UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TONY MEZZADRI, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

MEDICAL DEPOT, INC. dba DRIVE MEDICAL DESIGN AND MANUFACTURING; DOES 1 THROUGH 10, inclusive,

Defendant.

Case No.: 14-CV-2330-AJB-DHB

ORDER DENYING MOTION FOR CLASS CERTIFICATION

(Doc. Nos. 41, 46)

This action arises out of the allegedly deceptive nature Defendant Medical Depot, Inc. ("Defendant") labeled four models of its full-body patient slings during an eight-year period. Presently before the Court is Plaintiff Tony Mezzadri's ("Plaintiff") motion for class certification. (Doc. Nos. 41, 46.)[1] The Court heard oral argument on April 21, 2016, and took the matter under submission. For the following reasons, the Court **DENIES** Plaintiff's motion.

[1] Doc. No. 41 is the public redacted version of Plaintiff's motion, and Doc. No. 46 is the sealed version. Future citations in this order will refer only to Doc. No. 41.

BACKGROUND

Defendant manufactures (through a third-party Chinese corporation, Unitrend) and sells (through medical equipment retailers) durable medical equipment to physically disabled persons. (Doc. No. 15 ¶¶ 11, 13.) The durable medical equipment at issue in this litigation are four models of Defendant's full-body patient slings ("slings" or "Drive slings"). (Doc. No. 41-1 at 8.) The slings consist of mesh material and use a four-point attachment system to attach to a floor lift. (Doc. No. 15 ¶ 12.) Together with the lift, the sling is primarily used to lift a disabled person out of bed and into his or her wheelchair and vice versa. (*Id.*)

Information about Drive slings is available on Defendant's website. (*Id.* ¶ 14.) During the class period, each sling's profile on the website included a hyperlink to the sling's "hangtag," which is something of a brochure. (*Id.*; *see* Doc. No. 15-1.) The hangtag and the label affixed to the sling include many representations concerning the sling's quality, craftsmanship, and durability that Plaintiff alleges are materially false and misleading. (Doc. No. 15 ¶¶ 14, 17, 23.) Specifically, the hangtag states the sling is "built to exacting standards," is "carefully inspected prior to shipment," and will provide "years of dependable service." (*Id.* ¶ 14.) It further states the sling is made of polyester and can be safely machine washed and dried. (*Id.* ¶¶ 15, 23.) Based on these representations, Plaintiff purchased a sling on January 4, 2013. (*Id.* ¶ 16.)

Contrary to these representations, Plaintiff asserts that Defendant does not dictate design specifications or standards to Unitrend and is, in fact, completely unaware of the standards Unitrend employs. (*Id.* ¶ 19.) Moreover, Defendant does not open the boxes of slings that arrive from Unitred prior to forwarding the slings to retailers or end users and is unaware whether Unitrend inspects the slings before shipment. (*Id.* ¶ 20.) Nor does Defendant expect the sling's useful life to be longer than a single year. (*Id.* ¶ 22.) Finally, although the body of the sling is made of polyester, the straps that connect the sling to the floor lift are made of the weaker polypropylene, which weakens even when laundered on "low" settings in residential washers and driers. (*Id.* ¶ 23.) Had Plaintiff known these

truths, he contends he would not have purchased a Drive sling. (*Id.* ¶ 25.)

Plaintiff filed the instant action on March 26, 2014, in San Diego Superior Court. (Doc. No. 1-1, Exh. A.) Plaintiff amended his complaint on June 12, 2014. (Doc. No. 1-1, Exh. B.) On October 2, 2014, Defendant removed the case to this Court. (Doc. No. 1.) Following a motion to dismiss, which was granted in part, (Doc. Nos. 4, 13), Plaintiff filed the second amended complaint ("SAC") on March 4, 2015, alleging violations of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), Consumer Legal Remedies Act ("CLRA"), Song-Beverly Consumer Warranty Act ("Song-Beverly Act"), and California common law, (Doc. No. 15). On December 16, 2015, Plaintiff filed the instant motion for class certification. (Doc. No. 41.) Defendant opposed the motion, (Doc. No. 51), and Plaintiff replied, (Doc. No. 52). The Court held a hearing on this matter on April 21, 2016. The Court took the matter under submission, and this order follows.

LEGAL STANDARD

Class actions are the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To depart from this rule, the "class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (citation and internal quotation marks omitted). The proponent of class treatment, usually the plaintiff, bears the burden of demonstrating the propriety of class certification. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1067 (9th Cir. 2014). This burden requires the plaintiff to provide sufficient facts to satisfy the four requirements of Rule 23(a) and at least one subsection of Rule 23(b) of the Federal Rules of Civil Procedure. *Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Under Rule 23(a), the plaintiff must demonstrate that (1) the class is so numerous that joinder of all parties is impracticable; (2) there are questions of law or fact common

to the class; (3) the claims or defenses of the representative party are typical of those of the class; and (4) the representative party will fairly and adequately protect the class's interests. Fed. R. Civ. P. 23(a). These requirements are commonly referred to as numerosity, commonality, typicality, and adequacy. "If the court finds the action meets the requirements of Rule 23(a), the court then considers whether the class is maintainable under Rule 23(b)." *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 451 (S.D. Cal. 2014).

In the instant matter, Plaintiff seeks certification under Rule 23(b)(3), (Doc. No. 41-1 at 15), under which the plaintiff must demonstrate that (1) the questions common to the class predominate over any questions that affect only individual members; and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). These requirements are known as predominance and superiority.

When entertaining a class certification motion, the court is obligated to conduct a rigorous analysis of whether the requirements of Rule 23 are satisfied. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). While the court must not go on a freewheeling inquiry into the merits of the plaintiff's claims, "[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (quoting *Falcon*, 457 U.S. at 160). Accordingly, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). The court must therefore limit its inquiry "to those aspects relevant to making the certification decision on an informed basis." *Astiana v. Kashi Co.*, 291 F.R.D. 493, 499 (S.D. Cal. 2013).

DISCUSSION

Plaintiff seeks to certify a class comprised of "[a]ll California residents who purchased a Drive model 13221, 13222, 13223, or 13224 full-body patient sling between March 1, 2006, and March 27, 2014." (Doc. No. 41-1 at 8.) Plaintiff contends

certification is appropriate because the class was uniformly exposed to, and detrimentally relied upon, the following misrepresentations: (1) the slings' fabric resists deterioration from moisture and laundering and would provide "years of dependable service"; (2) the slings could safely be machine dried on "low" temperature; and (3) the slings are made of polyester. (*Id.* at 7.) The reality, Plaintiff contends, is that the slings' safe useful life is only six months; the sling straps were made of polypropylene, a material weaker than polyester; and the slings cannot be safely machine dried even on "low temperature." (*Id.* at 7–8.)[2]

I. Requirements of Rule 23(a)

Defendant contends that Plaintiff cannot satisfy certain of his burdens under Rule 23(a), namely, that Plaintiff has not satisfied the commonality and typicality requirements. (Doc. No. 51 at 13–21.) The Court will discuss all four Rule 23(a) requirements.

A. Numerosity and Adequacy

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean 'impossibility'"; rather, the inquiry focuses on the "difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (citation omitted). While there is no set threshold, classes of more than seventy-five members are generally sufficient. *Breeden v. Brenchmark Lending Grp.*, 229 F.R.D. 623, 628 (N.D. Cal. 2005). In determining whether numerosity is satisfied, the court may draw reasonable inferences from the facts before it. *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1332 n.5 (9th Cir. 1977); *Astiana*, 291 F.R.D. at 501.

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[2] The Court notes that Plaintiff's motion makes no mention of two of the alleged misrepresentations he identifies in the SAC, specifically, that the slings are built to "exacting standards" and are inspected prior to shipment.

Rule 23(a)(4) requires the class representative to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In assessing this requirement, courts within the Ninth Circuit apply a two-part test: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

Here, Plaintiff estimates that Defendant has sold 27,000 slings in California during the class period. (Doc. No. 15 ¶ 8.) It can be reasonably inferred from this volume that there are hundreds, if not thousands, of California consumers who have purchased Defendant's slings. *See Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 588 (C.D. Cal. 2011) ("sales volume in California would support a finding that Plaintiff met her burden of establishing numerosity"). Defendant does not dispute that the putative class satisfies the numerosity requirement. Likewise, Defendant raises no argument concerning the adequacy of Plaintiff or class counsel. Based on the evidence before it, and drawing all reasonable inferences therefrom, the Court concludes Plaintiff has satisfied these two requirements. *Algarin*, 300 F.R.D. at 456–57 (finding numerosity and adequacy satisfied where defendant did not dispute the requirements).

B. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). Commonality is satisfied where claims "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, Inc.*, 564 U.S. at 350. The plaintiff's burden for showing commonality is "minimal." *Hanlon*, 150 F.3d at 1020. Accordingly, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* at 1019.

Plaintiff identifies the following as questions common to the class: (1) whether Defendant misrepresented the characteristics and durability of its slings; and, if so, (2) whether those misrepresentations violate the UCL, FAL, CLRA, and Song-Beverly Act. (Doc. No. 41-1 at 15–16.) Defendant's commonality argument essentially boils down to Plaintiff's inability to prove his claims by common proof. (*See* Doc. No. 51 at 15–19.)

Defendant's arguments are unavailing in that Defendant appears to conflate the permissive standard of commonality with the more rigorous standard of predominance. Whether Plaintiff's claims are susceptible to classwide proof is relevant only to whether common questions predominant over individual questions. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) ("the individualized issues [defendant] raised go to [predominance] under Rule 23(b)(3), not to whether there are common issues under Rule 23(a)(2)"). Here, there can be no question that Plaintiff's success will turn on the truth or falsity of the challenged statements. In other words, the question of whether Defendant's statements are false or misleading "is central to the validity of each one of [Plaintiff's] claims," the answer to which will "drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (citation omitted).

The Court therefore finds that Plaintiff has satisfied commonality. This is not to say, however, that Defendant's contentions are irrelevant. Rather, they are more appropriately addressed to the issue of whether Plaintiff has satisfied predominance and will accordingly be considered to assess Plaintiff's showing on that requirement.

C. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members of the class have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured in the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted). Because this is a "permissive" requirement, it is satisfied if the

representative parties' claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020.

Defendant argues Plaintiff's claims are not typical because he decided to purchase a Drive sling after conducting research on patient slings and reading the statements at issue in this litigation on Defendant's website. (Doc. No. 51 at 20.) Defendant claims this renders Plaintiff's claims atypical because the way in which he obtained his sling "occurs in less than one percent of purchases" as most patients "do not view or rely on the representations at issue or even make a choice about what sling they receive or [] pay for it directly." (*Id.*) Defendant also argues Plaintiff's purchase of a Drive sling with a commode opening renders his claims atypical of those who purchased a non-commode model because slings with commode openings "may require more frequent machine washing and drying than a sling that is not designed for toileting." (*Id.* at 20–21.)

These arguments miss the mark. "In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiff's legal theory . . . ." *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) (citation and internal quotation marks omitted). Furthermore, "individual experience with [a] product is irrelevant" because "the injury under the UCL, FAL, and CLRA is established by an objective test. 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.'" *Bruno v. Quten Res. Inst., LLC*, 280 F.R.D. 524, 534 (C.D. Cal. 2011) (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009)).

The Court finds that Plaintiff's claims are typical of the class. He alleges the class has been injured by uniform conduct, to wit, Defendant's allegedly false representations. Defendant made the same representations with respect to each of the four sling models at issue, whether the sling featured a commode opening or not. Given that the typicality inquiry focuses on Defendant's conduct, this is sufficient to satisfy the "permissive" requirement. That Plaintiff may have conducted his own research on patient slings prior

to purchasing one does not alter the Court's conclusion because this conduct does not subject Plaintiff to a unique defense that threatens to become the focal point of the litigation. *Hanon*, 976 F.2d at 508 ("a named plaintiff's motion for class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it" (citation and internal quotation marks omitted)). Accordingly, the Court finds Plaintiff has satisfied typicality.

II. Requirements of Rule 23(b)(3)

"In addition to meeting the conditions imposed by Rule 23(a), the party seeking class certification must also show that the action is appropriate under Rule 23(b)(1), (2) or (3)." *Astiana*, 291 F.R.D. at 503 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). Certification under Rule 23(b)(3), the subsection under which Plaintiff seeks certification, is appropriate only where the plaintiff establishes that (1) issues common to the class predominate over issues affecting individual class members; and (2) the class action device is superior to other methods available for adjudicating the dispute. Fed. R. Civ. P. 23(b)(3); *Hanlon*, 150 F.3d at 1022.

A. Predominance

Predominance requires the class to be sufficiently cohesive to warrant adjudication by representation. *Amchem Prods., Inc.*, 521 U.S. at 623. This inquiry is more stringent than the commonality requirement of Rule 23(a)(2). Indeed, the analysis under Rule 23(b)(3) "presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2)[.]" *Hanlon*, 150 F.3d at 1022.

Plaintiff argues that all of the proposed class members were subject to the same statements by Defendant regarding the characteristics and durability of Drive slings, and therefore common questions predominate over any individualized questions. Specifically, Plaintiff argues that the statements' veracity and whether those statements violate the California consumer protection laws are susceptible to classwide proof. (*See* Doc. No. 41-1 at 15–27.) Defendant counters that Plaintiff cannot establish the statements' veracity or Plaintiff's claims with common proof due to numerous factual issues related to

materiality, reliance, and exposure. (Doc. No. 51 at 15–19, 23–25.)

1. UCL, FAL, CLRA, and Common Law Claims

As an initial matter, the parties do not dispute that Plaintiff's claims brought under the UCL, FAL, CLRA, and California common law require some showing of reliance upon the misrepresentations.[3] If plaintiffs were required to prove individual reliance in all class actions brought under these statutes, class certification would never be possible as individual issues would always predominant over issues common to the class. Fortunately for Plaintiff, the California consumer protection laws permit plaintiffs to invoke a presumption of reliance. To do so, Plaintiff must show that (1) the misrepresentation was material; and (2) the class as a whole was exposed to it. *Tobacco II*, 46 Cal. 4th at 312, 326–28 (UCL and FAL); *Algarin*, 300 F.R.D. at 453 (CLRA). California common law also permits a presumption of reliance "when the same material misrepresentations have actually been communicated to each member of a class[.]" *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993) (emphasis omitted). Omissions are similarly actionable if the plaintiff shows that, "had the omitted information been disclosed, one would have been aware of it and behaved differently." *Id.* at 1093.

a. Materiality

Plaintiff contends he has satisfied his burden on both prongs. He first argues "there is little doubt that the aspects of the sling at issue in this lawsuit—[] that the slings cannot

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[3] Technically, UCL plaintiffs need not prove that each class member relied on the allegedly fraudulent misrepresentations. Rather, California law requires plaintiffs "show that members of the public are likely to be deceived." *Tobacco II*, 46 Cal. 4th at 312 (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002)) (internal quotation marks omitted). As such, Plaintiff need only show that the reasonable consumer is likely to have been deceived by the challenged business practices or advertising. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). From a practical standpoint, Plaintiff's burden under the UCL operates similarly to the presumption of reliance under the CLRA. *See Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 230–31 (N.D. Cal. 2015) ("the question of consumer deception still requires a showing of reliance" (citing *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 (2011))).

be machine dried, have straps constructed from *polypropylene* (not 'polyester'), and have a useful life of [] *six months or less* (not 'years')—would be material to a reasonable consumer." (Doc. No. 41-1 at 18) (emphasis in original). Plaintiff analogizes the first two statements to the "wearable textile good" context, in which the Federal Trade Commission has promulgated regulations requiring garment manufacturers to provide care instructions, information on the textiles used, and warnings that a "prescribed regular care procedure" would harm the garment. (*Id.* at 18–19.) With respect to the last statement, Plaintiff argues that a representation regarding the safe useful life of the slings is material, stating "[i]t perhaps suffices to say that a decrease of at least 75% of the useful life of a product would be material to a reasonable consumer[.]" (*Id.* at 20.)

It is true that materiality is judged by an objective standard. Specifically, a misrepresentation is "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question[.]" *Tobacco II*, 46 Cal. 4th at 327 (quoting *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 976–977 (1997)). The objective nature of this test renders materiality particularly susceptible to common proof. However, in light of the evidence showing that a sizeable percentage of the putative class did not consider the representations at issue, the Court finds the issue of materiality in this case is not subject to common proof. Indeed, the evidence offered by Defendant suggests that the statements were not material to home healthcare providers, who chose patient slings for *99%* of the putative class.

According to declarations from home healthcare providers,[4] end users and their

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[4] Defendant provided six declarations from various employees of home healthcare providers in support of its opposition: Luke McGee, CEO of QMES LLC, (Doc. No. 51-5 ¶ 1); John Gvodis, Regional President and founding partner of Triad Medical, (Doc. No. 51-6 ¶ 1); Anna Marie Patch, Vice President of Reimbursements for Maverick Healthcare Holdings, II, Inc. (Doc. No. 51-7 ¶ 1 ["Patch Decl."]); Vahag Kolsuzyan, VP Operations of LA Medical Wholesaler, (Doc. No. 51-8 ¶ 1 ["Kolsuzyan Decl."]); Steve Yaeger, Chief Operating Officer of Calox, (Doc. No. 51-9 ¶ 1 ["Yaeger Decl."]); and John

physicians rarely play a role in choosing which sling is ultimately provided. Rather, a doctor or other medical professional will write a prescription for a patient for a sling and lift. (Patch Decl. ¶ 4; Kolsuzyan Decl. ¶ 7; Yaeger Decl. ¶ 5.) That prescription will include pertinent information about the patient (*e.g.*, the patient's height and weight) and the patient's needs (*e.g.*, whether the patient needs neck support or a commode opening). (Patch Decl. ¶ 4; Kolsuzyan Decl. ¶ 7; Yaeger Decl. ¶ 5.) Doctors will rarely, if ever, designate a sling by manufacturer. (Patch Decl. ¶ 4.)

Upon receipt of a prescription, the provider will select an appropriate sling from its inventory based on the patient's information and needs and what the provider has in stock at the time. (Patch Decl. ¶ 5; Kolsuzyan Decl. ¶ 8; Yaeger Decl. ¶ 6.) Neither the sling's brand, care instructions, nor sling materials factor into the providers' decision of which sling is provided to the patient.[5] (Patch Decl. ¶ 5; Kolsuzyan Decl. ¶ 8; Yaeger Decl. ¶ 6.) Once selected, the provider will deliver the sling to the patient's home. (Patch Decl. ¶ 7; Kolsuzyan Decl. ¶ 9; Yaeger Decl. ¶ 8.)

This expert evidence demonstrates that materiality varies markedly between consumers who, like Plaintiff, conduct their own research and purchase Defendant's slings from third-party retailers and those whose slings are chosen by home healthcare providers. *See Algarin*, 300 F.R.D. at 457 (finding plaintiff failed to carry his burden "[i]n light of the objective evidence showing that there was a substantial number of class

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Parnes, CEO of Ocean Medical Health, (Doc. No. 51-10 ¶ 1). However, only three of these six companies operate within California. (Patch Decl. ¶ 2; Kolsuzyan Decl. ¶ 2; Yaeger Decl. ¶ 2.) It is therefore not clear to the Court how the declarations of McGee, Gvodis, and Parnes are relevant to this action. Accordingly, the Court will consider only the declarations of Patch, Kolsuzyan, and Yaegar.

[5] At the hearing on this matter, Plaintiff questioned the veracity of the declarants' statements that care instructions are irrelevant in their decisions concerning which brands' slings will be stocked and provided to end users, suggesting they would give a different opinion if questioned on this subject at a deposition under oath. The Court notes that each declaration is given under penalty of perjury. Plaintiff offered nothing more than counsel's speculation to attempt to undermine the declarants' truthfulness.

members who were not misled by the [challenged] claim"); *see also Saavedra v. Eli Lilly & Co.*, No. 2:12-CV-9366-SVW (MANx), 2014 WL 7338930, at *8 (C.D. Cal. Dec. 18, 2014) ("Physicians' roles in prescribing [the product] further attenuates the causation and materiality inquiries."). As such, the Court finds Plaintiff has failed to carry his burden of "offer[ing] some means of proving materiality and reliance by a reasonable consumer on a classwide basis . . . ." *Kosta*, 308 F.R.D. at 225.[6]

b. Classwide Exposure

Having found Plaintiff has failed to carry his burden of showing that materiality is capable of common proof, the Court need not continue the analysis. The Court will nonetheless consider Plaintiff's argument concerning classwide exposure. Plaintiff sets forth two arguments that he contends satisfy his burden on this point: (1) the statements are appropriately viewed as omissions (as opposed to affirmative misrepresentations); or (2) when viewed as misrepresentations, exposure may be inferred because (a) there was classwide access to the misrepresentations, and (b) there is a reasonable basis to infer that the average class member would seek out the information prior to making their purchase. (Doc. No. 41-1 at 20–27.)

Plaintiff's first contention carries no clout. As an initial matter, Defendant is correct that the vast majority of Plaintiff's claims are couched in terms of affirmative misrepresentations. It would be inappropriate to certify a class based on a theory of

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[6] Based on this conclusion, the Court need not reach Defendant's alternative argument that Plaintiff has failed to show the statements are susceptible to a common understanding. (Doc. No. 51 at 16.) If the Court were to reach this argument, it would easily be rejected. The cases requiring a common understanding are largely decided in the context of food mislabeling claims seeking restitution for phrases such as "All Natural." *See, e.g.*, *Astiana*, 291 F.R.D. at 508. The Court is not persuaded that phrases such as "the sling is made of polyester" or "the sling will provide years of dependable service" are subject to wildly divergent definitions such that Plaintiff's failure to present a uniform definition would be fatal to his claims. *See id.* at 504 (stating the phrase "'Nothing Artificial' has a clearly ascertainable meaning; namely, that the product contains no artificial or synthetic ingredients").

liability not advanced in the SAC.[7] But even if the Court were to subscribe to Plaintiff's view, omissions are actionable only if the plaintiff shows that, "had the omitted information been disclosed, *one would have been aware of it* and behaved differently." *Mirkin*, 5 Cal. 4th at 1093 (emphasis added). Accordingly, viewing the misrepresentations as omissions would still require Plaintiff to show classwide exposure to the source of the information (*e.g.*, to the hangtag and label) prior to purchase.

This Plaintiff cannot do. The home healthcare providers attest that the vast majority of putative class members receive their slings through providers. As such, those class members are not exposed to the statements at issue prior to purchase.[8] Where the evidence shows that "some [class members] may not have relied on, *or even been exposed to*, any of the allegedly false representations[,]" *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 623 (S.D. Cal. 2007) (emphasis added), presuming reliance is inappropriate, *see Berger*, 741 F.3d at 1068 ("class certification of UCL claims is available only to those class members who were actually exposed to the business practices at issue" (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020–21 (9th Cir. 2011))); *Mazza*, 666 F.3d at 596 ("common issues of fact would not predominate in the class as currently defined because it almost certainly includes members who were not exposed to, and therefore could not have relied on, [defendant's] allegedly misleading

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[7] While Plaintiff's sixth cause of action is predicated on a concealment theory, that does not change the fact that the vast majority of his claims are based upon affirmative misrepresentations.

[8] Plaintiff contends that, as agents of the end users, the providers' exposure to the statements can be attributed to the putative class members. (Doc. No. 52 at 5–8.) Even if agency principles apply in this context, presuming reliance would be inappropriate because the evidence shows that the providers do *not* rely on the statements, choosing patient slings without regard to manufacturer or care instructions. *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009) ("if the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action" (citing *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993))).

advertising material").[9]

Plaintiff's second argument—that classwide exposure may be inferred via his proffered two-step process—is similarly unavailing. First, Plaintiff offers no legal authority to support this process of establishing classwide exposure. Second, the process presupposes that the Court will conclude the statements are material. Yet this is a conclusion the Court does not reach at this stage of the litigation. *See Johns v. Bayer Corp.*, 280 F.R.D. 551, 558–59 (S.D. Cal. 2012) (stating the issue of materiality "is a question of fact to be determined at a later stage"); *Astiana*, 291 F.R.D. at 505 ("Although Defendant calls into question Plaintiffs' evidence tending to show [] materiality of the representation . . . , the ultimate determination is to be made by the trier of fact."). Finally, case law suggests that those who seek to invoke the presumption must show the statements were actually made to the class. *See Mirkin*, 5 Cal. 4th at 1095 (stating the presumption may be invoked "when the same material misrepresentations have *actually* been communicated to each member of a class" (emphasis omitted)). Plaintiff's position would have the Court assume exposure in order to assume reliance. This is an inferential leap the Court is disinclined to take.

In sum, the Court finds that Plaintiff has failed to show the issues of materiality and classwide exposure are susceptible to common proof. Presuming reliance is therefore not appropriate. *See Stearns*, 655 F.3d at 1022–23 ("If the misrepresentation or omission is not material as to all class members, the issue of reliance 'would vary from consumer to consumer' and the class should not be certified." (quoting *Vioxx*, 180 Cal. App. 4th at 129)), *abrogated on other grounds by Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Without the presumption, individualized issues of reliance predominant over the common

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[9] Plaintiff suggested at the hearing on this matter that it would be permissible for the Court to extend the "exposure period" to thirty days after purchase based upon the Song-Beverly Act's provision of a thirty-day return window. Plaintiff, however, provided no support for the proposition that one statute's return window is relevant to the classwide exposure inquiry for claims brought under other statutes.

questions. On this basis, the Court **DENIES** Plaintiff's motion for class certification of his claims arising under the UCL, FAL, CLRA, and California common law.[10] [11]

2. Song-Beverly Act Claims

That Plaintiff has failed to carry his burden on his UCL, FAL, CLRA, and California common law claims does not end the inquiry because Plaintiff also brings claims under the Song-Beverly Act, in which he alleges breach of the implied warranties of merchantability and fitness for a particular purpose. (Doc. No. 15 ¶¶ 91–109.) Plaintiff argues there is no issue of reliance with respect to these claims because "warranty claims do *not* require proof of reliance." (Doc. No. 41-1 at 26.) Defendant does not dispute this point, but instead argues that the applicability of the Song-Beverly Act is not a common question because the vast majority of the class's purchases were not through "sales at retail." (Doc. No. 51 at 19.)

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[10] At the hearing on this matter, Plaintiff suggested that a narrower class of consumers who purchased Drive slings directly from retailers would constitute a certifiable class. While the presumption of reliance could conceivably be invoked with respect to such a class, it would nonetheless founder on the damages issue discussed *infra* in Discussion Section II.A.3.

[11] For the same reason, the Court is skeptical that the class is ascertainable. While not delineated in Rule 23, courts have generally required a party seeking class certification to demonstrate that the putative class is ascertainable. *See McCrary v. Elations Co.*, No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, at *3 (C.D. Cal. Jan. 13, 2014). A class is ascertainable if it is "administratively feasible for the court to determine whether a particular individual is a member" using objective criteria. *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 521 (C.D. Cal. 2012) (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)). While it is conceivable that consumers in this case can be identified through Defendant's records, as Plaintiff contends, it is not readily apparent from those records which consumers were actually exposed to the representations and thus a class member. This fact distinguishes the instant matter from the certifiable class in *Astiana*. There, the court found the class certifiable because "there [was] no concern that the class includes individuals who were not exposed to the misrepresentation." *Astiana*, 291 F.R.D. at 500. In contrast, the Court has grave concerns that the class here is mostly comprised of consumers who were never exposed to the alleged misrepresentations. *See supra* Discussion Section II.A.1.b.

The Court first considers Plaintiff's position that reliance is not an element of his Song-Beverly Act claims. Plaintiff relies upon two cases for this proposition. (Doc. No. 41-1 at 26) (citing *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 974 (N.D. Cal. 2014); *Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1230 (2010)). However, these cases are not instructive. While they state that reliance is not an element of an *express* warranty claim, they are silent on the role of reliance in *implied* warranty cases.

That reliance is a necessary element of Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose cannot reasonably be disputed. To prevail on this claim, Plaintiff must allege that "(1) at the time of purchase, the buyer intended to use the product for a particular purpose; (2) the seller had reason to know this; (3) the buyer *relied* on the seller's judgment to select suitable goods for that purpose; (4) the seller had reason to know that the buyer was relying on seller in this way; and (5) the product failed to suit buyer's purpose and subsequently damaged the buyer." *Smith v. LG Elecs. U.S.A, Inc.*, No. C 13-4361 PJH, 2014 WL 989742, at *7 (N.D. Cal. Mar. 11, 2014) (citing *Keith v. Buchanan*, 173 Cal. App. 3d 13, 25 (1985)) (emphasis added). Plaintiff seemingly acknowledges the need to establish reliance in his SAC. (*See* Doc. No. 15 ¶ 105) ("Plaintiff justifiably relied on Drive's skill and judgment").

Given Plaintiff's need to ultimately prove reliance, the Court's discussion of the UCL, FAL, CLRA, and California common law claims applies with equal force to this claim. The issue is further compounded by the fact that Plaintiff has offered no manner by which he can establish through common proof Defendant's knowledge of the class's particular purpose for the Drive slings. As the California appellate court noted in *Metowski v. Traid Corp.*,

> Each of the[] elements [for this claim] may be established only by testimony from each purchaser as to what his intended purpose was, whether he relied on defendant's skill and judgment, whether defendant had reason to know of his particular purpose and his reliance. There is no common method by which each class member's reliance and defendant's knowledge of this reliance and

the intended purpose may be proved.

28 Cal. App. 3d 332, 341 (1972). Accordingly, the Court **DENIES** Plaintiff's motion for class certification of his claim for breach of the implied warranty of fitness for a particular purpose.

The Court, however, agrees with Plaintiff that reliance does not appear to be an element of his claim for breach of the implied warranty of merchantability. *See Smith*, 2014 WL 989742, at *7 ("to prevail on an implied warranty of merchantability claim, the plaintiff must demonstrate that the alleged defect renders the subject goods unfit for their ordinary purpose" (citing *S. Cal. Stroke Rehab. Assocs., Inc.*, 782 F. Supp. 2d 1096, 1112 (S.D. Cal. 2011))); *see also Guttmann v. La Tapatia Tortilleria, Inc.*, No. 15-CV-02042-SI, 2015 WL 7283024, at *4 n.2 (N.D. Cal. Nov. 18, 2015) ("Causes of action for breach of express warranty and breach of implied warranty of merchantability do not appear to require proof of reliance as a separate element." (citing *Holmes Packaging Mach. Corp. v. Gingham*, 252 Cal. App. 2d 862, 876 (1967))).

Defendant argues certification is inappropriate because "the issue of whether [Defendant] violated the Song-Beverly [Act] is not a common question." (Doc. No. 51 at 19.) Defendant's position hinges on the meaning of sales "at retail." The Song-Beverly Act applies only to "sale[s] of consumer goods that are sold at retail in [California.]" Cal. Civ. Code § 1792. Defendant argues the vast majority of slings reach end users through home health care providers who fill prescriptions, and that this type of transaction is not a retail sale. (Doc. No. 51 at 19.)

The Court need not reach the merits of Defendant's position because it is just that: a merits inquiry. Whether Plaintiff can ultimately prevail on establishing that the filling of a prescription and delivery of a sling to the end user constitutes a "sale at retail" is purely a question going to the merits of Plaintiff's claim which may not be adjudicated at this stage of the litigation. Rather, the proper inquiry is whether this issue is susceptible to classwide proof. The Court finds that it is. The proof needed to establish whether this type of transaction falls within the Song-Beverly Act's definition of a "sale at retail" will

be the same across each transaction. As such, Plaintiff's showing on one filled prescription will be identical to his showing on all filled prescriptions. The Court therefore concludes that Defendant's argument is not an obstacle to class certification of Plaintiff's claim for breach of the implied warranty of merchantability.

3. Damages

Plaintiff next argues that class recovery can be resolved on a classwide basis, either by permitting full refunds to the class or under a price premium model, *e.g.*, refund of the price the class paid that can be attributed to the statements at issue. (Doc. No. 41-1 at 27–30; Doc. No. 52 at 10.) In *Comcast Corp. v. Behrend*, the Supreme Court made clear that a plaintiff who seeks to represent a putative class must present a damages model that ties the defendant's conduct at issue to a method of measurement that is consistent with his liability case. 133 S. Ct. at 1433–35. Failure to do so renders the plaintiff unable to meet the predominance requirement. *See id.* at 1435.

Plaintiff first argues that a full refund is appropriate because it "is consistent with [his] overarching allegation that neither he nor any of the class members would have purchased a Drive sling but for [Defendant's] misrepresentations regarding material aspects of the sling." (Doc. No. 41-1 at 27.) Defendant counters that a full refund is inappropriate because "there is no evidence showing class members received no benefit from their Drive slings." (Doc. No. 51 at 26.)

The Court agrees with Defendant. Plaintiff is accurate in his observation that the Court has broad discretion to craft an appropriate remedy. *See Makaeff v. Trump Univ., LLC*, 309 F.R.D. 631, 637 (S.D. Cal. 2015). However, that broad discretion must be exercised to ensure the relief is not an arbitrary measurement and comports with the plaintiff's theory of liability. *Id.* at 637, 640; *see also Comcast*, 133 S. Ct. at 1433 (rejecting the contention that, "at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be"; rather, "any model supporting a plaintiff's damages case must be consistent with its liability case" (citation and internal quotation marks omitted)).

Courts generally permit full recovery where the plaintiff's theory of liability is that the product (1) is completely valueless, or (2) the fraud in the selling induced the plaintiff to purchase a product he otherwise would not have purchased. *See F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) (per curiam) (full refunds appropriate where plaintiffs sought redress for "the amount consumers spent on the heat detectors that would not have been spent absent Figgie's dishonest practices"); *Ortega v. Natural Balance, Inc.*, 300 F.R.D. 422, 430 (C.D. Cal. 2014) (full refunds appropriate where dietary supplement "was valueless because it provided none of the advertised benefits and was illegal").

Here, Plaintiff does not argue that the slings are completely valueless. Nor could he. As Plaintiff acknowledges, the slings have a safe useful life of six months. That the sling can be used for six months certainly provides the class with some benefit, even if it falls short of the purported promise of providing "years of dependable service." *See Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK (VBKx), 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) (stating a full refund is "only [] appropriate if not a single class member received any benefit from the products"); *In re POM Wonderful LLC*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *2–3 & n.2 (C.D. Cal. Mar. 25, 2014) (decertifying class, concluding that a full refund model was inappropriate because it failed to account for other value consumers received from the product).

Furthermore, the Court is not persuaded by the argument Plaintiff does make. Plaintiff argues that had it not been for Defendant's statements, he would not have purchased a *Drive* sling. Plaintiff, however, does not argue that he would not have purchased *any* sling. The Court finds this distinction dispositive. In finding full refunds appropriate, the Ninth Circuit in *Figgie* analogized the situation before it—the purchase of heat detectors—to a hypothetical counterfeit diamond case. 994 F.2d at 606. The Court noted that limiting recovery to the difference between the price paid and the value of the object received would be inequitable because "had [purchasers] been told the truth, perhaps they would not have bought rhinestones at all or only some." *Id.* Unlike

counterfeit diamonds or heat detectors, Plaintiff cannot argue that absent Defendant's statements, Plaintiff and the putative class would not have purchased a sling *at all*. Given the nature of patient slings, class members likely would have purchased another manufacturer's sling.[12] As such, the Court finds it would be inequitable to permit the class to seek full refunds.

Plaintiff's alternative theory of damages based on a price premium model hardly warrants discussion. Certainly, "[t]he difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution. In order to recover under this measure, there must be evidence of the actual value of what the plaintiff received." *Vioxx*, 180 Cal. App. 4th at 131 (citations omitted). Plaintiff asserts he "would propose to conduct interactive consumer surveys that measure the price premium a consumer paid based on a product's inclusion of a false representation or the omission of a material representation." (Doc. No. 41-1 at 29.)

Plaintiff, however, has not actually proposed a consumer survey. He does not support his theory of recovery with an expert declaration. Plaintiff's position is far less developed than that in *Saavedra v. Eli Lilly & Co.* where the district court readily denied class certification based on the plaintiffs' failure to present a method of calculating damages based on a price premium theory. 2014 WL 7338930, at *7. Although the plaintiffs supported their theory with an expert declaration, the court noted that the expert "has yet to design the survey and method he will use in his [] analysis." *Id.* at *6. Like the plaintiffs in *Saavedra*, Plaintiff here "ha[s] done worse than not even advancing a reliable method of calculating classwide damages—[he has] advanced 'no damages model at

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[12] The Court is skeptical that the statements had any impact on the brand of sling purchased for those whose slings were chosen by home healthcare providers. As each of the providers state in their declarations, slings are considered "commodity items" that do not differ significantly between brands. (Patch Decl. ¶ 3; Kolsuzyan Decl. ¶ 6; Yaeger Decl. ¶ 4.) As such, the slings' brands play little role in the providers' decision of which brands to carry. (*Id.*)

all.'" *Id.* (quoting *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552 (C.D. Cal. 2014)). As such, permitting Plaintiff to proceed on a price premium model would be inappropriate. *See Comcast*, 133 S. Ct. at 1433 (stating plaintiff must propose a damages model that "measure[s] damages resulting from the particular [] injury on which [his] liability in this action is premised").

Based on the foregoing, the Court finds Plaintiff's failure to present a damages model that is consistent with his theory of liability is fatal to his class certification motion. As such, the Court **DENIES** Plaintiff's motion with respect to his claim for breach of the implied warranty of merchantability.[13]

B. Superiority

Plaintiff argues a class action is the superior method of adjudicating this controversy due to the relatively minimal retail price of Drive slings, which cost, on average, about $160. (Doc. No. 41-1 at 30–31.) Plaintiff's position, however, assumes that common issues predominate. (*Id.* at 30.) Defendant counters that a class action is not superior, focusing on the potential unmanageability of a certified class. (Doc. No. 51 at 30.)

Superiority requires consideration of the following: (1) the interest of individuals within the class in controlling their own litigation; (2) the extent and nature of any pending litigation commenced by or against the class involving the same issues; (3) the convenience and desirability of concentrating the litigation in the particular forum; and (4) the manageability of the class action. Fed. R. Civ. P. 23(b)(3)(A)–(D); *Amchem Prods., Inc.*, 521 U.S. at 615–16.

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[13] At the hearing, Plaintiff requested an additional opportunity to present a viable damages model. The Court finds granting this request inappropriate. Plaintiff had ample time to prepare the instant motion following the deadline for completing discovery related to class certification. (Doc. Nos. 32, 35.) *Comcast* is not new law, and Plaintiff should have been well aware of his duty to present an appropriate damages model at this stage of the litigation.

There is no suggestion that other lawsuits have been filed against Defendant for the conduct at issue in this case. Furthermore, this "case involves multiple claims for relatively small individual sums." *Astiana*, 291 F.R.D. at 507. These facts suggest that a class action is the superior method of adjudication. On the other hand, there is nothing to suggest that it is convenient or desirable to concentrate the litigation in the Southern District of California. In addition, and most importantly, the myriad individual issues that predominant over the common questions render a class action in this case "not a superior method of adjudicating the controversy." *Algarin*, 300 F.R.D. at 461. On balance, the Court finds that Plaintiff has failed to show class treatment is superior.

CONCLUSION

For the foregoing reasons, Plaintiff Tony Mezzadri's motion for class certification is **DENIED**. (Doc. Nos. 41, 46.) Counsel for the parties are **ORDERED** to contact Judge Bartick to set a case management conference for final scheduling of the case.

IT IS SO ORDERED.

Dated: May 12, 2016

Hon. Anthony J. Battaglia
United States District Judge