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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE CONDE, et al.,

Plaintiffs,

v.

SENSA, et al.,

Defendants.

Case No.: 14-cv-51 JLS WVG

**ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF SUSAN
GRACE STOKES’ MOTION FOR
CLASS CERTIFICATION**

(ECF No. 115)

Presently before the Court is Plaintiff Susan Grace Stokes’ Motion for Class Certification (“Mot.,” ECF No. 115). Also before the Court is Defendants IB Holding, LLC and TechStyle, Inc.’s Opposition to Plaintiff’s Motion (“Opp’n,” ECF No. 119) and Plaintiff’s Reply in Support of Her Motion (“Reply,” ECF No. 123). The Court heard oral argument on September 4, 2018. After considering the Parties arguments’ and the law, the Court **DENIES WITHOUT PREJUDICE** Plaintiff’s Motion for Class Certification.

BACKGROUND

This case was originally brought by José Conde against Sensa Products, LLC (“Sensa”). ECF No. 1. There were three pending related cases: *Conde v. Sensa et al.*, Case No. 14-CV-51 JLS (WVG) (S.D. Cal., filed Jan. 7, 2014), *Delaney et al. v. Sensa et al.*, Case No. 14-CV-2120 JLS (WVG) (S.D. Cal., filed Sept. 8, 2014), and *Stokes v. Sensa et al.*, Case No. 14-CV-2325 JLS (WVG) (S.D. Cal., filed Oct. 1, 2014). The plaintiffs in

1 *Delaney* moved the Court for an order consolidating the three cases. ECF No. 17.¹ The
2 Court granted the motion and consolidated the cases. ECF No. 32. All cases were brought
3 against Sensa, but GNC was another named defendant in the *Delaney* case. After
4 consolidation, all plaintiffs then filed an amended complaint against Sensa, Dr. Alan Hirsh,
5 and GNC. ECF No. 33. The *Delaney* Plaintiffs and GNC settled, and Delaney dismissed
6 the class claims against GNC. ECF No. 53. It appears that all named plaintiffs except
7 Stokes were a part of the settlement, because after the settlement and dismissal of GNC,
8 only Stokes moved to file an amended complaint. ECF No. 56. The Court granted the
9 request, and Stokes filed an amended complaint against Sensa and various other companies
10 and individuals. ECF No. 60.

11 In 2014, the Federal Trade Commission (“FTC”) filed a complaint against Sensa,
12 Adam Goldenberg, and Dr. Hirsch, (collectively, “FTC Defendants”) alleging unfair or
13 deceptive acts or practices and false advertisements.² Request for Judicial Notice (“RJN”),
14 ECF No. 119-3 at 13.³ The FTC and the FTC Defendants entered into a stipulated
15 judgment for \$46.5 million. *Id.* at 25; Third Consolidated Amended Class Action
16 Complaint (“TAC”), ECF No. 76 ¶ 13. As part of the settlement, the FTC Defendants were
17 restrained from, among other things, falsely representing that any product causes weight
18 loss. RJN 20. The amount owed was later reduced to \$26.5 million because of Sensa’s
19 “deteriorating financial condition.” Opp’n at 10. The FTC then mailed over 477,000
20 refund checks to consumers who bought Sensa’s products. *Id.* In connection with the FTC
21 matter, in late 2013 or early 2014, “Sensa Products changed the ‘lose up to 30lbs or more
22

23 ¹ Unless otherwise indicated, ECF numbers relate to filings in the lead case, Case Number 14-CV-51.

24 ² Mr. Goldenberg is a director and officer of Sensa, and Dr. Hirsch conducted studies regarding the Sensa
25 products.

26 ³ Defendants request the Court take judicial notice of the FTC Settlement (ECF No. 119-3). The same
27 settlement is attached to Plaintiff’s Complaint (ECF No. 70-2, at 20–44). The Court may take judicial
28 notice of documents incorporated into the complaint by reference. *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). The Court therefore **GRANTS** Defendants’ request for judicial notice.

1 in just 6 months’ statement to ‘9.5 pounds in 6 months’ and/or ‘10 pounds in 3+ months.’”
2 Declaration of Kristin Chadwick in Support of Mot. (“Chadwick Decl.”), ECF No. 119-1
3 ¶ 6. In October 2014, Sensa declared bankruptcy. Opp’n at 14.

4 The bankruptcy did not end this case. Plaintiff Stokes’ TAC is brought against Sensa
5 Products, LLC; Sensa, Inc. (f/k/a Intelligent Beauty, Inc.); IB Holding, LLC (a/k/a
6 Intelligent Beauty Holding, LLC); TechStyle, Inc. (f/k/a JustFab, Inc. and Just Fabulous,
7 Inc.); Dr. Alan R. Hirsch; Don Ressler; Adam Goldenberg; Kristen Chadwick; TCV VI,
8 L.P; TCV Technology Crossover Ventures; and John Drew. *See generally* ECF No. 76.
9 Plaintiff alleges Sensa was part of an “interconnected web of entities” operating as a single
10 enterprise. Mot. at 7. Plaintiff alleges “the enterprise, acting through IB Holding, LLC
11 (“IBH”), and TechStyle, Inc., f/k/a JustFab, Inc.’s (“JustFab”) (collectively, the “Solvent
12 Defendants”) used unrecoverable or forgiven loans to systematically strip the assets of
13 IB[H] and Sensa Products.” *Id.*

14 The summary of the allegations are as follows: Sensa produced various weight-loss
15 products, which were “tastant crystals” or “sprinkles” that users would sprinkle on their
16 food. TAC ¶ 2. As marketed by Sensa, when the users smelled and tasted the crystals, the
17 crystals would trigger the user’s “I feel full” signal and the user would therefore eat less
18 food. *Id.* ¶ 3. Originally, Sensa marketed that the products would allow users to “lose up
19 to 30lbs or more in just 6 months” without requiring the user to diet or exercise. TAC ¶¶ 4–
20 5; Opp’n at 12. As noted above, this marketing was changed in 2013/2014 to lose “‘9.5
21 pounds in 6 months’ and/or ‘10 pounds in 3+ months.’” Chadwick Decl. ¶ 6.

22 Plaintiff brings causes of action generally alleging false and misleading
23 advertising/marketing, unfair competition, and breach of warranties. The products at issue
24 are: Sensa Weight-Loss System; Sensa for Men Weight-Loss System; and Sensa
25 Advanced Weight-Loss System (hereinafter, the “Class Products”). (Mot. at 7 n.1.)
26 Plaintiff states she relied on the labeling for the Class Products and alleges the Products
27 are ineffective, the Products have not been “clinically shown” to cause weight loss, and the
28 system is not “supported by impressive clinical results.” TAC ¶¶ 7–8. Plaintiff seeks

1 certification of a nationwide class defined as “all persons in the United States who
2 purchased Defendants’ Sensa Weight-Loss System, on or after August 22, 2012.”

3 LEGAL STANDARD

4 Motions for class certification proceed under Rule 23(a) of the Federal Rules of Civil
5 Procedure. Rule 23(a) provides four prerequisites to a class action: (1) the class is so
6 numerous that joinder of all members is impracticable (“numerosity”), (2) there are
7 questions of law or fact common to the class (“commonality”), (3) the claims or defenses
8 of the representative parties are typical of the claims or defenses of the class (“typicality”),
9 and (4) the representative parties will fairly and adequately protect the interests of the class
10 (“adequate representation”). Fed. R. Civ. P. 23(a).

11 A proposed class must also satisfy one of the subdivisions of Rule 23(b). Here,
12 Plaintiff seeks to proceed under Rule 23(b)(3), which requires that “the court find[] that
13 the [common questions] predominate over any questions affecting only individual
14 members [‘predominance’], and that a class action is superior to other available methods
15 for fairly and efficiently adjudicating the controversy [‘superiority’].” The relevant factors
16 in this inquiry include the class members’ interest in individually controlling the litigation,
17 other litigation already commenced, the desirability (or not) of consolidating the litigation
18 in this forum, and manageability. Fed. R. Civ. P. 23(b)(3)(A)–(D).

19 “In determining the propriety of a class action, the question is not whether the
20 plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather
21 whether the requirements of Rule 23 are met.” *Eisen v. Carlisle & Jacquelin*, 417 U.S.
22 156, 178 (1974) (internal quotations omitted). “Rule 23 does not set forth a mere pleading
23 standard.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, “[a] party
24 seeking class certification must affirmatively demonstrate his compliance with the Rule—
25 that is, he must be prepared to prove that there are in fact sufficiently numerous parties,
26 common questions of law or fact, etc.” *Id.* The court is “at liberty to consider evidence
27 which goes to the requirements of Rule 23 even though the evidence may also relate to the
28 underlying merits of the case.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir.

1 1992). A weighing of competing evidence, however, is inappropriate at this stage of the
 2 litigation. *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003); *Wang v. Chinese Daily*
 3 *News, Inc.*, 231 F.R.D. 602, 605 (C.D. Cal. 2005).

4 ANALYSIS

5 I. Standing

6 Under Article III of the United States Constitution, a federal court may only
 7 adjudicate an action if it constitutes a justiciable “case” or a “controversy” that has real
 8 consequences for the parties. *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Lujan v. Defenders*
 9 *of Wildlife*, 504 U.S. 555, 560 (1992). A threshold requirement for justiciability in federal
 10 court is that the plaintiff have standing to assert the claims brought. *Id.* “[S]tanding
 11 requires that (1) the plaintiff suffered an injury in fact . . . , (2) the injury is fairly traceable
 12 to the challenged conduct, and (3) the injury is likely to be redressed by a favorable
 13 decision.” *Mazza v. Am. Honda Motor Co.*, 666 F.3d 594–95 (9th Cir. 2012) (quoting
 14 *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)).

15 Defendants contest Plaintiff’s standing in various regards: (1) Plaintiff is a Florida
 16 resident who neither purchased any Sensa products in California during the class period
 17 nor visited or purchased products from the Sensa websites; (2) Plaintiff did not suffer an
 18 injury because she was happy with the products and accomplished her goal of maintaining
 19 her weight; and (3) Plaintiff never purchased two of the Class Products: Sensa for Men
 20 and Sensa Advanced. Opp’n at 15–17. The Court addresses each argument in turn.

21 A. Florida Residency and Purchase

22 Plaintiff does not contest that she is a Florida resident and that she did not purchase
 23 the Class Product in California or from the Sensa website. *See* TAC ¶ 27. She purchased
 24 the Class Product multiple times, first after watching an infomercial on ShopNBC and later
 25 at a GNC store. ECF No. 119-2, at 38, 44. Plaintiff argues, however, that this does not
 26 negate her standing as she was deceived by a California defendant’s conduct and
 27 subsequently purchased the Product.

28 ///

1 The Court in *Forcellati v. Hyland's Inc.*, 876 F. Supp. 2d 1155 (C.D. Cal. 2012),
2 addressed a similar issue. In that case, the defendants, which were headquartered in
3 California, argued that the plaintiff, a New Jersey resident, lacked standing to bring
4 consumer protection claims in California. *Id.* at 1160. The court distinguished two issues:
5 the ability of a nonresident plaintiff to assert a claim under California law and a choice-of-
6 law analysis. *Id.* The court determined that the defendants were making a choice-of-law
7 argument rather than a standing argument and that the plaintiff did not lack standing to
8 bring claims under California law.

9 Here, Defendants similarly make a choice-of-law argument, not a proper standing
10 argument. As in *Forcellati*, Defendants do not argue that any of the Article III standing
11 requirements are not met. *See id.* at 1060. Rather, Plaintiff here seeks to certify a
12 nationwide class of persons who purchased a product in the United States during the
13 relevant time period. Plaintiff Stokes certainly did this. This confers standing on her;
14 whether California law applies is a separate issue. Further, the argument that Stokes did
15 not purchase a product through the website does not mean she has no standing to bring this
16 case. The proposed class Plaintiff Stokes seeks to certify does not specify that the members
17 purchased the product through the website, even if it turns out most of them did so. *See*
18 *Opp'n* at 9 (stating 84% of purchasers bought the product online). This argument goes
19 towards the typicality requirement, which will be addressed below. *See infra* Section II.C.

20 ***B. Satisfaction With the Product***

21 Defendants cite to Ms. Stokes' deposition, at which she testified that she was
22 satisfied with the Class Product, purchased it continually for five years, and achieved her
23 goal of maintaining her weight even though she was not exercising due to an injury. *Opp'n*
24 at 16.⁴ Defendants argue that Ms. Stokes therefore lacks standing to bring this case. To
25

26
27 ⁴ To contest this, Plaintiff submitted a declaration attached to her Reply, in which she states that she
28 "purchased Sensa for approximately four years because [she] believed the advertisements that said it was
an effective weight loss product." "Stokes Decl.," ECF No. 123-1 ¶ 4. She states that, although she
believed the advertisements at the time, she "now know[s] that Sensa did not work." *Id.* ¶ 5.

1 support this argument, Defendants cite to *Hovsepian v. Apple, Inc.*, in which the court
2 determined the class was not ascertainable because “it includes members who have not
3 experienced any problems with their [Class Products]. Such members have no injury and
4 no standing to sue.” No. 08-5788 JF (PVT), 2009 WL 5069144, at *6 (N.D. Cal. Dec. 17,
5 2009); *see also Moheb v. Nutramax Labs. Inc.*, No. CV 12-3633-JFW (JCx), 2012 WL
6 6951904, at *3 (C.D. Cal. Sept. 4, 2012) (determining members who derived benefit from
7 the product and “are satisfied users” have no injury and no standing to sue). *Hovespian*
8 and *Moheb*, like the present case, also involved false advertising claims. The courts in
9 those cases, however, provided little analysis supporting their finding of no standing, nor
10 did they define what constituted an “injury in fact” for standing purposes.

11 In contrast, other courts have held that standing is not negated in situations similar
12 to the present case simply because the purchaser was satisfied with the product. In
13 *McCrary v. Elations Co.*, No. EDCV 13-242 JGB (OPx), 2014 WL 1779243 (C.D. Cal.
14 Jan. 13, 2014), the court found “unpersuasive” the defendant’s “concern that some putative
15 class members were happy with [the product] and thus were uninjured.” *Id.* at *14. The
16 court cited *In re Google AdWords Litigation*, No. 5:08–CV–3369, 2012 WL 28068, at *10
17 (N.D. Cal. Jan. 5, 2012), which held “the requirement of concrete injury is satisfied when
18 the Plaintiffs and class members in UCL and FAL actions suffer an economic loss caused
19 by the defendant, namely the purchase of defendant’s product containing
20 misrepresentations.” The court in *McCrary* also cited *Ries v. Arizona Beverages USA*, 287
21 F.R.D. 523 (N.D. Cal. 2012), which held:

22 The focus of the [Unfair Competition Law (“UCL”)] and [False
23 Advertising Law (“FAL”)] is on the actions of the defendants,
24 not on the subjective state of mind of the class members. All of
25 the proposed class members would have purchased the product
26 bearing the alleged misrepresentations. Such a showing of
27 concrete injury under the UCL and FAL is sufficient to establish
Article III standing.

28 *Ries*, 287 F.R.D. at 536 (internal citation omitted).

1 The Court agrees with the analysis of *Google* and *Ries*. Plaintiff Stokes’ alleged
2 satisfaction with the Class Product at the time she was using it, or the fact that she did not
3 gain weight while using the Class Product, is insufficient to strip her of standing.
4 Satisfaction (or lack thereof) is not the focus of the “injury” requirement for a false
5 advertising claim: A product can be falsely advertised even if people enjoy it. Plaintiff
6 Stokes purchased the Class Product after viewing the advertisements and has standing to
7 claim that the advertisements were false and that she was damaged thereby.

8 ***C. The Three Class Products***

9 Plaintiff testified that she has never heard of or purchased Sensa for Men or Sensa
10 Advanced. ECF No. 119-2, at 11–12. Defendants argue that Plaintiff lacks standing to
11 bring claims based on the two Class Products different than the one she purchased. Opp’n
12 at 17. Cases regarding multiple Class Products and how this relates to standing vary.

13 In *Azimpour v. Sears, Roebuck & Co.*, 15cv2798-JLS (WVG), 2017 WL 1496255
14 (S.D. Cal. Apr. 26, 2017), for example, this Court found that the named representative had
15 standing despite the fact that she purchased a different pillow than the class members. *See*
16 *id.* at *5. The Court found that “[p]laintiff’s allegations are based on Defendant’s allegedly
17 deceptive pricing scheme[,] which uniformly applies to and affects all products.” *Id.* In
18 sum, the case “is not about a pillow—it is about a price tag.” *Id.* In that decision, the Court
19 cited *Branca v. Nordstrom, Inc.*, No. 14CV2062-MMA (JMA), 2015 WL 10436858 (S.D.
20 Cal. Oct. 9, 2015), in which the court had found that “it is immaterial for the purposes of
21 [plaintiff’s] claims whether one purchased a pair of shoes versus a hat, so long as the item
22 bore a ‘Compare At’ tag. . . . Rather, his claims relate to the consistent format of the tags.”
23 *Id.* at *5. These cases lead to the conclusion that even if the products are different, as long
24 as the alleged problem with the products (such as the marketing or misrepresentation) is
25 the same, the plaintiff has standing to bring the case.

26 In *Tria v. Innovation Ventures, LLC*, No. CV 11-7135-GW(PJWx), 2013 WL
27 12324181 (C.D. Cal. Feb. 25, 2013), by contrast, the court held that “a plaintiff has no
28 injury-in-fact with respect to products she has not purchased, although she has purchased

1 similar products, at least where the products she has and has not purchased are not
2 effectively identical for purposes of the type of case brought.” *Id.* at *3. The plaintiff did
3 not have standing to pursue claims related to a product she did not purchase when there
4 were “unquestionable distinctions in the types of statements that have been used to market
5 or advertise” the two products. *Id.* Similarly, in *Dysthe v. Basic Research LLC*, No. CV
6 09-8013 AG (SSx), 2011 WL 5868307 (C.D. Cal. June 13, 2011), the court found the
7 plaintiff did not have standing to pursue claims regarding Relacore when she purchased
8 Relacore Extra. *Id.* at *4. The court reviewed the ingredients of the products and found
9 “significant differences” between the products and the products’ packaging and that the
10 products are “marketed and sold separately by Defendants.” *Id.* at *5.

11 Here, Defendants attempt to distinguish the three Class Products: the original Sensa
12 product contains “primarily maltodextrin, tricalcium phosphate, silica, and certain natural
13 and artificial flavors,” whereas Sensa for Men is “specially formulated for men” and
14 “contained or concentrated and/or different flavors than the original product” and Sensa
15 Advanced contained a new ingredient, chromium, “to provide metabolism support.” Opp’n
16 at 12. Defendants also argue that “[t]he accompanying marketing and representations
17 about these three products were correspondingly different and tailored to the product.” *Id.*

18 The three Class Products are clearly marketed under the same general theme: use
19 Sensa and lose weight. The fact that the Class Products contain different “flavors” or one
20 additional ingredient does not mean that the Class Products are significantly different. *See*
21 *Dysthe*, 2011 WL 5868307, at *5. Further, the only evidence to support Defendants’
22 argument that the marketing for the Products differed is the change in marketing in 2013
23 or 2014: Sensa Advanced did not promote as much weight loss as did the other Products.
24 But, the three Class Products are “effectively identical” with regards to the underlying
25 purpose of this case—alleged false labeling and misrepresentation. *Tria*, 2013 WL
26 12324181, at *3. Because the ingredients of the three Class Products are very similar and
27 the Class Products are marketed to consumers for similar purposes, the Court finds Plaintiff
28 has standing to bring claims relating to all three Class Products.

1 The Court therefore finds that Plaintiff has standing to bring this case.

2 **II. Rule 23(a) Requirements**

3 Plaintiff must establish that the proposed class satisfies the four requirements of Rule
4 23(a). Defendants do not contest that Plaintiff’s proposed class meets the Rule 23(a)
5 requirements of numerosity and commonality. The Court analyzes these requirements
6 briefly, focusing on the contested elements of typicality and adequacy.

7 **A. Numerosity**

8 “[A] proposed class must be ‘so numerous that joinder of all members is
9 impracticable.’” *Rannis v. Recchia*, 380 Fed. App’x 646, 650 (9th Cir. 2010) (quoting Fed.
10 R. Civ. P. 23(a)(1)). While “[t]he numerosity requirement is not tied to any fixed numerical
11 threshold[,] . . . [i]n general, courts find the numerosity requirement satisfied when a class
12 includes at least 40 members.” *Id.* at 651.

13 Plaintiff does not provide the Court with an approximate number of class members,
14 instead providing the confidential sum of money that Defendants have earned through sale
15 of the Class Products. Mot. at 20. Given this large value, and given that Defendants do
16 not dispute the numerosity of the proposed class, the Court finds that the number of
17 members is sufficiently numerous that joinder is impracticable, and therefore finds that this
18 requirement is fulfilled. *See Astiana v. Kashi Co.*, 291 F.R.D. 493, 501 (S.D. Cal. 2013)
19 (“In ruling on a class action a judge may consider reasonable inferences drawn from facts
20 before him at that stage of the proceedings.”).

21 **B. Commonality**

22 Rule 23(a)(2) requires that “there are questions of law or fact common to the class.”
23 Fed. R. Civ. P. 23(a)(2). To satisfy this requirement, “[a]ll questions of fact and law need
24 not be common to satisfy the rule. The existence of shared legal issues with divergent
25 factual predicates is sufficient, as is a common core of salient facts coupled with disparate
26 legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.
27 1998). The common contention, however, “must be of such a nature that it is capable of
28 classwide resolution—which means that determination of its truth or falsity will resolve an

1 issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 564
2 U.S. at 350.

3 Plaintiff asserts that classwide liability hinges on many common questions,
4 including whether the marketing and advertisements for Sensa were false, whether
5 Defendants’ conduct violated various laws, whether Defendants’ conduct breached
6 warranties, and whether Defendants made negligent misrepresentations. Mot. at 21; TAC
7 ¶ 147. There therefore exists at least one common question as to Plaintiff’s claims, and the
8 Court finds that the commonality requirement is satisfied.

9 *C. Typicality*

10 The Ninth Circuit has explained, “representative claims are ‘typical’ if they are
11 reasonably co-extensive with those of absent class members; they need not be substantially
12 identical.” *Staton*, 327 F.3d at 957; *Hanlon*, 150 F.3d at 1019. The test of typicality “is
13 whether other members have the same or similar injury, whether the action is based on
14 conduct which is not unique to the named plaintiffs, and whether other class members have
15 been injured by the same course of conduct.” *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D.
16 Cal. 1985).

17 Plaintiff Stokes alleges typicality is satisfied because she and the class members
18 purchased a Class Product and “were exposed to the same name (‘Sensa Weight-Loss
19 System’) and a uniform branded message.” Mot. at 23. Defendants make various
20 arguments against this, many of which echo Defendants’ dispute against Plaintiff’s
21 standing. Opp’n at 18–21. The Court addresses each of Defendants’ arguments in turn.

22 *1. Plaintiff Did Not Purchase the Class Product to Lose Weight But to* 23 *Maintain Her Weight at a Time When She Was Unable to Exercise*

24 Although Plaintiff Stokes may have purchased the Product for a different reason than
25 other class members, *i.e.*, maintaining her weight vs. losing weight, she still suffered the
26 same injury as the class members: monetary loss from purchasing a product based on
27 alleged misrepresentations. Typicality does not turn on the “specific facts from which [the
28 claim] arose.” *Hanon*, 976 F.2d at 508. Thus, the Court finds that Plaintiff is not atypical

1 for this reason.

2 2. *Plaintiff Experienced Side Effects From the Class Product*

3 Defendants argue that Plaintiff Stokes is not typical because she experienced side
4 effects from the Class Product. Plaintiff has filed a declaration stating she “is not seeking
5 relief for the side effects [she] experienced from using Sensa. [She is] seeking a full refund
6 of the purchase product of the product for [her]self and the other class members.” Stokes
7 Decl. ¶ 6. Therefore, Plaintiff Stokes is seeking the same relief as the class members and
8 is not atypical for this reason.

9 3. *Plaintiff Spent \$5,000 on the Class Product, Used the Class Product
10 for Five Years, and Was Satisfied With the Class Product*

11 Defendants argue that Plaintiff Stokes was a satisfied customer who continued to
12 purchase the Class Product over a five-year period and therefore is atypical of the other
13 class members. Plaintiff now states she was not satisfied with the Class Product and was
14 deceived by Defendants. Reply at 9. This contradicts her deposition testimony where she
15 testified she was “satisfied with Sensa while . . . using it” and “Sensa was the answer for
16 [her] to . . . be able to eat what [she] wanted without exercising.” ECF No. 119-2 at 35.
17 She testified her goal in buying Sensa was to maintain her weight, and she did indeed
18 maintain her weight. *Id.* She continued to buy the product because she was satisfied with
19 it. *Id.* at 74. Indeed, while Plaintiff Stokes’s first purchase of the Class Product was
20 induced by Defendants’ advertisements, it appears Plaintiff’s continued purchase of the
21 Class Product was because she believed it was working for her.

22 “In determining whether typicality is met, the focus should be ‘on the defendants’
23 conduct and plaintiff’s legal theory.’” *Simpson v. Fireman’s Fund Ins. Co.*, 231 F.R.D.
24 391, 396 (N.D. Cal. 2005) (citation omitted). Here, the legal theory is that Defendants
25 falsely labeled the Class Products and that the Class Products do not deliver what is
26 promised. Plaintiff also suffered the “same injury” as the class members—being subjected
27 to false labeling and losing money. *See Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 156
28 (1983); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 534 (C.D. Cal. 2011) (holding

1 that “individual experience with a product is irrelevant” because “the injury under the
2 [Unfair Competition Law], [False Advertising Law,] and [Consumer Legal Remedies Act]
3 is established by an objective test. Specifically, this objective test states that injury is
4 shown where the consumer has purchased a product that is marketed with a material
5 misrepresentation, that is, in a manner such that ‘members of the public are likely to be
6 deceived’”).

7 It is irrelevant that Plaintiff Stokes liked the Class Product during the time she was
8 using it—she is not seeking to represent a class of people who gained weight as a result of
9 Sensa or disliked the Class Product. The Court therefore finds that Plaintiff Stokes is not
10 atypical for this reason. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 507 (6th Cir.
11 2015) (holding that, “although [defendant] argues that some class members were not
12 injured because they kept buying [the Class Product]—a sign that [the Class Product]
13 works, says [Defendant]—that is not the right way to think about ‘injury’ in the false-
14 advertising context. The false-advertising laws at issue punish companies that sell products
15 using advertising that misleads the reasonable consumer”).

16 4. Plaintiff Used Only One of the Three Class Products

17 It is undeniable that Plaintiff used only one of three of the Class Products. In general,
18 “[t]he typicality requirement does not mandate that the products purchased . . . must be the
19 same as those of absent class members.” *In re TFT–LCD (Flat Panel) Antitrust Litig.*, 267
20 F.R.D. 583, 593 (N.D. Cal. Mar. 28, 2010). But “[i]n cases involving a variety of products,
21 courts, emphasizing that different products have different functions and different
22 consumers, have held that a named plaintiff that purchased a different product than that
23 purchased by unnamed plaintiffs fails to satisfy the typicality requirement of Rule
24 23(a)(3).” *Wiener v. Dannon Co.*, 255 F.R.D. 658, 666 (C.D. Cal. 2009).

25 In *Wiener*, the court determined that the proposed class representative had not
26 established typicality because she only purchased one of the products, Activia, and did not
27 purchase DanActive or Activia Light. *Id.* at 666. The defendant had made “different health
28 benefit claims” for the three products, and the products “target[ed] consumers with

1 different health issues.” *Id.* In sum, “the evidence needed to prove [plaintiff’s] claims
2 involving Activia, namely proof that Dannon’s claim that *Bifidus Regularis* is clinically
3 proven to regulate digestion is false or misleading, is not probative of the claims of
4 unnamed class members who purchased DanActive, which require evidence that the claim
5 that *L. Casei Immunitas* is clinically proven to strengthen the immune system is false or
6 misleading.” *Id.*

7 Here, unlike in *Wiener*, the Class Products all boast the same result: weight loss.
8 And, while Sensa for Men obviously targeted males, there is no evidence that this Class
9 Product was marketed any differently than the other two Class Products. As analyzed
10 above, the marketing and ingredients for the three products are substantially similar. *See*
11 *supra* Section I.C. Accordingly, the “various products purchased . . . do not negate a
12 finding of typicality” because Plaintiff Stokes alleges that the class members’ injuries
13 “arise[] from a common wrong.” *See Pecover v. Elec. Arts Inc.*, No. C 08-2820 VRW,
14 2010 WL 8742757, at *11 (N.D. Cal. Dec. 21, 2010). Plaintiff’s claims are therefore
15 “reasonably co-extensive with those of absent class members,” *Hanlon*, 150 F.3d at 1020,
16 and the Court finds that Plaintiff is not atypical for this reason.

17 5. *Plaintiff Did Not See and Rely on All Representations by Sensa Because*
18 *Sensa Changed Its Weight Loss Representations in 2013 or 2014*

19 Defendants state that in late 2013 or early 2014, “Sensa Products changed the ‘lose
20 up to 30lbs or more in just 6 months’ statement to ‘9.5 pounds in 6 months’ and/or ‘10
21 pounds in 3+ months.’” Chadwick Decl. ¶ 6. Defendants state Plaintiff Stokes never saw
22 or read these new representations. Plaintiff Stokes argues this minor change is immaterial,
23 and that the same evidence will be used to prove that both representations are false. Reply
24 at 9. The Court agrees with Plaintiff: what is important is whether Defendants’
25 misrepresentations were false or misleading. This will be the issue regardless of the change
26 in advertising, as the advertising uniformly claims that users will lose weight after using
27 the Class Product.

28 ///

1 6. *Plaintiff Did Not Purchase the Product Online and Never Saw Sensa's*
2 *Website*

3 As mentioned above, Plaintiff Stokes purchased her product from a retail store and
4 over the phone, not online. Defendants state that 84% of the class members purchased the
5 Class Product online and Plaintiff Stokes is therefore atypical. Opp'n at 20. In support of
6 their argument, Defendants cite to *McCrary*, in which the court excluded class members
7 who purchased the product online because the proposed class definition required that the
8 putative member be exposed to the "packaging and/or labeling of" the product." 2014 WL
9 1779243, at *11. The court reasoned that "[m]ost, if not all, online consumers would not
10 have seen the packaging or labeling on the product prior to purchase." *Id.*

11 *McCrary* is clearly different from the present case. The class definition here does
12 not include a requirement that a class member be exposed to a certain advertisement. In
13 any event, Plaintiff Stokes testified she saw the Class Product advertised on an infomercial
14 on ShopNBC and saw ads on television. ECF No. 119-2 at 46, 73. Plaintiff Stokes also
15 purchased the Class Product at the retail store and saw the box or advertisement there that
16 stated it was a weight-loss product. The class members who purchased the Class Products
17 online also saw ads similarly stating that the Class Products would help with weight loss.
18 Given the uniform marketing, the different avenues of purchase here do not defeat
19 typicality. *See Greenwood v. Compucredit Corp.*, No. C 08-4878 CW, 2010 WL 291842,
20 at *4 (N.D. Cal. Jan. 19, 2010) ("The typicality requirement does not mandate that the
21 products purchased [or] methods of purchase . . . be the same as those of the absent class
22 members.") (quoting *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 261 (D.D.C. 2002)).

23 In sum, the Court finds that Plaintiff Stokes has established the "typicality"
24 requirement for a class representative.

25 ***D. Adequacy***

26 Federal Rule of Civil Procedure 23(a)(4) requires that "the representative parties will
27 fairly and adequately protect the interests of the class." "To determine whether the
28 representation meets this standard, [courts] ask two questions: (1) Do the representative

1 plaintiffs and their counsel have any conflicts of interest with other class members, and
2 (2) will the representative plaintiffs and their counsel prosecute the action vigorously on
3 behalf of the class?” *Staton*, 327 F.3d at 957.

4 Defendants argue Plaintiff Stokes cannot adequately fulfill her duties as class
5 representative because of her health issues. Opp’n at 21. Defendants state that, “[d]ue to
6 health reasons, Stokes was not able to travel from Florida to California (i) in July 2015 for
7 an Early Neutral Evaluation, (ii) in July 2017 for a second Early Neutral Evaluation, or
8 (iii) in January 2018 for her deposition.” *Id.* Plaintiff Stokes does not contest that she
9 could not travel to these events, but states she was able to appear telephonically and that
10 she was deposed in Florida.

11 Defendants further state that “Stokes also cannot attend trial in California,” but this
12 misrepresents Plaintiff’s deposition testimony. Plaintiff testified that, “[i]f this case were
13 to go to trial in California,” she “would have to make arrangements.” ECF No. 119-2 at
14 60. She testified that she does not know when she will be able to travel to California
15 because she does not know what is going to happen. *Id.* at 61–62. Defendants cite to *Tria*,
16 where the court found various reasons why the plaintiff was not a suitable class
17 representative, one of which being the plaintiff testified she did not know whether she was
18 willing to go to trial in the case. 2013 WL 12324181, at *8. *Tria* is inapplicable where, as
19 here, the plaintiff appears to be willing to go to trial and willing to make arrangements
20 should the time come. This does not make Plaintiff Stokes an inadequate representative.

21 Defendants also claim Plaintiff Stokes lacks sufficient knowledge to be the
22 representative in this case. Opp’n at 21. In support, Defendants cite to Plaintiff Stokes’
23 deposition, at which she testified she is not aware of any settlements with anybody in this
24 case or dismissals of any defendants from the case. ECF No. 119-2 at 34. She testified
25 that she does not know the “geographic parameters” of the proposed class, nor does she
26 know whether she is seeking to represent men and women, a certain age group, or
27 purchases made in a certain time period. *Id.* at 64–65. She was unable to define “alter
28 ego” and does not know whether the concept has anything to do with the case. *Id.* at 71.

1 She also testified she believes there are other class representatives in the case. *Id.* at 164.

2 “Just where the dividing line is between what a class representative plaintiff should
3 know herself and what she can safely leave to her counsel is somewhat unclear.” *Tria*,
4 2013 WL 12324181, at *8. On the one hand, “[c]ourts have held that a class representative
5 who is unfamiliar with the case will not serve the necessary role of check[ing] the otherwise
6 unfettered discretion of counsel in prosecuting the suit. Courts have developed a standard
7 of ‘striking unfamiliarity’ to assess a representative’s adequacy in policing the prosecution
8 of his or her lawsuit.” *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994) (citations
9 omitted). On the other hand, courts have found named representatives to be adequate if
10 they understand the alleged violations, the “underlying legal basis” of the action, or “the
11 gist of the suit.” *Stuart v. Radioshack Corp.*, No. C-07-4499 EMC, 2009 WL 281941, at
12 *11 (N.D. Cal. Feb. 5, 2009) (collecting cases).

13 Here, Plaintiff Stokes has demonstrated that she has a general understanding of her
14 claims. She testified that “[t]his is a class action.” ECF No. 119-2 at 12. She also testified
15 that she and the class members “believed in something,” bought the Class Product, and lost
16 money. *Id.* at 65. She testified that the class members “believed in what they were doing,
17 and it was not true” and the Class Product “didn’t work for them for some reason for
18 another.” *Id.*

19 Although the Court has some reservations regarding Plaintiff Stokes’ knowledge of
20 the complicated history of this case, it concludes that Plaintiff Stokes would adequately
21 represent the class. Plaintiff Stokes could not travel to California for her deposition, but
22 she did sit for a lengthy deposition in Florida. She was available to participate
23 telephonically at both conferences with Magistrate Judge Gallo. Reply at 9. The Court is
24 also encouraged by Plaintiff Stokes’ statement that she “will do everything in [her] ability
25 to attend” trial if it occurs and will do “what is necessary as the class representative in this
26 case.” Stokes Decl. ¶ 8. Further, Plaintiff Stokes understands the “gravamen of the claim”
27 in this case. See *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004). The
28 Court finds that Plaintiff Stokes is sufficiently familiar with their claims to adequately

1 represent the members of the proposed class.

2 Class counsel also appears to be adequate, and the Court has already appointed
3 Bursor & Fisher as interim class counsel in this case. ECF No. 32, at 7 (finding “Bursor
4 & Fisher has demonstrated that it is capable of adequately and fairly representing Plaintiffs
5 in this case”). Defendants have raised no concerns in this regard. Class counsel represent
6 that they have extensive experience, and have thus far litigated the case vigorously.
7 Consequently, the court concludes that Bursor & Fisher are able adequately to represent
8 the class.

9 In sum, the Court finds that Plaintiff Stokes has demonstrated that she is an adequate
10 class representative and that class counsel are also adequate. The adequacy requirement is
11 therefore satisfied. Plaintiff Stokes has satisfied the four requirements of Rule 23(a) and
12 the Court proceeds to analyze the requirements of Rule 23(b)(3).

13 **III. Rule 23(b)(3) Requirements**

14 Rule 23(b)(3) states that a class may be maintained if the requirements of Rule 23(a)
15 are fulfilled and if “the court finds that the questions of law or fact common to the class
16 members predominate over any questions affecting only individual members, and that a
17 class action is superior to other available methods for fairly and efficiently adjudicating the
18 controversy.” Fed. R. Civ. P. 23(b)(3).

19 **A. *Predominance of Common Issues***

20 The predominance analysis focuses on “the legal or factual questions that qualify
21 each class member’s case as a genuine controversy” to determine “whether proposed
22 classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*
23 *Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *see also* Fed. R. Civ. P. 23(b)(3) (to
24 certify a class, the court must find that “questions of law or fact common to class members
25 predominate over any questions affecting only individual members”). “Considering
26 whether questions of law or fact common to class members predominate begins . . . with
27 the elements of the underlying cause of action.” *Erica P. John Fund, Inc. v. Halliburton*
28 *Co.*, 563 U.S. 804, 809 (2011) (quotation marks omitted). A court must analyze these

1 elements to “determine which are subject to common proof and which are subject to
2 individualized proof.” *In re TFT-LCD I*, 267 F.R.D. at 310–11. Defendants argue that
3 individual legal and factual issues will predominate in this matter and thus this requirement
4 is not satisfied. Opp’n at 24.

5 *1. Arbitration*

6 Defendants first cite to the arbitration clause on Sensa’s website, arguing this causes
7 predominance issues. Sensa’s website contains a provision that states all purchasers agree
8 to arbitrate their claims on an individual basis. Opp’n at 24; *see* ECF No. 119-1 at 32 (term
9 on the website stating: “Any controversy, claim or dispute arising out of or relating tin any
10 way to . . . products purchased through the Site shall be resolved by final and binding
11 arbitration”). According to Defendants, approximately 84% of the purchases made during
12 the class period were through Sensa’s website. Plaintiff Stokes does not contest this high
13 percentage of online purchasers nor the existence of the arbitration agreement, but argues
14 the Court should create subclasses or exclude certain members later. Reply at 11.

15 One court has held that “[t]he fact that some members of a putative class may have
16 signed arbitration agreements or released claims against a defendant does not bar class
17 certification,” and that “class certification should not be denied merely because some class
18 members may be subject to the defense that their claims are barred by valid documents
19 releasing the defendant from liability.” *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666,
20 681 (N.D. Cal. 2011) (quoting *Coleman v. GMAC*, 220 F.R.D. 64, 91 (N.D. Tenn. 2004)).
21 The court in *Coleman* decided to proceed “by ruling on the merits of the class certification
22 and reserving the right to create subclasses or exclude members from the class at a later
23 juncture.” 220 F.R.D. at 91.

24 This path, however, has been rejected by another court. In *Pablo v. ServiceMaster*
25 *Global Holdings Inc.*, No. C 08-3894 SI, 2011 WL 3476473 (N.D. Cal. Aug. 9, 2011), the
26 court declined to resolve the arbitration issue at a later juncture because, “in this case[,]”
27 plaintiffs’ legal claims are already complex, defendants have presented significant
28 evidence of numerous enforceable arbitration agreements, intervening Supreme Court case

1 law has complicated the issue of waiver and enforcement, and this case was filed
2 approximately three years ago.” *Id.* at *3. The court reasoned that “a significant portion
3 of this litigation would be devoted to discovering which class members signed such
4 agreements and enforcing those agreements, rather than to the resolution of plaintiffs’ legal
5 claims—which themselves are complex.” *Id.* at *2. The court therefore denied the motion
6 for class certification.

7 Defendants here also point the Court to choice of law issues relating to the arbitration
8 agreement. The arbitration agreement on Sensa’s website states that “any controversy,
9 claim or dispute arising out of . . . products purchased through the Site shall be governed
10 by the laws of your home state of residence.” ECF No. 119-1 at 37. In *Lozano v. AT&T*
11 *Wireless Services, Inc.*, 504 F.3d 718 (9th Cir. 2007), the Ninth Circuit affirmed the denial
12 of a motion for class certification. *Id.* at 728. The district court below “found the class
13 action waiver to be unconscionable under California law . . . [and] recognized that the
14 waiver may not be unconscionable under other states’ laws.” *Id.* Therefore, common
15 issues did not predominate because the defendant’s “intent to seek arbitration of the class
16 would necessitate a state-by-state review of contract conscionability jurisprudence.” *Id.*
17 The Ninth Circuit found the district court did not abuse its discretion in declining to certify
18 the class on this basis. *Id.* Citing *Lozano*, Defendants here argue that challenges to the
19 enforceability of the arbitration provision could be governed by the law of each state of the
20 class member, Opp’n at 25; Plaintiff Stokes does not respond to this specific argument.

21 If the proposed class is certified, the Court will be forced to determine which of the
22 class members may be subject to the arbitration provision (*i.e.*, those who purchased
23 online), and those who are not (*i.e.*, all others). The Court also may have to analyze the
24 legality of the arbitration clause and whether it binds all, some, or none of the purchasers.
25 See *Lozano*, 504 F.3d at 728. In the end, it is possible that approximately 84% of the class
26 members would not be able to participate in the class action due to their online purchase.
27 The Court therefore agrees with the reasoning by the court in *Pablo*: These individual
28 issues would overshadow the common issues of whether Defendants’ advertisements were

1 false and whether Defendants violated certain laws. Consequently, the Court finds that
2 Plaintiff Stokes has not satisfied the predominance requirement for this reason. The Court
3 proceeds in analyzing Defendants' further arguments so it may point out other issues with
4 the proposed class.

5 2. *State Law Variations*

6 Plaintiff proposes certifying a nationwide class and applying California law to the
7 case. Mot. at 18–19. Defendants point to predominance problems with this proposal,
8 arguing in reliance on *Mazza*, 666 F.3d 581, that California law will not apply to the class
9 claims because “the laws of each state govern the claims of the putative class members.”
10 Opp’n at 26.

11 The class action proponent bears the initial burden of showing that California has a
12 sufficient aggregation of contacts to the claims of the putative class. *See Mazza*, 666 F.3d
13 at 589. “Such a showing is necessary to ensure that application of California law is
14 constitutional.” *Id.* (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310–13 (1981)).
15 “Once the class action proponent makes this showing, the burden shifts to the other side to
16 demonstrate that foreign law, rather than California law, should apply to class claims.” *Id.*
17 (internal quotation marks omitted).

18 “California law may only be used on a classwide basis if the interests of other states
19 are not found to outweigh California’s interest in having its law applied.” *Id.* at 589–90.
20 To determine whether the interests of other states outweigh California’s interest, courts
21 apply a three-step governmental interest test:

22 First, the court determines whether the relevant law of each of
23 the potentially affected jurisdictions with regard to the particular
24 issue in question is the same or different.

25 Second, if there is a difference, the court examines each
26 jurisdiction’s interest in the application of its own law under the
27 circumstances of the particular case to determine whether a true
28 conflict exists.

1 Third, if the court finds that there is a true conflict, it carefully
2 evaluates and compares the nature and strength of the interest of
3 each jurisdiction in the application of its own law to determine
4 which state's interest would be more impaired if its policy were
5 subordinated to the policy of the other state and then ultimately
applies the law of the state whose interest would be more
impaired if its law were not applied.

6 *Id.* (quoting *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 87–88 (2010)).

7 The Ninth Circuit in *Mazza* reviewed the application of California consumer
8 protection laws, specifically the Unfair Competition Law, the False Advertising Law, and
9 the Consumer Legal Remedies Act, to a nationwide class. *Id.* at 587, 590. The court
10 performed California's choice-of-law analysis and determined: (1) there are material
11 differences between California consumer protection laws and the laws of other states,
12 including requirements of scienter, reliance, and available remedies; (2) foreign
13 jurisdictions have a significant interest in regulating interactions between their citizens and
14 corporations doing business within their state, insofar as consumer protection laws affect a
15 state's ability to attract industry; and (3) applying California law to those jurisdictions
16 would significantly impair their "ability to calibrate liability to foster commerce," while
17 "California's interest in applying its law to residents of foreign states is attenuated." *Id.* at
18 591–94. Based on this analysis, the court held that "each class member's consumer
19 protection claim should be governed by the consumer protection laws of the jurisdiction in
20 which the transaction took place" and vacated the district court's certification of a
21 nationwide class. *Id.* at 594.

22 Other courts similarly have declined to apply California consumer protection law to
23 a nationwide class. *See, e.g., Brazil v. Dole Packaged Foods, LLC*, No. 12-cv-1831-LHK,
24 2014 WL 2466559, at *14 (N.D. Cal. May 30, 2014) (declining to certify a nationwide
25 class and narrowing the proposed class to exclusively California consumers); *Astiana*, 291
26 F.R.D. at 510; *Thurston v. Bear Naked, Inc.*, No. 3:11-cv-2890-H (BGS), 2013 WL
27 5664985, at *12 (S.D. Cal. July 30, 2013); *Gustafson v. BAC Home Loans Servicing, LP*,
28 294 F.R.D. 529, 539 (C.D. Cal. 2013).

1 a. Conflicts Between States' Laws

2 Plaintiff brings causes of action for: (1) violation of the Magnuson-Moss Warranty
3 Act; (2) breach of express warranty; (3) breach of implied warranties; (4) violation of
4 California's Consumers Legal Remedies Act; (5) violation of California's False
5 Advertising Law; (6) unlawful business practices in violation of California's Unfair
6 Competition Law (unlawful, unfair, and fraudulent and deceptive practices); (7) violation
7 of Florida's Deceptive and Unfair Trade Practices Act; and (8) negligent misrepresentation.
8 *See generally* TAC.

9 Defendants identify various "material conflicts" between the laws of California and
10 other states for Plaintiff's causes of action. Opp'n at 26. Defendants state that the
11 consumer protection laws vary as follows: (1) allowing vs. barring class actions, (2) proof
12 of causation and reliance, and (3) proof of actual injury and damages. *Id.* Warranty laws
13 vary as well; for express warranties, for example, the elements of reliance and the notice
14 requirements vary among states. *Id.* at 27. For implied warranties, privity is required
15 between the consumer and the manufacturer in some states. *Id.* The elements of negligent
16 misrepresentation also vary. Defendants have attached a chart showing the relevant
17 differences for all causes of action and remedies. *See* ECF No. 119-2 at 110–33. Plaintiff
18 does not contest that there are differences, but argues they are not material in this case as
19 applied to the facts. Reply at 11.

20 Defendants have demonstrated that there are differences between California's and
21 other states' laws on material issues for many, if not all, of Plaintiff Stokes' causes of
22 action. Issues such as privity, the statute of limitations, the notice requirement, etc., are
23 material in this case because each could be dispositive of the individual class members'
24 cases.⁵

25
26 ⁵ Plaintiff Stokes contests Defendants' argument regarding reliance, arguing that of course the consumers
27 relied on the advertising, or else they would have been purchasing a random box of sprinkles. Mot. at 9.
28 While this may be true and it is likely that the consumers relied on the weight loss advertisements, Plaintiff
Stokes does not present any argument as to why other elements are not material to this case, such as
privity, statute of limitations, etc.

1 b. States' Interests

2 Defendants argue each state has an interest in applying its own law for issues
3 involving conduct that impacts its residents. Opp'n at 27. Indeed, the court in *Mazza* held
4 that "each state has an interest in setting the appropriate level of liability for companies
5 conducting business within its territory." 666 F.3d at 592. Plaintiff Stokes does not appear
6 to contest this, arguing only why California would be more impaired if its own law were
7 not applied. The Court finds that all states have an interest in applying their own laws to
8 protect their residents.

9 c. Which Law Applies?

10 This issue now becomes which state's interest would be more impaired should their
11 law not apply. Plaintiff Stokes argues that Sensa was headquartered in California, so most
12 class members purchased the Class Products online from a California-based company.
13 Reply at 13. Plaintiff Stokes notes that Defendants had no physical locations in other states,
14 and "did not pay taxes to foreign states for the online sales of Sensa." *Id.* In sum, Plaintiff
15 Stokes claims that the foreign states, "to whom sales of Sensa provided virtually no tax
16 revenue or jobs, face minimal impairment from the application of California to
17 Defendants." *Id.*

18 The Court disagrees with Plaintiff Stokes' reasoning. Simply because Defendants
19 are not located in and do not pay taxes in foreign states does not mean that those states do
20 not have an interest in protecting their own residents. The Court must look at the interests
21 of all states.

22 It is true that Sensa was located in California, and California has an interest in
23 ensuring false advertising and unfair business practices do not emanate from companies
24 within its borders. *See Pecover v. Elec. Arts Inc.*, No. C 08-2820 VRW, 2010 WL 8742757,
25 at *20 (N.D. Cal. Dec. 21, 2010) (noting that California courts have "recognized
26 California's interest in entertaining claims by nonresident plaintiffs against resident
27 defendants"). California "has a legitimate interest in extending state-created remedies to
28 out-of-state parties harmed by wrongful conduct occurring in California." *Norwest Mortg.*,

1 *Inc. v. Super. Ct.*, 72 Cal. App. 4th 214 (1999). Nonetheless, “every state has an interest
2 in having its law applied to its resident claimants.” *Mazza*, 666 F.3d at 592–93 (citing
3 *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir.), *amended on denial*
4 *of reh’g*, 273 F.3d 1266 (9th Cir. 2001)). Further, both California courts and the Ninth
5 Circuit have held that “the place of the wrong” has the predominant interest in regulating
6 the conduct at issue. *Hernandez v. Burger*, 102 Cal. App. 3d 795, 801–02 (1980),
7 *Abogados v. AT & T, Inc.*, 223 F.3d 932, 935 (9th Cir. 2000). The Restatement (First) of
8 Conflict of Laws defines the “place of wrong” as “the state where the last event necessary
9 to make an actor liable for an alleged tort takes place.” *See Zinn v. Ex-Cell-O Corp.*, 148
10 Cal. App. 2d 56, 80 n.6 (1957) (citing Restatement (First) of Conflict of Laws § 377
11 (1934)). Note 4 to the Restatement further elaborates that “[w]hen a person sustains loss
12 by fraud, the place of wrong is where the loss is sustained, not where fraudulent
13 representations are made.” Thus, the “place of the wrong” occurs where the potential class
14 members sustains their loss. *See Guzman*, 305 F.R.D. at 617 (finding same). Here, this
15 would be where the members saw the advertisements and subsequently purchased the
16 product, regardless of where the company selling the product was located at the time. Thus,
17 as the place of the wrong, these states would have a greater interest than does California in
18 applying their law to this case.

19 The Court therefore concludes that, under California’s choice-of-law analysis, the
20 claims of the potential classmembers should be governed by the laws of the jurisdiction in
21 which the loss was sustained. For purchases made outside California, the Court finds that
22 other states’ interests would be more impaired by applying California law than would
23 California’s interests by applying the laws of other states. Applying California law for the
24 nationwide class is therefore inappropriate. Because adjudication of the nationwide claims
25 could require application of the laws of 50 states, common questions of law would not
26 predominate for the proposed nationwide class, as is required by Rule 23(b)(3). In sum,
27 the Court finds that Plaintiff has not satisfied the predominance requirement.

28 ///

1 **B. Superiority**

2 The final requirement for class certification is “that a class action [be] superior to
3 other available methods for fairly and efficiently adjudicating the controversy.” Fed R.
4 Civ. P. 23(b)(3). “In determining superiority, courts must consider the four factors of Rule
5 23(b)(3).” *Zinser*, 253 F.3d at 1190. The Rule 23(b)(3) factors are:

6 (A) [T]he class members’ interests in individually controlling the
7 prosecution or defense of separate actions; (B) the extent and
8 nature of any litigation concerning the controversy already begun
9 by or against class members; (C) the desirability or undesirability
10 of concentrating the litigation of the claims in the particular
forum; and (D) the likely difficulties in managing a class action.

11 Fed. R. Civ. P. 23(b)(3). The superiority inquiry focuses “on the efficiency and economy
12 elements of the class action so that cases allowed under [Rule 23(b)(3)] are those that can
13 be adjudicated most profitably on a representative basis.” *Zinser*, 253 F.3d at 1190
14 (internal quotation marks omitted). A district court has “broad discretion” in determining
15 whether class treatment is superior. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th
16 Cir. 1975).

17 Defendants argue that a class action is not superior to other methods here because of
18 the prior FTC settlement. Opp’n at 21. Defendants primarily rely on *Kamm v. California*
19 *City Development* in support of this argument. In *Kamm*, the plaintiffs brought a putative
20 class action for claims arising out of the defendants’ land promotion scheme. 509 F.2d at
21 206. Prior to the initiation of the plaintiffs’ suit, the Attorney General and the Real Estate
22 Commissioner of California had brought an action against four of the nine defendants, in
23 which a permanent injunction and final judgment on a settlement agreement had already
24 been filed. *Id.* at 207–08. The settlement agreement provided for offers of restitution of
25 principal payment to certain purchasers, as well as an agreement that the defendant would
26 use its “best efforts to establish and implement a program to settle future disputes,”
27 including rendering quarterly reports to the Attorney General setting forth the names of
28 complainants, the general nature of the complaints, and the disposition. *Id.* at 208. The

1 defendants were also permanently enjoined from engaging in the fraudulent conduct at
2 issue. *Id.* The state court retained jurisdiction over the matter, and nothing precluded any
3 purchaser from instituting an individual action against the defendants for any alleged
4 damage. *Id.*

5 Under those circumstances, the Ninth Circuit upheld the district court’s dismissal of
6 the plaintiffs’ class complaints for lack of superiority, citing seven factors supporting the
7 holding. *Id.* at 212. First, “[a] class action would require a substantial expenditure of
8 judicial time which would largely duplicate and possibly to some extent negate the work”
9 in the prior action. Second, the class action would involve thousands of buyers “in separate
10 transactions over a 14 year period.” Third, “[s]ignificant relief had been realized in the
11 state action through:” (a) restitution, (b) defendant’s “agreement to establish a program to
12 settle future disputes,” (c) a permanent injunction, and (d) a “guarantee of funds for off-
13 site improvements.” Fourth, the state court retained continuing jurisdiction. Fifth, no
14 member of the class was barred from initiating a suit on his or her own behalf. Sixth,
15 “[a]lthough the class action aspects of the case ha[d] been dismissed, appellants’ action
16 [was] still viable.” And seventh, “[d]efending a class action would prove costly to the
17 defendants and duplicate in part the work expended over a considerable period of time in
18 the state action.” *Id.*

19 Applying *Kamm* to a situation similar to that of the present case, the court in *Imber-*
20 *Gluck v. Google Inc.*, No. 5:14-cv-1070-RMW, 2015 WL 1522076 (N.D. Cal. Apr. 3,
21 2015), analyzed the superiority requirement for a proposed class when an FTC settlement
22 was already in place. After applying the *Kamm* factors, the court in *Imber-Gluck* found
23 the class action was not superior because the relief plaintiffs sought, *i.e.*, refunds for their
24 purchases from Google, was already available through the FTC settlement. *Id.* at *2.

25 Plaintiff Stokes argues the Court should not consider the FTC settlement superior to
26 the class action for two reasons. First, she distinguishes *Kamm* by stating that she estimates
27 that classwide damages are more than \$170 million, so “tens of thousands of class
28 members” are still owed money despite the \$26.5 million obtained by the FTC. Reply at

1 10.⁶ This argument, however, was specifically rejected by the Ninth Circuit in *Kamm*, in
2 which the settlement totaled \$3.3 million for losses of up to \$200 million. 509 F.2d at 207–
3 08. The court noted “[i]t is true that not all members of the class appellants seek to
4 represent will be protected by the California settlement; nor will the class recover an
5 amount that is even close to that sought in the class action.” *Id.* at 211. The settlement did
6 not cover all putative class members, and required the defendant to “use its best efforts to
7 establish and implement a program to settle future disputes.” *Id.* at 208. Similarly, here,
8 although the FTC settlement did not provide as much money as Plaintiff and the class
9 members seek, this disparity does not prevent the Court from considering the FTC
10 settlement in analyzing superiority.

11 Plaintiff also argues that the FTC settlement did not involve the solvent Defendants
12 in this action, IBH or JustFab, so there is no duplication as to those Defendants. Reply at
13 10. Again, the court in *Kamm* rejected a similar argument, noting that “the state action did
14 not involve the same controversy, [and] did not include five of the defendants named in
15 this action.” 509 F.2d at 213. Although there were differences between the two actions,
16 both “involve[d] the same fraudulent conduct of the defendants and both seek to provide
17 relief for those injured thereby.” *Id.* In sum, the court concluded that the differences did
18 not “render the state action so different a controversy that it should not have been
19 considered by the district court in determining whether the class action was superior to
20 alternative methods.” *Id.* Therefore, despite the different parties, the Court may still
21 consider the FTC settlement in analyzing superiority. The Court now analyzes the *Kamm*
22 factors in the context of this case:

23 First, the class action would “require a substantial expenditure of judicial time which
24 would largely duplicate” the work of the FTC investigation and resulting settlement. *See*
25

26
27 ⁶ Plaintiff Stokes argues that the FTC settlement was paid to people who purchased Sensa at any time
28 from 2008 to 2014, and therefore many class members are not covered. Reply at 10 n.1. Plaintiff Stokes’
proposed class covers those who purchased Sensa on or after August 22, 2012. Therefore, the FTC
settlement and proposed class are therefore at least duplicative for the overlapping time.

1 *Kamm*, 509 F.2d at 212. Second, the class would involve thousands of purchasers of the
2 Class Products over a period of approximately six years. Third, the FTC settlement has
3 provided “significant relief” to some class members to the tune of \$26.5 million. The
4 difference between this case and *Kamm*, however, is that here there is no “agreement [by
5 the defendants] to settle future disputes.” Fourth, the district court in the FTC matter
6 retained jurisdiction “for purposes of construction, modification, and enforcement of this
7 Order.” *See* Ex. I to TAC, ECF No. 76-2 at 41. Fifth, the FTC settlement does not state
8 whether it bars class action claims; however, it appears that it does not, as the Court
9 assumes that Defendants would have raised this argument. Sixth, Plaintiff Stokes’ claims
10 (as well as other individual claims) are still viable. Seventh, as the Court assumes to be
11 true generally, defending a class action “would prove costly to the defendants.” *See Kamm*,
12 509 F.2d at 212.

13 In sum, the *Kamm* factors weigh almost exclusively in favor of finding that the
14 superiority requirement has not been met here. Although it is true that the main distinction
15 between the facts in this case and those in *Kamm*, *i.e.*, that there is no agreement here to
16 settle future disputes, weighs in favor of Plaintiff Stokes, the Court finds that because
17 Plaintiff Stokes and other members may still bring individual suits, this is an adequate way
18 to resolve future disputes. This leads the Court to conclude that Plaintiff Stokes has failed
19 to establish that the proposed class action is superior to other methods for adjudication of
20 the controversy.

21 **IV. Ascertainable Class**

22 Although usually analyzed before the Rule 23 factors, the Court now analyzes
23 whether the class is ascertainable so it may point out one final flaw in Plaintiff Stokes’
24 proposed class. “As a threshold matter, and apart from the explicit requirements of Rule
25 23(a), the party seeking class certification must demonstrate that an identifiable and
26 ascertainable class exists.” *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009).
27 Certification is improper if there is “no definable class.” *Lozano*, 504 F.3d at 730. “A
28 class should be precise, objective, and presently ascertainable,” though “the class need not

1 be so ascertainable that every potential member can be identified at the commencement of
2 the action.” *O’Connor v. Boeing N. Am. Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)
3 (internal quotation marks omitted). “A class is ascertainable if it is defined by ‘objective
4 criteria’ and if it is ‘administratively feasible’ to determine whether a particular individual
5 is a member of the class.” *Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK, 2014
6 WL 2860995, at *4 (N.D. Cal. June 23, 2014). On the other hand, “[a] class definition is
7 inadequate if a court must make a determination of the merits of the individual claims to
8 determine whether a person is a member of the class.” *Hanni v. Am. Airlines, Inc.*, No. C
9 08-00732, 2010 WL 289297, at *9 (N.D. Cal. Jan. 15, 2010). “It is not fatal for a class
10 definition to require some inquiry into individual records, as long as the inquiry is not so
11 daunting as to make the class definition insufficient.” *Herrera v. LCS Fin. Servs. Corp.*,
12 274 F.R.D. 666, 673 (N.D. Cal. 2011) (internal quotation marks omitted).

13 Defendants did not address the ascertainability of the proposed class; however, the
14 problems recognized by the Court above also pose problems for this requirement, and the
15 Court briefly repeats them here. First, the Court finds that Plaintiff Stokes has failed to
16 establish an ascertainable class because 84% of the class purchased the Class Product from
17 the website and therefore may be subject to arbitration. This statistic has been presented
18 by Defendants and not refuted by Plaintiff Stokes, nor has she argued that the arbitration
19 provision on the website is invalid or inapplicable. *See Guzman v Bridgepoint Educ., Inc.*,
20 305 F.R.D. 594, 612 (S.D. Cal. Mar. 26, 2015) (determining that “Plaintiff fails to
21 demonstrate an identifiable and ascertainable class in light of evidence suggesting that up
22 to 96% of the proposed class may not even be eligible to participate in this class action”
23 due to an arbitration agreement).

24 Second, the Court finds that Plaintiff Stokes has failed to establish an ascertainable
25 class because the proposed class does not exclude purchasers who have already received
26 funds from the FTC settlement. In *Algarin*, the court found that the class was “overbroad
27 and not ascertainable” because the class “does not exclude purchasers who have already
28 received refunds through [defendant’s] Refund program. 300 F.R.D. at 455. The court

1 noted that, “[a]s the [Unfair Competition Law] only permits recovery or
2 restitution/disgorgement, for purchasers who have already received refunds, they have
3 already been compensated well over any potential disgorgement. These purchasers have
4 no claims.” *Id.*; *see a;sp Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128,
5 1151 (N.D. Cal. 2010) (finding a class not ascertainable where the definition includes
6 persons who have received refunds, replacements, or who have not suffered any damages
7 at all).

8 In sum, Plaintiff Stokes has failed to demonstrate her proposed class is ascertainable.

9 CONCLUSION

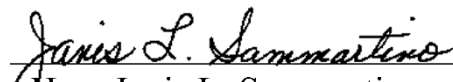
10 The Court finds Plaintiff Stokes has not met her burden in establishing that: (1) the
11 class is ascertainable, (2) common issues predominate over individual issues, and (3) the
12 class action is superior to other methods. The Court therefore **DENIES** Plaintiff Stokes’
13 Motion for Class Certification (ECF No. 115).

14 The Court is within its discretion to give Plaintiff Stokes a second opportunity to
15 show that the proposed class fulfills all requirements of Federal Rule of Civil Procedure
16 23. *See, e.g., Newberry v. Cnty. of San Bernardino*, No. EDCV 14-2298 JGB (SPx), 2015
17 WL 9701153, at *7 (C.D. Cal. July 23, 2015); *Deirmenjian v. Deutsche Bank, A.G.*, No.
18 CV 06-00774, 2010 WL 3034060, at *1 (C.D. Cal. July 30, 2010), *aff’d*, 548 Fed. App’x
19 461 (9th Cir. 2013) (denying without prejudice motion for class certification where
20 plaintiffs failed to show ascertainability and further evidence may cure deficiency). The
21 Court finds that Plaintiff Stokes may be able to cure the deficiencies noted herein. Any
22 further motion for class certification shall address the issues detailed above.

23 The Court **ORDERS** the parties to meet and confer and, by October 15, 2018, jointly
24 propose a briefing schedule for Plaintiff Stokes’ renewed motion for class certification.

25 **IT IS SO ORDERED.**

26 Dated: September 10, 2018

27 
28 Hon. Janis L. Sammartino
United States District Judge