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

Case No.	**CV 14-7242-DMG (KSx)**	Date	June 23, 2016
Title	***Stacey Pierce-Nunes, et al. v. Toshiba America Information Systems, Inc., et al.***	Page	1 of 14

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER RE PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [169, 179, 180, 188]

This matter is before the Court on Plaintiff Aurelio Diaz's motion for class certification [Doc. ## 169, 179, 180.] The Court held a hearing on the motion on June 17, 2016. Having duly considered the parties' written submissions and oral argument, the Court now renders its decision. For the reasons set forth below, Diaz's motion for class certification is **DENIED**.

I.
PROCEDURAL BACKGROUND

On July 7, 2015, Plaintiff Aurelio Diaz, on behalf of himself and all others similarly situated, filed the operative Second Amended Complaint ("SAC") alleging violations of the (1) California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"); (2) California False Advertising Law, Cal. Bus & Prof. Code § 17500 *et seq.* ("FAL"); (3) California Consumers Legal Remedies Act, Cal. Civil Code § 1750 *et seq.* ("CLRA"); and (4) Florida Deceptive and Unfair Trade Practices Act, F.S.A. § 501.201 *et seq.*[1] [Doc. # 101.] The SAC alleges that Defendants Toshiba America Information Systems, Inc., Toshiba Corporation, and Toshiba Lifestyle Products & Services Corporation falsely marketed and advertised Toshiba-brand televisions as "LED TVs," "LED HDTVs," or "LED televisions." (*Id.* ¶ 2.) On March 18, 2016, Diaz filed a motion for class certification ("Class Cert."). [Doc. ## 169, 179, 180.] On April 15, 2016, Defendants filed their opposition. [Doc. # 181.] On May 13, 2016, Diaz filed his reply. [Doc. ## 187, 200, 201.]

[1] On February 4, 2016, the Court granted Plaintiff Stacey Pierce-Nunes' request for voluntary dismissal. [Doc. # 155.] Diaz is the only remaining named plaintiff in this putative class action.

II.
FACTUAL BACKGROUND

A. The Parties

Defendants distribute, market, and direct the marketing of Toshiba-brand "LED TVs" throughout the United States. (SAC ¶¶ 10-12.)

Plaintiff Aurelio Diaz is a Florida resident who purchased a Toshiba-brand "LED TV" for personal use on or around September 10, 2012 from Best Buy. (*Id.* ¶ 8; Declaration of Sean A. Commons in support of Defendants' Opposition to the Motion For Class Certification ("Commons Decl."), Ex. 2 (Plaintiff Aurelio Diaz's Supplemental Response to Defendant Toshiba America Information Systems, Inc.'s First Set of Special Interrogatories) at 4:8-9 [Doc. # 182-2].)

B. The Marketing of LED Televisions[2]

Diaz alleges that what Defendants market as "LED TVs" is misleading because Defendants fail to disclose that its references to light emitting diodes ("LEDs") refer to the light source that illuminates the LCD panel, rather than the display technology itself. (SAC ¶ 4.) In order to understand Diaz's claims, some background on television display technology is helpful.

In the early to mid-2000s, television manufacturers introduced flat panel, liquid crystal display ("LCD") televisions, known as LCD TVs, to compete with Plasma TVs. (SAC ¶ 34.) In an LCD TV, the LCD is lit by a separate source of light. (*Id.* ¶ 35.) Initially, all manufacturers of LCD TVs primarily used cold cathode fluorescent lights ("CCFLs") as the light source to illuminate the LCD panel ("CCFL-lit LCD TV"). (*Id.* ¶ 38.) Manufacturers thereafter began using LEDs as the light source ("LED-lit LCD TV"). (*Id.* ¶ 39.) According to Diaz, the "introduction of a different light source did **not** change the manner in which LCD panels and LCD TVs generate the screen image." (*Id.* (emphasis in original).)

In the summer of 2009, Defendants introduced their first LCD TV with an LED light source. (*Id.* ¶ 41.) Defendants advertised the televisions as LCD TVs. (*Id.* ¶ 43.) The LED-lit LCD TVs were priced higher than comparable CCFL-lit LCD TVs and did not sell well. (*Id.* ¶

[2] At this stage of the proceedings, the Court must accept the factual allegations in the complaint as true. *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975).

44.) At the time, other television market leaders—such as Samsung and Best Buy—began advertising LED-lit LCD TVs as LED TVs. (Declaration of Scott Ramirez in support of Defendants' Opposition to the Motion for Class Certification ("Ramirez Decl.") ¶ 4 [Doc. # 183].) Defendants decided to follow the trend and began marketing their LED-lit LCD TVs as LED TVs. (SAC ¶ 46.) The result of the marketing campaign was both "immediate and dramatic" as LED-lit LCD TVs "became the leader of the industry" and dominated the "LCD TV market as well as the overall flat panel television market." (*Id.* ¶ 48.) By 2012, approximately 51% of all LCD TVs sold in the United States used LED backlighting and, by 2013, this number increased to approximately 84%. (*Id.* ¶ 18.)

C. Diaz's Allegations and Proposed Classes

Diaz alleges that he and other consumers were led to believe that the televisions they purchased were not LCD TVs at all, but "an entirely different, improved, and technologically advanced class or species of television." (*Id.* ¶ 4.)[3] Diaz alleges that he would not have purchased or would have paid less for his television had the television not been falsely and deceptively advertised or had he known the truth. (*Id.* ¶ 62.)

In his motion, Diaz moves to certify the following nationwide class:[4]

> All persons who purchased, for personal use and not re-sale, within the United States, a Toshiba-brand LED-lit LCD television on or after January 1, 2010 up through any trial of this matter. The proposed class excludes any person or entity related to or affiliated with Toshiba or who purchased such televisions for re-sale (e.g., retailers) and any assigned judicial officer or staff and their immediate families.

(Class Cert at 10.)[5]

[3] Actual LED TVs, which use an LED display, are available for sale, but at prices not accessible to mainstream consumers. (SAC ¶ 55.) Defendants do not market actual LED TVs. (*Id.* ¶ 56.)

[4] In the alternative, Diaz moves to certify a Rule 23(b)(2) nationwide injunctive-relief class, or a Rule 23(c)(4) issue or Rule 23(b)(3) state-specific class. (Class Cert. at 9.) Because Diaz fails to meet the requirements under Rule 23(a), the Court declines to address these alternatives.

[5] Diaz now identifies the television boxes at issue by providing an "incomplete" list of known Toshiba-branded LED TV models which he claims are within the class definition. (Declaration of Gilbert Lee in Support of

Diaz also requests that he be appointed as the class representative, and that Jonathan Shub, Daniel Shulman, Francis Scarpulla, Hayward J. Kaiser, and Gilbert Lee be appointed as class counsel. (*Id.* at 12-13.)

III.
LEGAL STANDARD

A. Substantive Requirements of Rule 23

A district court has broad discretion in making a class certification determination under Rule 23. *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (district courts "have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23"). Nonetheless, a court must exercise its discretion "within the framework of Rule 23." *Navellier*, 262 F.3d at 941.

The following prerequisites must be met before a court may certify a class under Rule 23:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These prerequisites "ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Id.* (internal citation and quotation marks omitted).

If the Rule 23(a) requirements are satisfied, a plaintiff must also satisfy one of Rule 23(b)'s provisions. The main provision at issue here is Rule 23(b)(3). A class action may be

the Motion For Class Certification ("Lee Decl.") ¶¶ 7-11, Ex. 27 (Toshiba-Branded LED TV Models 2009-2014) [Doc. ## 170-22 – 170-27].)

maintained pursuant to Rule 23(b)(3) if (1) "questions of law or fact common to class members predominate over any questions affecting 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). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1182 (9th Cir. 2015) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). In order to meet the superiority requirement, a class action must be superior to any other methods of resolving the case. Fed. R. Civ. P. 23(b)(3).

B. Burdens and Standard of Proof

"The party seeking class certification bears the burden of establishing that the proposed class meets the requirements of Rule 23." *Edwards*, 798 F.3d 1172 at 1177; *see also Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 321 (C.D. Cal. 2015) ("More than a pleading standard, Rule 23 requires the party seeking class certification to affirmatively demonstrate compliance with the rule[.]") (internal citation, ellipsis, and quotation marks omitted). Certification is properly granted only after "a rigorous analysis [determining] that the prerequisites of Rule 23(a) have been satisfied." *Dukes*, 131 S. Ct. at 2551. A court ruling on a class certification "is merely to decide a suitable method of adjudicating the case" and "should not turn class certification into a mini-trial on the merits." *Edwards*, 798 F.3d at 1178 (internal citation and quotation marks omitted).

Neither the Supreme Court nor the Ninth Circuit has definitively set forth a specific standard of proof for Rule 23 determinations. *See Dukes*, 131 S. Ct. at 2551-52 (setting forth a "rigorous analysis" requirement without discussing a specific standard of proof); *Edwards*, 798 F.3d at 1178 (Rule 23 determinations "will inevitably touch upon the merits of plaintiffs' underlying . . . claims" but cautioning that a class certification should not become a "mini-trial on the merits") (internal citation and quotation marks omitted). Rather, the Ninth Circuit has stated that, "[w]hile some evaluation of the merits frequently 'cannot be helped' in evaluating [certifiability], that likelihood of overlap with the merits is 'no license to engage in free-ranging merits inquiries at the certification stage.'" *Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014) (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013)). "[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." *Id.* (quoting *Amgen*, 133 S. Ct. at 1194-95) (emphasis in original).

III.
DISCUSSION

Diaz asserts that the proposed class satisfies the elements of Rules 23(a) and 23(b)(3). The Court discusses each of these requirements in turn.

A. Rule 23(a)

1. Numerosity and Commonality

Defendants do not dispute that the proposed class meets the numerosity and commonality requirements.[6] Accordingly, the Court assumes, for the purpose of deciding this motion, that these two prerequisites are satisfied.

2. Adequacy

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (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?" *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1020) (9th Cir. 1998) (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

a. Named Plaintiff

Defendants contend that Diaz is not an adequate class representative because: (1) he is subject to an adverse inference for spoliation because he lost his receipt, (2) his credibility has been compromised because his interrogatory responses do not match his deposition testimony regarding his television purchase history, and (3) he is unfamiliar about the legal theories of the

[6] Defendants contend that there is no way to prove, with common evidence, which putative class members misunderstood "LED TV" as alleged in the SAC. (Opp. at 14.) The individualized issues raised by Defendants go to the predominance inquiry under Rule 23(b)(3), discussed *infra* Part.IV.B, and not to whether there are common issues under Rule 23(a)(2). *See Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (finding defendant's argument as to which consumers saw or heard which advertisements go to individualized issues under Rule 23(b)(3)); *see also In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 975 (C.D. Cal. 2015) ("[C]ontentions concerning 'materiality' and the need for individualized proof for reliance and causation are better addressed in assessing whether Rule 23(b)(3)'s predominance requirement is satisfied.").

lawsuit and confirmed that he would just defer to counsel. (Opp. at 23-24.) The Court finds these arguments unavailing.

"Only when attacks on the credibility of the representative party are so sharp as to jeopardize the interest of absent class members should such attacks render a putative class representative inadequate." *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010). The fact that Diaz does not have proof of his purchase will not put him in conflict with other class members because many class members may also lack receipts and can provide proof of purchase through other means such as possession of the actual product, credit card records, bank records, or store records. *See Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 540 (N.D. Cal. 2012) (finding plaintiffs' lack of documentation of their purchases does not create a conflict-of-interest because many class members will also lack receipts and can proceed on evidentiary proffer). Although Diaz's testimony does not match his interrogatory responses regarding the identity of "flat panel televisions" purchased since January 1, 2004, such discrepancies do not impact issues directly relevant to the litigation given that Diaz testified he did not purchase another LED TV. (Commons Decl., Ex. 1, Deposition of Aurelio Diaz ("Diaz Depo.") at 104:18-22, 105:5-6 [Doc. #182-1].) Thus, the contradictory statements made by Diaz are not sufficiently severe to undermine his ability to serve as class representative.

Lastly, Diaz has demonstrated sufficient familiarity with the basic elements of his claims. (*See* Commons Decl., Ex. 1, Diaz Depo. at 168:1-10.) Diaz also made himself available for a deposition and testified that that he has reviewed "several hundred pages" of documents related to the case. (Reply Declaration of Gilbert Lee in support of Motion For Class Certification ("Reply Lee Decl."), Ex. 39, Diaz Depo. at 14:25-15:7 [Doc. # 187-3].) A named plaintiff can be an adequate representative if he merely "understands his duties and is currently willing and able to perform them. The Rule does not require more." *Local Joint Exec. Bd of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir.2001). The Court rejects Defendants' contentions that Diaz is an inadequate class representative on the basis of these arguments.

b. Class Counsel

The adequacy of counsel is considered under Rule 23(a)(4) and Rule 23(g). *See* Fed. R. Civ. P. 23(g); *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122–23 (9th Cir. 2014) (noting that "named plaintiff's and class counsel's ability to fairly and adequately represent unnamed [plaintiffs]" are "critical requirements in federal class actions under Rules 23(a)(4) and (g)"). Defendants contend that class counsel is inadequate because counsel: (1) allowed Diaz to

verify interrogatory responses that conflict with sworn testimony, (2) filed a complaint containing inaccurate allegations, (3) proffered Dr. Silzars as an expert witness in this case when he declined to serve as an expert,[7] and (4) have engagement letters that appear to violate the Rules of Professional Responsibility. (Opp. at 25.)

Although attorneys' ethics in handling the suit are a relevant consideration in determining adequacy of counsel, the Court does not find any of Defendants' objections persuasive. *See Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 248 (C.D. Cal. 2006) (finding class counsel adequate despite defendants' arguments that plaintiffs' counsel submitted false declarations, gave incorrect information about a duty to comply with a subpoena, and frivolously instructed their clients not to answer deposition questions). Diaz has provided the Declarations of Jonathan Shub, Daniel Shulman, Francis Scarpulla, Hayward J. Kaiser, and Gilbert Lee [Doc. ## 169-4, 169-3, 169-5, 169-2, 170] demonstrating that they are experienced and qualified counsel. Diaz's legal team has satisfied the adequacy of representation requirement.

3. Typicality

Typicality requires a showing 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 purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (quoting *Hanon*, 976 F.2d at 508). The typicality standard under Rule 23(a)(3) is "permissive": "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (quoting *Hanlon*, 150 F.3d at 1020). "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanon*, 976 F.2d at 508 (citations omitted).

Diaz argues that his claims are typical of the claims because he, like millions of consumers, purchased a Toshiba-brand "LED TV" in the belief, based on Defendants' marketing, that it was not an LCD TV. (Class Cert. at 12.) Defendants argue that Diaz's

[7] Diaz's counsel states that whether Dr. Silzars will serve as an expert in this case is still being resolved. (Lee Decl. ¶¶ 3-4 [Doc. # 170].)

testimony exposes him to several defenses, mainly that he cannot show causation, reliance or injury because he decided to purchase an LED TV before arriving at Best Buy based on statements by third parties, and not Defendants. (Opp. at 23.)

In determining whether typicality is met, "individual experience with a product is irrelevant" because "the injury under the UCL, FAL and CLRA is established by an objective test." *Astiana v. Kashi Co.*, 291 F.R.D. 493, 502 (S.D. Cal. 2013). "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.* (citation omitted). Nonetheless, to the extent "a named plaintiff did not read Defendants' statements on the product packaging of products purchased or explicitly testified that [he] did not rely on packaging statements, such an individual is *not* typical of the class [he] seeks to represent." *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 662 (C.D. Cal. 2014) (emphasis in original).

Here, Diaz has failed to provide any evidence that he *relied* on Defendants' advertising and product packaging when he decided to purchase an LED TV. Diaz testified that he decided to purchase an LED TV prior to arriving at Best Buy based on advertisements which he had difficulty remembering. (Commons Decl., Ex. 1, Diaz Depo. at 122:17-24, 123:1-4, 7-17, 24-125:7 [Doc. # 182-1].) Defendants introduced evidence that their marketing practices during the class period varied and, at times, disclosed that LED TVs use LEDs as the light source to illuminate the television panel. (*See* Ramirez Decl. ¶ 37, Exs. 4, 15-24, 28-29 [Doc. ## 183-4, 183-36 – 183-45, 183-49 – 183-50].) For example, Defendants' website during the class period defined "LED TV" as follows: "LED TVs use liquid crystal illumination, just like LCD TVs. But unlike LCDs they include a backlight made of several light-emitting diodes (LEDs)." (*Id.* ¶ 37, Ex. 4.) Based on this evidence, the Court cannot infer that Diaz relied on false or misleading advertisements made by Defendants when he decided to purchase an LED TV. *Mazza*, 666 F.3d at 596 ("A presumption of reliance does not arise when class members 'were exposed to quite disparate information from various representatives of the defendant'") (citation omitted); *see also Ehret v. Uber Technologies, Inc.*, 2015 WL 7759464, at *9 (N.D. Cal. Dec. 2, 2015) (collecting cases where courts have not been willing to assume class-wide exposure based on an advertising campaign that was not massive, uniform, and long-term).

Although Diaz viewed Defendants' product packaging which stated "LED TV" before he purchased the television, he testified he did so at the register only "to make sure it was the TV that [he] picked off the wall." (Reply Lee Decl., Ex. 39, Diaz Depo. at 195:19-22 [Doc. # 187-3].) Diaz's testimony makes clear that he did not *rely* on Defendants' product packaging prior to

purchasing the product. *See Allen*, 300 F.R.D. at 662 n.10. (the fact that plaintiff *saw* the label of a product before purchasing it is not evidence that plaintiff *relied* on the product packaging); *see also Kosta v. Del Monte Foods*, 308 F.R.D. 217, 227 (2015) (plaintiff's claims as to certain products not typical of the proposed class where plaintiff did not see the challenged statement on the product). Thus, Diaz cannot be typical of other members of the class he seeks to represent.

Having failed to meet the typicality requirement of Rule 23(a)(3), Diaz's motion for class certification must be denied.

B. Rule 23(b)

Although Diaz's failure to meet the typicality requirement of Rule 23(a)(3) is fatal to his class certification motion, in his reply brief, Diaz expressed his intention to request leave to substitute an adequate class representative if the Court were to find Diaz inadequate "for whatever reason."[8] Reply at 25. The Court therefore continues its analysis under Rule 23(b)(3).

1. UCL, FAL and CLRA

The UCL, FAL, and CLRA are governed by the "reasonable consumer" test – i.e., whether "members of the public are likely to be deceived" by the representation. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *see also Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal.App. 4th 1351, 1360 (2003). To state a claim under the UCL based on false advertising or promotional practices, a plaintiff need only "show that members of the public are likely to be deceived" by the defendant's conduct. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312, 93 Cal. Rptr. 3d 559 (2009)). "'Likely to deceive' . . . indicates that the ad[vertisement] is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508, 129 Cal. Rptr.2d 486 (2003). The FAL uses the same standard as the UCL. *Block v. eBay, Inc.*, 747 F.3d 1135, 1140 (9th Cir.2014) (citing *In re Tobacco II Cases*, 46 Cal. 4th at 312, 93 Cal. Rptr. 3d 559).

To bring a CLRA claim, a plaintiff must "'show not only that a defendant's conduct was deceptive but that the deception caused [him] harm.'" *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011) (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129, 103 Cal. Rptr. 3d 83 (2009)). Thus, the CLRA differs from the UCL because it requires that each

[8] The Court notes that it previously denied Diaz's request to join additional class representatives for untimeliness. [Doc. # 162.]

class member have an actual injury caused by the practice declared to be unlawful by the CLRA. *Id.* (citation omitted). "But, '[c]ausation, on a classwide basis, may be established by *materiality*. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class.'" *Id.* (quoting *In re Vioxx*, 180 Cal. App. 4th at 129, 103 Cal. Rptr. 3d 83) (emphasis in original). A misrepresentation or omission 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." *Id.* (citation omitted). "[M]ateriality is generally a question of fact unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." *Id.* (citation omitted). "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." *Id.* at 1022–23 (internal quotation omitted).

2. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (citation omitted). It involves the same principles that guide the Rule 23(a)(2) commonality analysis, but it "is even more demanding than Rule 23(a)." *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). "[T]he common questions must be a significant aspect of the case that can be resolved for all members of the class in a single adjudication." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (internal quotation, brackets and alteration omitted). The "focus is on the relationship between the common and individual issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks omitted). The "predominance" prong is satisfied "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (quoting Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1777 (2d ed. 1986)).

Diaz contends that because he is challenging the very name of the product itself—LED TV—common issues predominate because class members' exposure to the challenged deception is apparent. (Class Cert. at 19.) Defendants, on the other hand, respond that individual issues relating to consumer understanding, exposure to advertising, and materiality predominate rendering this case incapable of classwide resolution. (Opp. at 12-18.) Specifically, Defendants assert that there is no way to prove, with common evidence, that the putative class members believed that LED TVs do not use LCD technology. (*Id.* at 14.) Defendants contend that many

consumers "would have learned about LED TVs based on information from Defendants, other manufacturers, retailers, third-parties, and media made freely available." (*Id.*) The Court finds Defendants' arguments persuasive.

First, assuming that each class member may have been exposed to the LED TV label, Diaz will not be able to demonstrate with common proof, even under a reasonable consumer standard, that each class member had the same understanding of the product labeling, let alone *relied* on the LED TV label when purchasing a Toshiba-brand LED-lit LCD TV. Defendants introduced evidence that their packaging for their LED-lit LCD TVs has varied since 2010, such that approximately 90% of the cartons for roughly 100 different sizes and models of LED TVs "have either disclosed that the TVs use LEDs for backlighting, expressly referenced the use of LCD technology, or contained no mention of 'LED TV' or even LEDs at all." (*See* Ramirez Decl. ¶¶ 18-25 and Ex. 13 [Doc. ## 183-13 – 183-34].)

The Court's own review of Defendants' product packaging and advertising confirms that there was a lack of uniformity. Although many of the cartons for the later models reflected the "LED TV" label, substantially all of the 2009 and 2010 television models, and some of the 2011 models, clearly referenced that the television was an "LCD TV," and the packaging for a few of the television models did not reference LED TV at all.[9] (*Id.*; *see also* Reply Lee Decl. ¶¶ 5-6, Exs. 30, 31, and 32 [Doc. # 187-2].) Defendants also introduced evidence to demonstrate that it was common practice within the industry to use the term LED TV to describe LCD televisions with LED backlighting. (*See* Ramirez Decl. ¶¶ 37, 39 and Exs. 41-49 (collection of on-line information explaining LED TVs use LEDs for backlighting) [Doc. ## 183-62 – 183-70].) In analogous situations, where exposure to the alleged misleading advertising and labeling varied, courts have found that individual issues predominate because consumers' understanding of the alleged misrepresentation would not be uniform. *See, e.g.*, *Kosta v. Del Monte Goods, Inc.*, 308 F.R.D. 217, 229 (N.D. Cal. 2015) (denying class certification because of variations among the challenged labels and packaging); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *14 (N.D. Cal. June 13, 2014) (finding individual issues predominate because "consumers were exposed to label statements that varied by size, variety and time period"); *Moheb v. Nutramax Labs. Inc.*, 2012 WL 6951904, at *7 (C.D. Cal. Sept. 4, 2012) ("Plaintiff cannot demonstrate that common issues predominate because some of the members of the Class never saw or relied upon Defendant's representations. . . ."); *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 623 (S.D. Cal. 2007) (finding significant individualized issues because "[c]lass members may have

[9] Even when the packaging did not reference LCD technology, evidence in the record indicates that many retailers displayed information at the point of sale or online explaining that LED TVs use LEDs to backlight an LCD television. (*See* Ramirez Decl. ¶¶ 41-42 and Exs. 46, 52-56 [Doc. ## 183-67, 183-73 – 183-77].)

relied on different representations, while some may not have relied on, or even have been exposed to, any of the allegedly false representations").

Second, the Court finds that Diaz will not be able to demonstrate with common proof that the LED TV label was *material* to consumers' purchasing decision. Besides the fact that Diaz himself may not have relied upon the challenged product packaging or advertising prior to buying his TV, Defendants introduced evidence that consumers purchase TVs based on a variety of factors, including their own research, speaking with sales people, comparison shopping,[10] or recommendations from family, friends, or co-workers. (*See* Ramirez Decl. ¶¶ 43, 59-64, Exs. 40, 58) [Doc. ## 183-61, 183-79].) A November 2008 survey conducted by Defendants showed that 19-35% of consumers were influenced by the recommendations of friends, family, or co-workers when considering purchasing a Toshiba-branded television. (*Id.*, Ex. 40.) An August 2009 survey conducted by Defendants found that 15% of consumers made purchasing decisions based on their own research. (*Id.*, Ex. 50.) Defendants also introduced evidence that there are numerous reasons a consumer may purchase LED-lit LCD TVs, in addition to or aside from image quality, including style (thinner form), energy efficiency (less heat-dissipation compared with CCFLs), color rendition (wider color gamut), and environmental benefits (LEDs are mercury free). (*Id.* ¶¶ 9-14.) Thus, the Court is not convinced that the question of materiality—i.e., whether reasonable consumers would find the "LED TV" label deceptive and material to their purchasing decision—is susceptible of classwide proof.

Because issues of reliance and materiality require individualized inquiry in this case, the Court finds that class certification is inappropriate for failure to meet the predominance requirement of Rule 23(b)(3).[11]

C. Motion To Strike

Diaz filed a request to strike Defendants' Exhibit 16, a 29-page chart purporting to list "Examples of Conflicts with California Law." [Doc. # 188.] Diaz also filed a request for

[10] Diaz himself testified that after looking at "a lot of brands," he chose a Toshiba-brand LED-lit LCD TV because it was the "newest TV that came out" and when viewing a vacuum cleaning advertisement, "Toshiba has the best picture for the white." (Commons Decl., Ex. 1, Diaz Depo. at 125:6-25, 127:20-128:7 [Doc. # 182-1].)

[11] The Court need not assess the "superiority" requirement of Rule 23(b)(3) because the predominance requirement has not been met. *See* Fed. R. Civ. P. 23(b)(3) (permitting certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, *and* that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy") (emphasis added).

judicial notice regarding charts filed by Defendants' counsel in other matters purporting to document "Variations in State Consumer Protection and Deceptive Trade Practices Laws." [Doc. # 189.] The Court **DENIES** Diaz's motion to strike Exhibit 16 as moot - the Court did not rely upon Exhibit 16 to resolve the motion. Similarly, the Court **DENIES** Diaz's request for judicial notice because the Court did not rely on the documents.

V.
CONCLUSION

In light of the foregoing, the Court **DENIES** Diaz's motion for class certification.