2d 1117, 1125 (C.D. Cal. 2010) ("California courts have held that reasonable reliance is not an element of claims under the UCL, FAL, and CLRA."). The Court need not, and should not, "abandon this objective test and instead contemplate hypothetical class members' individual interaction with the product." *Id*. (citing *In re Tobacco II Cases*, 46 Cal.4th 298, 327 , 93 Cal.Rptr.3d 559 , 207 P.3d 20 (2009) ("[A] presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation was material[, meaning] if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."). Other courts in this district have held that the fact that "some consumers purchased the [product] for other reasons does not defeat a finding that" the product was marketed with a material misrepresentation, which *per se* establishes an injury. *See Johnson v. General Mills, Inc.*, 276 F.R.D. 519 (C.D. Cal. 2011); *Delarosa v. Boiron*, 275 F.R.D. 582, 586 (C.D. Cal. 2011).

As in *Bruno*, the "determination of these claims' truth or falsity—namely, whether Defendants' products were marketed using misrepresentations and whether these misrepresentations were material—will resolve an issue that is central to [the claims'] validity." *Bruno*, 280 F.R.D. at 536 (internal quotation omitted). "Especially given the relatively lenient requirements for commonality preconditions of Rule 23(a)(2) , this Court concludes that this standard is met

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where there are shared legal issues and facts." *Id*., (citing *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 536 (C.D. Cal. 2011)).

So too, commonality is met here, as class wide issues dominate the litigation. Those issues include whether the statement at issue is misleading—whether the hand-sanitizer in fact kills 99.99% of germs—and whether this misleading statement would be material to a reasonable consumer. Both of these issues turn on a single class wide question which can be answered on a class wide basis. *See Kumar v. Salov N. Am. Corp.*, No. 14-CV-2411-YGR, 2016 WL 3844334, at *4-5 (N.D. Cal. July 15, 2016) (finding "sufficient common questions of fact and law" when "[t]he central question here is whether [defendant's] labels were likely to deceive a reasonable consumer.") In particular, the issue of whether Defendant's product actually kills 99.99% of all germs is central to this case. It will be answered by expert testimony as to the efficacy of the product, and the percentage of germs it does not kill as compared to the number of harmful germs in existence. This testimony, in fact, has already been gathered in the form of the Declaration of Dr. Philip M. Tierno, Jr., filed herewith. (*See* Tierno Decl., ¶ 8) ("Because the alcohol-based-sanitizers being discussed do not kill more than 0.01% of known germs, including many germs that were not tested, CVS's statement that their product 'kills 99.99% of germs' is inherently false.") In addition, Plaintiff will show through expert testimony that the statement at issue is material to a reasonable consumer in the form of the Declaration of Bruce Silverman, an expert in marketing, who testifies that the statement would likely impact buying decisions, and the Declaration of Jon A. Krosnick, who testifies as to a survey of consumers which will show that they are impacted by the statement. These common questions are apt to draw common answers which drive the litigation as, for all causes of action, both the misleading nature of the label statement and the materiality of that statement to consumers will be the primary elements of liability. "Variation among class members in their motivation for purchasing the product, the factual

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circumstances behind their purchase, or the price that they paid does not defeat" commonality. *Astiana v. Kashi Co.*, 291 F.R.D. 493, 502 (S.D. Cal. 2013) (internal quotation marks omitted).

An additional common question is whether Defendant knew the statement was false at the time it made it. This question will be answered by documents and testimony from Defendant. In Plaintiff's deposition of Defendant's Person Most Knowledgeable on the subject areas defined by Plaintiff, Plaintiff learned that Defendant based its 99.99% statement solely on a study conducted by the manufacturer showing that the hand-sanitizer killed no more than twenty-five germs in the allotted time period. It strains credulity to believe that Defendant could credibly have based its statement on only this study, and believed it to be true. Thus, this question too will be determined by common evidence.

4. Plaintiff Can Show Typicality.

Rule 23(a)(3) requires the putative class representatives to have claims or defenses that are "typical of the claims or defenses of the class." The typicality requirement "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2009) (quotation marks and citation omitted). This "permissive" standard requires only that the representative's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.

Courts have held that plaintiffs in false advertising cases satisfy the typicality requirement where they allege claims resulting from the same misrepresentations as applied to the entire class. *See Reitman*, 2019 WL 7169792 at *7 (holding that the class representatives met the typicality requirement where they were subject to the same representations as the class members); *Krommenhock*, 334 F.R.D. at *562 (typicality shown where the class representatives alleged that they and the class members had paid a premium for the product due to misleading health and wellness

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claims); *Hawkins v. Kroger Co.*, No. 15CV2320 JM (AHG), 2020 WL 7421754, at *11 (S.D. Cal. Nov. 9, 2020), *reconsideration denied*, No. 15CV2320 JM (AHG), 2020 WL 8225732 (S.D. Cal. Dec. 29, 2020) ("Typicality exists between Plaintiff's claims and the putative class members' claims because they all allegedly relied on Kroger's "0g Trans Fat" label in their decision to purchase the breadcrumbs.") Accordingly, Plaintiff may represent all members of the Class, regardless of which CVS hand sanitizer product they purchased. *In re TFT–LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 593 (N.D. Cal. Mar. 28, 2010) ("The typicality requirement does not mandate that the products purchased . . . must be the same as those of absent class members.").

Here, Plaintiff has demonstrated an injury caused by the false product statement which arises from the same course of events as the Class Members' injuries. CVS lied to all of the Class Members, including Plaintiff, in exactly the same manner. Plaintiff purchased the same product as the Class Members, and that product had the same efficacy as to Plaintiff and the Class Members. Plaintiff's claims and the Class Members claims are clearly thus based on the same facts. Typicality is met.

5. Plaintiff Can Show that Class Certification is Appropriate Under Rule 23(b)(2).

Because Plaintiff seeks injunctive relief, he moves alternatively under Rule 23(b)(2) for an injunction-only class should the Court find that Rule 23(b)(3) has not been met. Rule 23(b)(2) permits class certification where the party against whom relief is sought "has acted or refused to act on grounds that apply generally to the class, so that injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc.*, 564 U.S. at 360.

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Here, Plaintiff seeks, on behalf of himself and all other members of the Class, an injunction requiring Defendant to remove the misleading statement from its product. This injunctive relief, if granted, will apply generally to the class, and not to any specific member solely, as the Class Members have been and will continue to each be exposed to the same product labeling created by Defendant. The Class Members have all purchased the same product, and may be exposed to it again. Accordingly, the product labeling can be enjoined as to all of the class members, or to none of them.

6. Plaintiff Can Show that Class Certification is Appropriate Under Rule 23(b)(3).

a) Plaintiff Can Show Predominance.

To show predominance, the plaintiff must establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). "Predominance is . . . 'readily met in certain cases alleging consumer . . . fraud." *Bruno*, 280 F.R.D. at 537 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). Here, an analysis of each cause of action shows that common questions predominate over individualized issues as to each of them.

Intentional Misrepresentation and Negligent Misrepresentation.

The intentional misrepresentation and negligent misrepresentation claims differ only as the the state of mind requirement for Defendant. For both claims, that element will be proven by classwide evidence in the form of documents and testimony from Defendant showing that it relied on a study testing only 25 common germs to conclude that its product killed 99.99% of all germs. The falsity of the statement will also be determined by classwide evidence in the form of expert

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testimony from Plaintiff's expert, Dr. Philip M. Tierno, Jr., who testifies that alcohol does not, in fact, kill 99.99% of known germs. (Tierno Decl., ¶ 12.) The facts that Defendant intended for the Class Members to rely on the statement, and that it knew of the statement's falsity, can also be determined by classwide evidence obtained from Defendant, and can be inferred from the fact that Defendant placed the statement prominently on the front of the product labeling, and only placed the disclaimer on the back of the product, in smaller lettering. Defendant's Person Most Knowledgeable on a range of issues related to this case, Matthew Thorsen, CVS's director of store brand packaging testified at deposition that CVS did not conduct any of its own testing to substantiate the product claim that it kills 99.99% of germs, and would "never change the language of that," instead relying wholly on its supplier, Vi-Jon, to supply substantiating testing. (Marquez Decl., Exh. 5, Excerpts from the Deposition of Matthew Thorsen ("Thorsen Dep.") at 29:10-31:3). As to why the disclaimer was included on the back of the product, in small lettering, and not on the front of the product, with the rest of the product claim, Mr. Thorsen, on behalf of CVS, could not say. (*Id*., 50:13-16). To the extent that the disclaimer would matter, the Ninth Circuit's holding in *Williams v Gerber Products Co*., 552 F.3d 934 (9th Cir. 2008), has made it clear that it would not, "[w]e disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the . . . small print on the side of the box." *Id*. at 939. Further, Mr. Thorsen could not answer as to why CVS's product was never tested against shigella, salmonella, campylobacter, listeria, and yersinia, all common pathogens involved in food preparation (*id*., 56:20-58:3), or no viral testing done at all. (*Id*. at 58:8-12). Mr. Thorsen also could not answer why no testing was done on human hands in real life conditions. (*Id*., 58:15-19).[1]

[1] Defendant will be hard pressed to marshal evidence in its favor on this point, as the employees which it listed in interrogatory responses as having knowledge as to the creation and approval of the language at issue all testified that they had no

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Reliance need not be proven on an individualized basis; instead, courts look to the reasonable consumer to determine whether a consumer would attach importance to the claim. *Allen v. Conagra Foods, Inc.*, 331 F.R.D. 641, 658 (N.D. Cal. 2019). As the court explained in *Allen*:

> Under California law, "[q]uestions of materiality and reliance are determined based upon the reasonable consumer standard, not the subjective understandings of individual plaintiffs." *Kumar v. Salov N. Am. Corp.*, No. 14-CV-2411-YGR, 2016 WL 3844334, at *7 (N.D. Cal. July 15, 2016); *see Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). "A representation is material...if a reasonable consumer would attach importance to it or if the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) (internal quotation marks omitted). A class of plaintiffs can make the required materiality showing without individualized proof by establishing (with, for example, market research) that the statements would be material to a reasonable member of the purchaser class. *Kumar*, 2016 WL 3844334, at *8. A showing of materiality is sufficient to raise an inference of classwide reliance. *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 902 (N.D. Cal. 2015); *Mullins v.*

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such knowledge. (*See, e.g.,* Marquez Decl., Exh. 6, Excerpts from the Deposition Transcript of Czarina Tse ("Tse Dep.") at 58:13-61:22)). However, Ms. Tse did testify that Defendant does not place stickers over the front label claims because "we want the customer to see what the—what this hand sanitizer is for," and then clarified that what it "is for" is killing 99.99% of germs. (*Id*., 153:2-12). Ms. Rotti testified that she was not aware of any evidence showing that CVS customers look at the back of the label or follow an asterisk. (Rotti Dep., 90:20-91:8). However, Ms. Rotti also testified that, like Ms. Tse, despite Defendant's assertions in its interrogatory response, she did not participate in the creation and approval of the language at issue in this case. (*Id*., 99:24-101:21).

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> *Premier Nutrition Corp.*, No. 13-CV-01271-RS, 2016 WL 1535057, at *5 (N.D. Cal. Apr. 15, 2016) (noting that the reasonable belief of an ordinary consumer was amenable to common proof and the defendant's marketing research provided evidence of materiality).

Id. Plaintiff has come forward with exactly the kind of market research contemplated in *Allen* which shows that Defendant's representation that its product kills 99.99% of germs was material to a reasonable consumer. The Declaration of Bruce Silverman provides expert testimony from a marketing guru that the language at issue would in fact impact buying decisions. Mr. Silverman states that, "[a] reasonable consumer would rely on the veracity of the Challenged Claim, i.e., that the Challenged Products kill 99.99% of germs," that "[i]t is unreasonable to expect consumers to proactively determine whether the Challenged Statement that appears on the front surface of Defendants' packaging is true . . ." that "[h]ad Defendants' packaging disclosed that the Challenged Products were incapable of killing 99.99% of all germs, such disclosure would have adversely affected consumers' willingness to purchase the Challenged Products," and that "[a]ssuming Plaintiff's allegations are true, a reasonable consumer would be misled and deceived by [Defendant's] packaging as a whole." (Silverman Decl., ¶ 32). This expert testimony is borne out by the deposition testimony of Adrienne McGonigle, CVS's Brand Manager for store brand beauty and personal care, who testifies that it is important that product labels be truthful, and unacceptable to consumers, as well as to the deponent professionally, if they are not truthful. (Marquez Decl., Exh. 7, Excerpts from the Transcript of the Deposition of Adrienne McGonigle ("McGonigle Dep.") at 55:20-56:8; 56:19-57:3). Ms. McGonigle also testified that, as a consumer, she believes the statement that the hand-sanitizer kills 99.99% of germs to mean that it kills "just about all germs." (*Id*. at 72:1-21). Ms. McGonigle also testified that CVS's product labeling had an impact on a consumer's willingness to purchase a CVS brand

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product (*id.*, 86:1-8), and that every statement made on the label of a CVS product is geared towards ensuring that the product sells. (*Id.*, 87:9-14). Moreover, Ms. McGonigle testified that she believed more customers would be likely to purchase the product because it states "kills 99.99% of germs" on its front label. (*Id.*, 89:7-14). Further, Plaintiff's suvey expert, Dr. Jon A. Krosnick, will perform a consumer survey which shows that consumers are likely to find the statement at issue to be important in making a buying decision. (Marquez Decl., Exh. 8, Declaration of Dr. Jon A. Krosnick ("Krosnick Decl."), ¶¶ 2-3).

Defendant cannot reasonably argue that the existence of its disclaimer presents individualized issues, as whether a reasonable consumer would read the disclaimer, and whether that disclaimer would disabuse the reasonable consumer of the notion that the product in fact kills 99.99% of germs, will likewise be determined on a classwide basis. (*See* Silverman Decl., ¶ 74.). And Mr. Thorsen, on behalf of CVS, testified that he was not aware of any studies showing whether consumers read the back of the label of products when making purchasing decisions. (Thorsen Dep., 60:12-16). However, the acceptance criteria for the claim evaluation was related solely to the back label claim. (*Id.*, 74:4:15).

Nor will Plaintiff's or the Class Members' other reasons for purchasing the product create individualized issues. As this Court held in *Bruno*, "the Court finds no merit in Defendants' argument that Plaintiff will be subject to a unique defense because she had reasons other than the representation for purchasing the product. . . . [A] plaintiffs' individual experience with the product is irrelevant where, as here, the injury under the UCL, FAL, and CLRA is established by an objective test." 280 F.R.D. 534. "Specifically, this objective test states that injury is shown where the consumer has purchased a product that is marketed with a material misrepresentation, that is, in a manner such that "members of the public are likely to be deceived." *Id.* (citing *In re Tobacco II Cases*, 46 Cal.4th 298, 312 , 93 Cal.Rptr.3d 559 , 207 P.3d 20 (2009); *see also Yumul v. Smart Balance, Inc.*, 733

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F.Supp.2d 1117, 1125 (C.D. Cal. 2010). This Court has found such arguments "unavailing" where they "urge[] this Court to abandon this objective test and instead contemplate hypothetical class members' individual interaction with the product." *Bruno*, 280 F.R.D. at 535 (quoting *In re Tobacco II Cases*, 46 Cal.4th 298, 327 , 93 Cal.Rptr.3d 559 , 207 P.3d 20 (2009) ("[A] presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation was material[, meaning] if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.").

Damages, too, will be determined on a class-wide basis, with a consumer survey to show exactly what the misstatement was worth; i.e., the pricing premium CVS extracted by making the promise. In the Ninth Circuit, a price premium is the proper of method of restitution to Class members in a consumer class action like this one. *See Brazil v. Dole Packaged Foods, LLC*, No. 12-cv-01831-LHK, 2014 WL 5794873, at *5 (N.D. Cal. Nov. 6, 2014) ("The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received."). Indeed, the Ninth Circuit has affirmed a district court's certification of a consumer-fraud class action which "proposed to measure" damages through a "classwide price premium attributable" to the products' labeling. *Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654, 657 (9th Cir. 2017). Dr. Krosnick has testified that it is more than feasible to conduct this survey, to determine the pricing premium that the Class Members paid. (Krosnick Decl., ¶ 191.) And Ms. McGonigle, at her deposition, agreed that Plaintiff's damages theory was a valid statement of lost value resulting from an inaccurate product statement. (McGonigle Dep. at 80:24-81:25). Further, Ms. McGonigle testified that if the statement, "kills 99.99% of germs" was not true, that customers did not get what they paid for. (*Id.*, 90:14-91:2). Ms. Tse, at her deposition, also affirmed Plaintiff's damages theory. (Tse Dep., 137:14-139:8; 146:14-19). In short, class-wide issues dominate these two claims. Predominance

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is shown for the misrepresentation claims.

False Advertising Law and Unfair Competition Law.

FAL and UCL claims are "ideal for class certification." *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012). Indeed, courts in this Circuit "routinely certify consumer class actions arising from alleged violations of the [ ] FAL[] and UCL." *Id.* "California's UCL prohibits any 'unlawful, unfair or fraudulent business act or practice.'" *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020) (quoting Cal. Bus. & Prof. Code § 17200). California's FAL prohibits any "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17500. "Any violation of the FAL ... necessarily violates the UCL." *Moore*, 966 F.3d at 1016 (internal quotation omitted); *see also Kasky v. Nike, Inc.*, 27 Cal.4th 939, 119 Cal.Rptr.2d 296, 45 P.3d 243, 250 (2002). Accordingly, the central liability question for these two claims will be whether the product label was deceptive or misleading.

As the Ninth Circuit explained in *Moore*:

> Whether a business practice is deceptive or misleading "under these California statutes [is] governed by the 'reasonable consumer' test." *Williams*, 552 F.3d at 938 (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). Plaintiffs "must show that members of the public are likely to be deceived." *Id*. (quotations omitted). This "requires more than a mere possibility that [Defendants'] label 'might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner.' " *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 129 Cal. Rptr. 2d 486, 495 (2003)). "Rather, the reasonable consumer standard requires a probability 'that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.' " *Id*. (quoting *Lavie*, 129 Cal. Rptr. 2d

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at 495).

966 F.3d at 1017. This "reasonable consumer" test can, of course, be determined by classwide evidence, because it is an objective standard, and not a subjective one requiring individualized inquiries. The reasonable consumer standard is an objective test that does "not require the court to investigate 'class members' individual interaction with the product.'" *Tait*, 289 F.R.D. at 480; *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 985-86 (9th Cir. 2015) (the reasonable consumer standard "does not require individualized proof of deception, reliance and injury." (quoting *In re Tobacco II Cases*, 207 P.3d 20, 40-41 (Cal. 2009))). Put differently, the "reasonable consumer" test focuses on the challenged misrepresentation, and the likely impact inherent in the statement itself, not any individual consumer's understanding of that misrepresentation. *See Bradach v. Pharmavite, LLC*, 735 F. App'x 251, 254–55 (9th Cir. 2018) ("the district court's conclusion that it would need to inquire into the motives of each individual class member was premised on an error of law."); *Escobar v. Just Born, Inc.*, No. CV 17-01826 TJH(PJW), 2019 WL 2619636, at *2 (C.D. Cal. Mar. 25, 2019), *reconsideration granted in part*, No. CV1701826TJHPJWX, 2019 WL 4605711 (C.D. Cal. June 19, 2019) (finding predominance existed as to UCL claims because the court would not be required to investigate individual class members' interaction with the product.").

Plaintiff has acquired just this kind of class-wide evidence. As noted, Plaintiff has come forward with expert testimony from Dr. Philip M. Tierno, Jr., who testifies that alcohol does not, in fact, kill 99.99% of known harmful germs. (Tierno Decl., ¶¶ 8, 10, 14, 15.) Plaintiff has also come forward with his marketing expert, Dr. Bruce Silverman's testimony that the 99.99% guarantee would in fact be material to a reasonable consumer, because a reasonable consumer would be likely to base its purchasing decision on such purportedly hard evidence. (Silverman Decl., ¶ 43.) ("'99.99%' . . . is *almost* perfect."). Finally, Dr. Jon

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Krosnick has testified that he can feasibly conduct a consumer survey showing that consumers would likely consider the statement at issue to be important. (Krosnick Decl., ¶¶ 56-57.) Plaintiff can and will show, with classwide evidence, that a reasonable consumer would likely be deceived by Defendant's product statement. Further, there will not even be individualized issues concerning damages, as Dr. Krosnick will be able to conduct a survey showing the premium paid by the Class Members in exchange for the purported statement. (Krosnick Decl., ¶ 202.) Clearly, predominance has been met for these claims.

b) Plaintiff Can Show Superiority.

Plaintiff also satisfies superiority under Rule 23(b)(3). As explained in *Bruno*:

> Given the small size of each class member's claim, class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action. *See Pecover v. Elec. Arts Inc.*, [2010 BL 378283], 2010 U.S. Dist. LEXIS 140632 , at *68 (N.D.Cal. Dec. 21, 2010) ("[T]he modest amount at stake for each purchaser renders individual prosecution impractical. Thus, class treatment likely represents plaintiffs' only chance for adjudication."). Indeed, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 , 100 S.Ct. 1166 , 63 L.Ed.2d 427 (1980). *See also Ballard v. Equifax Check Servs., Inc.*, 186 F.R.D. 589, 600 (E.D.Cal.1999) ("Class action certifications to enforce compliance with consumer protection laws are 'desirable and should be encouraged.' "). Furthermore, each member of the class pursuing a claim individually would burden the judiciary, which is contrary to the

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> goals of efficiency and judicial economy advanced by Rule 23. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir.2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 594-95 (C.D.Cal.2011).

280 F.R.D. at 537-38.

Examination of each of the Rule 23(b)(3) superirotiy factors also shows that superiority has been met.

The interest of each class member in individually controlling his own case.

This factor weighs in favor of class certification here because the cost of many individual actions would be prohibitively high and the damages at issue are modest. *See, e.g., Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 515 (9th Cir. 2013) ("In light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims. Thus, class certification is also the superior method of adjudication."); *Amchem*, 521 U.S. at 617. Each Class Member's potential monetary recovery is relatively low, as they will receive, most likely a fraction of the cost of one bottle of hand-sanitizer per individual.

The extent and nature of other existing litigation.

Plaintiff is not aware of any other litigation in this or any district against Defendant for the claims alleged in Plaintiff's Complaint. This is the only case raising these claims against Defendant. Accordingly, this factor weighs in favor of certification.

The desirability of concentrating the litigation in this forum.

Given that Defendant conducts a large amount of business in California, operating stores throughout the state, Plaintiff is a California resident who purchased Defendant's product in California, and the fact that this case involves

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California false advertising and unfair competition statutes, it is desirable to concentrate the litigation in this forum.

The trial will not pose any disabling manageability problems.

The primary liability questions here—whether the product actually kills 99.99% of all known germs, and whether a reasonable consumer would, viewing Defendant's statement, be misled—are class wide. The only individual issues are whether the individual Class Members purchased the product. This question, which can be established by submission of receipts, or, more likely from Defendant's own record, presents a single evidentiary issue as to damages, but the Ninth Circuit is clear that individualized issues as to damages cannot defeat class certification. *Leyva*, 716 F.3d at 515 (district court "abused its discretion when it based its manageability concerns on the need to individually calculate damages"). Superiority is met.

IV. CONCLUSION

Respectfully, the Court should grant Plaintiff's motion and issue an order certifying the proposed classes.

Dated: March 15, 2021

Respectfully Submitted,

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