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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 Selena Moorer,

12 Plaintiff,

13 v.

14 Stemgenex Medical Group, Inc., et al.

15 Defendants.  
16  
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18

Case No.: 16-cv-2816-AJB-NLS

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION FOR CLASS  
CERTIFICATION (Doc. No. 95),**

**(2) DENYING DEFENDANTS'  
MOTIONS TO STRIKE  
(Docs. No. 109, 110)**

19 This is a complex and troubling case. The question before the Court today is narrow:  
20 whether the case is certifiable. As to that question, the Court finds it is. However, the Court  
21 warns of dangers down the road, as stated in the briefing and discussed extensively at the  
22 oral argument hearing. Finding the class is narrowly certifiable at this stage, the Court  
23 **GRANTS** Plaintiffs' motion to certify the class. (Doc. No. 95.) The Court **DENIES** both  
24 Defendants' motions to strike the reports of Dr. David Stewart, (Doc. No. 109), and Dr.  
25 Michael Kamins and Dr. Eliot Hartstone, (Doc. No. 110), with some caveats.

26 **I. BACKGROUND**

27 On August 22, 2014, Plaintiffs filed a putative class action complaint against  
28 Defendants in the Superior Court of California, County of San Diego, alleging violations

1 of California’s Unfair Competition Law, Business and Professions Code section 17200, et  
 2 seq., (“UCL”), California’s False Advertising Law, Business and Professions Code section  
 3 17500, et seq., (“FAL”), California’s Consumer Legal Remedies Act, California Civil  
 4 Code section 1770, et seq., (“CLRA”), California’s Health and Safety Code section 24170,  
 5 et seq., (“Human Experimentation”), 18 U.S.C. section 1961, et seq., (“RICO”), Fraud,  
 6 Negligent Misrepresentation, and Unjust Enrichment. (Doc. No. 1-2.) On September 15,  
 7 2016, Plaintiffs filed a First Amended Complaint, (“FAC”), to include a claim for damages  
 8 under the CLRA. (Doc. No. 1-3.) The FAC contained similar factual allegations, but added  
 9 Plaintiff Stephen Ginsberg to the action and alleged an additional claim for Financial Elder  
 10 Abuse. (*Id.*) On November 16, 2016, Defendants removed the action to this Court pursuant  
 11 to 28 U.S.C. § 1441(a) and (b). (Doc. No. 1.)

12 The operative complaint alleges that Defendants engage in a nationwide scheme to  
 13 “wrongfully market and sell ‘stem cell treatments’” to consumers who are often “sick or  
 14 disabled, suffering from incurable diseases and a dearth of hope.” (Doc. No. 24 at 3.)  
 15 Specifically, Plaintiffs allege that Defendants advertise their “stem cell treatments” to  
 16 consumers via their website and make misrepresentations that the treatments “effectively  
 17 treat a multitude of diseases,” when in actuality, Defendants maintain “no reasonable basis”  
 18 to make these claims. (*Id.*) Plaintiffs further allege that Defendants represent to consumers  
 19 that “100% of its prior consumers are satisfied with its service,” while omitting material  
 20 information about its services, including consumer dissatisfaction and complaints  
 21 regarding the ineffectiveness of the treatments. (*Id.*) These statements were based upon  
 22 “Patient Satisfaction Ratings” or “PSR” collected by defendant. Plaintiffs seek to represent  
 23 a class of all consumers nationwide who purchased Stem Cell Treatments from StemGenex  
 24 between December 8, 2013 and present, and a subclass of all members of the nationwide  
 25 class aged 65 years or older at the time of purchase. (*Id.* ¶¶ 64–65.) Plaintiffs allege that  
 26 each customer was exposed to Defendants’ website, relied on Defendants’ “false and  
 27 misleading marketing” of the Stem Cell Treatments, and have been harmed as a result. (*Id.*)  
 28 Specifically, Plaintiff Moorer, suffering from lupus, and Plaintiff Gardener, suffering from

1 diabetes, each relied upon the customer satisfaction statistics posted on the StemGenex  
 2 website in deciding to purchase Defendants' Stem Cell Treatments. (*Id.* ¶¶ 8–9A.)  
 3 Plaintiffs allege that each Plaintiff paid a total of \$14,900.00 for the treatment, did not  
 4 benefit from the treatment, and informed Defendants of their dissatisfaction. (*Id.* ¶¶ 8–9A,  
 5 11.) Further, Plaintiffs allege they would “not have paid for the Stem Cell Treatment had  
 6 they known that the statistics on the StemGenex website regarding consumer satisfaction  
 7 were false, and that StemGenex had no reasonable basis for its marketing claim that the  
 8 Stem Cell Treatments were effective to treat diseases as advertised.” (*Id.* ¶ 10.)

## 9 II. MOTIONS TO STRIKE

10 Defendants seek to strike two of Plaintiffs' expert reports from Dr. Stewart and Drs.  
 11 Kamins and Hartstone. (Doc. No. 109, 110.)

### 12 A. LEGAL STANDARDS

13 On a motion for class certification, courts apply *Daubert v. Merrell Dow Pharms.,*  
 14 *Inc.*, 509 U.S. 579, 597 (1993) to expert testimony. *Ellis v. Costco Wholesale Corp.*,  
 15 657 F.3d 970, 982 (9th Cir. 2011). Expert testimony is admissible if the party offering such  
 16 evidence shows that the testimony is both reliable and relevant. Fed. R. Evid. 702; *Kumho*  
 17 *Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Daubert*, 509 U.S. at 590–91. Federal  
 18 Rule of Evidence 702 permits expert testimony if:

19 (a) the expert's scientific, technical, or other specialized knowledge will help  
 20 the trier of fact to understand the evidence or to determine a fact in issue; (b)  
 21 the testimony is based on sufficient facts or data; (c) the testimony is the  
 22 product of reliable principles and methods; and (d) the expert has reliably  
 applied the principles and methods to the facts of the case.”

23 Fed. R. Evid. 702. An expert can be qualified “by knowledge, skill, experience, training,  
 24 or education. *Id.*

25 At class certification, district courts do not have to conduct a full *Daubert* analysis.  
 26 *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 495 (C.D. Cal. Dec. 20, 2012).  
 27 Instead, “district courts must conduct an analysis tailored to whether an expert's opinion  
 28 was sufficiently reliable to admit for the purpose of proving or disproving Rule 23 criteria,

such as commonality and predominance.” *Id.* For this tailored analysis, district courts apply *Daubert*’s relevance and reliability requirements as “useful guideposts but the court[s] retain[ ] discretion in determining how to test reliability as well as which expert’s testimony is both relevant and reliable.” *Id.* (quoting *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 635 (N.D. Cal. 2007) affirmed on this point by *Ellis*, 657 F.3d at 982 (holding the district court “correctly applied the evidentiary standard set forth in *Daubert*”). But courts still must “resolve any factual disputes necessary to determine” whether the putative class satisfies Rule 23. *Id.* (quoting *Ellis*, 657 F.3d at 982).

## **B. DR. STEWART’S REPORT**

Defendants seek to strike Dr. Stewart’s report, which attempts to analyze what effect the PSR impacted a consumer’s decision to purchase the treatment. Essentially, Dr. Stewart’s report relates to the proposed class’s damages. Defendants argue the report ought to be disqualified because Dr. Stewart is unqualified and touches on efficacy—a charge that has been excluded from Plaintiffs’ complaint. The Court finds both Defendants’ objections without merit and thus **DENIES** the motion. (Doc. No. 109.) However, the Court **DIRECTS** Plaintiffs to change the survey question in accordance with its directions below.

First, the Court finds Dr. Stewart is qualified. Federal Rule of Civil Procedure 702 provides “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Plaintiffs state Dr. Stewart has researched and published extensively regarding market analysis, consumer behavior, branding, marketing communications, research, and management. (Doc. No. 124 at 19.) Plaintiffs assert his publications have “included market effects and the financial dimensions and financial outcomes of marketing.” (*Id.*) They state “[h]e has examined how consumers and managers search for and use information in decision making, effective communication with consumers, methods for the study of consumers and their behavior, and the effective and

1 efficient design of marketing programs, including marketing research that focuses on  
2 pricing strategy.” (*Id.*) As the Court is allowing Dr. Stewart’s survey to discuss damages  
3 only and not efficacy of treatment, the Court overrules Defendants’ objections.

4 The proposed survey to determine damages will ask two initial questions, in sum,  
5 (1) how important is the recommendation of previous customers to your decision to pursue  
6 a medical procedure, and (2) how important are price differentials in out-of-pocket  
7 expenses for a procedure. (*Id.* at 4.) Respondents to each question can choose between:  
8 very important; important; moderately important; slightly important; not at all important;  
9 or don’t know. (*Id.* at 5.) Next, the survey will ask the following:

10 Assume that there was a procedure that could substantially improve [their  
11 medical condition]. The procedure costs \$14,900, all of which you would have  
12 to pay yourself. Everyone who has had the procedure (100% of all patients  
13 receiving the procedure) report satisfaction with the results, that is, all patients  
14 reported that the procedure met or exceeded their expectations and were  
15 satisfied or extremely satisfied with the outcome. Now assume that you are  
16 considering this procedure and learn that not all patients were satisfied. In fact,  
17 you learn that only 50% of all patients who obtained the procedure reported  
18 any major improvement. Would you still consider this procedure given what  
19 you now know about the potential benefit?

20 (*Id.*) Respondents can answer with: Yes, I’ll try anything that might help; Yes, if I were  
21 offered a discount on the price; No; or Don’t know. For those who indicated they required  
22 a discount, the respondents would then be asked how much of a discount they would want  
23 before giving the procedure further consideration, starting with a minimum discount of 5%  
24 and up to “more than 65%.” (*Id.*)

25 The Court finds Dr. Stewart’s survey question to be a relevant concept with a few  
26 changes. The Court directs Dr. Stewart to change the survey to address the actual language  
27 Defendants’ used on its website and in marketing materials. The Court offers an example:

28 Assume that there was a procedure that could substantially improve [their  
medical condition]. The procedure costs \$14,900, all of which you would have  
to pay yourself. The providers of the procedure report that 100% of it’s prior  
consumers were satisfied with the provider’s service. Now assume that you  
are considering this procedure and learn that the patient’s statements of

1 satisfaction were obtained in exit interviews following receiving the  
2 procedure. Further you learn that only 50% of all patients who obtained the  
3 procedure reported any major improvement following the procedure. Would  
4 you still consider this procedure given what you now know about the potential  
benefit?

5 Plaintiffs are free to accept or reject this specific example but must comply with the  
6 Court's order to use the actual language used. Thus, the Court **DENIES** Defendants'  
7 motion to strike this report so long as edits are made to the question which follow the  
8 Court's guidance stated herein. (Doc. No. 109.)

9 **C. DRS. KAMINS & HARTSTONE**

10 Defendants also argue the report proposed by Dr. Kamins and Dr. Hartstone must  
11 be stricken. (Doc. No. 110.) This report establishes that the Pie Chart is material and  
12 misleading to consumers. (Doc. No. 110 at 4–5.) The proposed survey seeks to establish  
13 that the Overall Experience Pie Chart was material to consumers in choosing to consider  
14 stem cell treatment. In the survey, respondents were shown non-interactive screenshots of  
15 the defendants' web homepage. Respondents, split into two groups, were shown different  
16 screenshots from two different dates: March 21, 2015, and May 16, 2016. The March  
17 group—"Cell A"—was shown four pie charts regarding satisfaction with overall  
18 experience, the medical team, if StemGenex was a trusted partner, and whether patients  
19 would recommend StemGenex. The May group—"Cell B"—was shown a screenshot with  
20 nine pie charts, however, in this version all pie charts included a disclaimer stating, "patient  
21 satisfaction ratings above represent data received from patient exit surveys evaluating  
22 patient experience and care, accommodations, staff and facilities." (*Id.* at 5.)

23 The report then asks respondents to rank various statements which appeared on the  
24 screenshots to show which statement "most generated [their] interest in StemGenex stem  
25 cell therapy." (*Id.*) Defendants note the survey only includes one specific option based from  
26 factual information—selected from the overall experience Pie Chart; the others were  
27 puffery about StemGenex's treatment. Anything ranked in the top four were considered  
28 material to the decision.



1 The next part of the survey asked respondents what they thought patients were  
2 referring to in the Overall Experience Pie Chart. Respondents were given five options, one  
3 of which being effectiveness of the product. Defendants note that only 38% stated the Pie  
4 Chart meant effectiveness. However, Dr. Kamins concluded that they survey showed the  
5 overall experience Pie Chart was confusing to a significant number of consumers.

6 Defendants assert that the survey design did not adhere to necessary quality controls  
7 or have a proper control mechanism necessary for a causal survey. (Doc. No. 110 at 8.)  
8 Defendants allege Dr. Kamins' survey essentially shows causation (confusion, materiality,  
9 and reliance) but that Dr. Kamins' own assertions state the study is not appropriate to  
10 determine causality. To determine causality, a control group must be formed, and his study  
11 did not have one.

12 Defendants cleverly rely on Dr. Kamins' own testimony in a Florida case in which  
13 he purported to claim that proving materiality necessarily involves determining causality.  
14 *See Edmondson v. 2001 Live, Inc. et al.*, No. 8:16-cv-3243-T-17AEP (M.D. Fla.). Dr.  
15 Kamins stated: "To be false or misleading means the consumers have to have beliefs that  
16 are not based on truth, meaning that elements in the ad have to cause those false beliefs --  
17 -- because they're reading the ads. So that's causality." (Doc. No. 110 at 8.) He also states,  
18 regarding whether an ad had a material effect on a consumer: "Material effect? So just the  
19 nature of the statement, how do you determine if something has a material effect? You  
20 have to compare it to a control group, which means is causal." (*Id.* at 9.) Plaintiff does not  
21 directly respond to this argument.

22 Defendants also argue that Dr. Kamins' "survey results and opinions are not relevant  
23 to this case because the questions Dr. Kamins asked respondents and the conclusions he  
24 drew from those questions have no bearing on whether a causal nexus exists between the  
25 Pie Chart and putative class members' purchase of stem cell treatment." (*Id.* at 10.)

26 Plaintiffs argue the survey meets all relevant standards because it shows whether the  
27 altering of the patient satisfaction ratings disclaimer alter consumers' decision making to  
28 purchase stem cell therapy. (Doc. No. 123 at 18.) The tests are well designed, Plaintiff

1 asserts, because they compare two groups of identical consumers comparing the same page  
 2 with one main difference—the disclaimer—then evaluating consumers’ responses to show  
 3 that the patient satisfaction ratings without a disclaimer were more influential than with.  
 4 Plaintiffs also note no control group was used because the research goal was to examine  
 5 “the presence or absence” of the patient satisfaction ratings to causally establish the impact  
 6 the charts had on the consumers’ decisions whether to undergo stem cell therapy.  
 7 (Doc. No. 123 at 21.) Thus, Plaintiffs argue a control group without a disclaimer is  
 8 “nonsensical” because a disclaimer would not be needed if there were no charts presented.  
 9 (*Id.*)

10 The Court **GRANTS IN PART AND DENIES IN PART** Defendants’ request.  
 11 (Doc. No. 110.) To the extent the report is to be used to show causation, the Court  
 12 **GRANTS** the motion. However, to the extent that Plaintiffs will use the report to show  
 13 whether or not the pie chart was material in considering stem cell therapy, the Court  
 14 **DENIES** the motion. The simple.; fact is that Defendants’ put out an overly vague  
 15 statement and created confusion where different interpretations might lie. Defendants  
 16 cannot then turn around and use that confusion as a shield.

### 17 **III. MOTION TO CERTIFY CLASS**

18 Plaintiffs move to certify their class under Federal Rule of Civil Procedure 23.  
 19 (Doc. No. 95.)

#### 20 **A. Rule 23(a) Requirements**

21 “The class action is an exception to the usual rule that litigation is conducted by and  
 22 on behalf of individual named parties only. In order to justify a departure from that rule, a  
 23 class representative must be a part of the class and possess the same interest and suffer the  
 24 same injury as the class members.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550  
 25 (2011) (internal quotation marks and citations omitted). A plaintiff seeking class  
 26 certification must affirmatively show the class meets the requirements of Rule 23. *Comcast*  
 27 *Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (citing *Dukes*, 131 S. Ct. at 2551–52). To  
 28 obtain certification, a plaintiff bears the burden of proving that the class meets all four



requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011).

### 1. Adequately Defined

A class must be adequately defined to proceed and must rely on objective, verifiable criteria. *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 521 (C.D. Cal. 2012).

Here, Plaintiffs seek to certify a class defined as:

All persons residing in the United States who purchased Stem Cell Therapy Treatment from StemGenex for at least \$14,900 between December 8, 2013 and the time of trial, after (a) visiting [www.stemgenex.com](http://www.stemgenex.com) when the website contained Patient Satisfaction Ratings and/or (b) receiving an email from StemGenex with Patient Satisfaction Ratings.

(Doc. No. 95-1 at 26.) Thus, Plaintiffs assert, the class “ensures only those patients who were exposed to the offending misrepresentation qualify to make a claim.” (*Id.*)

Defendants argue that the class “cannot be readily determined” because it seeks people who merely visited the website without requiring that those people have seen the PSRs, read them, or understood them. (Doc. No. 107 at 16.) Thus, the class would contain consumers who were uninjured by the misleading PSRs or never even exposed to them. This would lead to each member of the class having to self-identify whether they were injured, which Defendants argue is infeasible.

Defendants also argue the class is overbroad because it includes dates before and after Dr. Lallande’s affiliation with StemGenex, includes a period of time in which the disclaimer accompanies the pie charts, and it continues past when the PSRs were removed from the website. (*Id.*)

During oral argument, Plaintiff asserted the class was adequately defined by two predominating issues: core liability and materiality. Counsel argued that in class actions when a misrepresentation is material, reliance can be inferred, and class members could have been exposed even when they did not see the Pie Chart. *United States ex rel. Terry v. Wasatch Advantage Group, LLC*, 327 F.R.D. 395, 417 (E.D. Cal. 2018) (“California courts often find predominance satisfied in CLRA cases because ‘causation, on a classwide basis,

1 may be established by materiality, meaning that if the trial court finds that material  
 2 misrepresentations have been made to the entire class, an inference of reliance arises as to  
 3 that class[.]” (listing cases)).

4 The Court agrees that the class is adequately defined, however, thinks the case is  
 5 best served by subdividing the classes per Fed. R. Civ. P. 23(c)(5) based on those exposed  
 6 to the PSR with the disclaimer and those exposed to the PSR without the disclaimer. The  
 7 Court defines the subclasses as follows: Subclass A is defined as the persons who saw the  
 8 Pie Chart without the disclaimer, dated from December 2013 to April 2016. Subclass B is  
 9 defined as the persons who saw the Pie Chart with the disclaimer, dated from April 2016  
 10 to March 2017, or when the information was no longer on the website or being used in  
 11 emails or advertising materials.

## 12 **2. Numerosity**

13 To establish numerosity, a plaintiff must show that the represented class is “so  
 14 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1); *Bates v.*  
 15 *United Parcel Serv.*, 204 F.R.D. 440, 444 (N.D. Cal. 2001). A court may reasonably infer  
 16 based on the facts of each case to determine if numerosity is satisfied. *Ikonen v. Hartz Mtn.*  
 17 *Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988). “As a general rule, classes of 20 are too small,  
 18 classes of 20–40 may or may not be big enough depending on the circumstances of each  
 19 case, and classes of 40 or more are numerous enough.” *Id.*

20 Here, Plaintiffs assert Defendants’ records and Class Members declarations show  
 21 the Class is “comprised of hundreds, at the very minimum 500. . . .” (Doc. No. 95-1 at 27.)  
 22 Defendants do not challenge this requirement. Thus, the Court finds this factor is met.

## 23 **3. Commonality**

24 As to commonality, Rule 23(a)(2) requires Plaintiff to show “there are questions of  
 25 law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “Commonality requires the  
 26 plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Dukes*,  
 27 131 S. Ct. at 2551. “That common contention . . . must be of such a nature that it is capable  
 28 of classwide resolution – which means that determination of its truth or falsity will resolve

1 an issue that is central to the validity of each one of the claims in one stroke.” *Id.* ““What  
 2 matters to class certification . . . is not the raising of common ‘questions’ . . . but, rather the  
 3 capacity of a classwide proceeding to generate common answers apt to drive the resolution  
 4 of the litigation. Dissimilarities within the proposed class are what have the potential to  
 5 impede the generation of common answers.”” *Id.* (emphasis in original) (citation omitted).  
 6 “[C]ommonality only requires a single significant question of law or fact.” *Mazza v.*  
 7 *American Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (commonality not  
 8 disputed as to whether Honda “had a duty to disclose or whether the allegedly omitted facts  
 9 were material and misleading to the public”); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122  
 10 (9th Cir. 2010) (Commonality is satisfied “if the named plaintiffs share at least one  
 11 question of fact or law with the grievances of the prospective class.”) (quoting *Baby Neal*  
 12 *for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)). Commonality has been construed  
 13 permissively. *Ellis*, 657 F.3d at 981.

14 Here, Plaintiffs’ claims all arise from a uniform misrepresentation regarding patient  
 15 satisfaction ratings, “the truth or falsity of which will resolve a common issue central to all  
 16 claims ‘in one stroke.’” (Doc. No. 95-1 at 27 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564  
 17 U.S. 338, 350 (2011)).) Plaintiffs also argue that materiality is also a common issue because  
 18 “this inquiry focuses on *the Defendants’ representations.*” (*Id.* at 28 (quoting *Bruno v.*  
 19 *Quten Research Inst., LLC*, 280 F.R.D. 524, 537 (C.D. Cal. 2011)).) Thus, because several  
 20 significant questions of fact are presented, Plaintiffs assert the commonality requirement is  
 21 satisfied.

22 Defendants argue that there are too many dissimilarities in the case which “will  
 23 impede the generation of common answers.” (Doc. No. 107 at 17.) Defendants state as  
 24 examples that “[m]ateriality, reliance, injury, and damages vary from patient to patient and  
 25 are not subject to common proof.” (*Id.*) Many class members have already testified they  
 26 did not see the PSRs or did not rely on them. Defendants further argue that individualized  
 27 issues predominate as to if and how the PSRs influenced Plaintiffs. Factors as to why  
 28 members received StemGenex, such as individualized medical histories, budgetary

1 concerns, specific circumstances leading to consider stem cell therapy, personal goals,  
2 expectations, sources of information relied on, research performed, and more, widely vary.

3 The Court recognizes Defendants' concerns. However, as Plaintiffs' affirmed during  
4 oral argument, this is a marketing case, not a medical one. Thus, differences in patient  
5 medical histories and the other concerns Defendants raise are irrelevant in a consumer class  
6 action case. Where Plaintiffs might find trouble, however, is in its damages analysis.  
7 However, as Plaintiffs' noted, this is a class certification motion and not summary  
8 judgment, and the issue of damages does not defeat class certification. *Pulaski &*  
9 *Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015) (holding "that  
10 damage calculations alone cannot defeat class certification."). Thus, this factor is met.

#### 11 4. Typicality

12 "The purpose of the typicality requirement is to assure that the interest of the named  
13 representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976  
14 F.2d 497, 508 (9th Cir. 1992). Where a Plaintiff's "unique background and factual situation  
15 require him to prepare to meet defenses that are not typical of the defenses which may be  
16 raised against other members of the proposed class," certification should be denied. *Id.*

17 Here, Plaintiffs argue that typicality is met because "Plaintiffs and the proposed  
18 Class assert the same claims arising from the same course of conduct: Defendants' uniform  
19 misrepresentation of patient satisfaction via the PSR, receipt of the same SCTT, and  
20 payment of a similar fee to StemGenex." (Doc. No. 95-1 at 29.) Defendants assert the class  
21 is not typical because the class is "enormously diverse, such that no member's knowledge  
22 or experience in choosing StemGenex for stem cell therapy is typical of the class as a  
23 whole." (Doc. No. 107 at 17.)

24 Plaintiffs argued at the motion hearing that Plaintiffs' claims can coexist with the  
25 rest of the class as they are the same or similar injury based on the same legal theory.  
26 Plaintiffs also asserted that if Defendants' defenses can apply uniformly to the entire class,  
27 as Defendants state they would, then the class ought to be tried as one case. Finally,  
28 Plaintiffs note that Defendants can present their defenses in a motion for summary

1 judgment.

2 Plaintiffs' point is notable. Here, Defendants' defense, i.e. whether a person signed  
3 a consent form or waiver which may have cured any misrepresentations before receiving  
4 stem cell treatment, can be applied evenly to all class members. This is not a medical case  
5 arguing the efficacy of stem cell treatment, but rather a marketing misrepresentation case.  
6 Thus, the individualized patient experiences is irrelevant. Rather, the test looks at what an  
7 objective consumer would have considered and how relevant or not the misrepresentation  
8 was. Looking at the motion through this lens, the Court finds the Plaintiffs' claims are  
9 typical. Thus, this element is met.

## 10 **5. Adequacy**

11 The adequacy requirement is satisfied if the class representatives "will fairly and  
12 adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit  
13 requires an evaluation of two factors: "(1) do the named plaintiffs and their counsel have  
14 any conflicts of interest with other class members and (2) will the named plaintiffs and  
15 their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler*  
16 *Corp.*, 150 F.3d at 1011, 1020 (9th Cir. 1998).

17 Here, Plaintiffs assert that Brewer's and Gardner's interests are "aligned with those  
18 of the Class Members because they have been harmed by the same common misconduct  
19 and seek the same or similar relief. (Doc. No. 95-1 at 29.) Defendants argue Brewer is not  
20 a typical class representative because (1) she has no claim against Dr. Lallande because her  
21 treatment was before Dr. Lallande's involvement and that (2) as a nurse, Brewer has  
22 specific efficacy knowledge that other class members lack. (Doc. No. 107 at 17–18.)

23 The Court notes neither of these arguments show the named Plaintiffs have a conflict  
24 of interest or will fail to prosecute the action vigorously. Thus, the Court rejects  
25 Defendants' objections.

## 26 **B. Rule 23(b) Requirements**

27 If a proposed class satisfies Rule 23(a)'s requirements, then the proposed class must  
28 also qualify as one of the types of class actions Rule 23(b) identifies. Fed. R. Civ. P. 23(b);

1 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979–80 (9th Cir. 2011). Rule 23(b)(3) is  
2 satisfied if the court finds that common “questions of law or fact” of the class “predominate  
3 over any questions affecting only individual members,” and “that a class action is superior  
4 to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.  
5 Civ. P. 23(b)(3).

6 Here, Plaintiffs assert that common issues predominate. Regarding Plaintiffs’ fraud-  
7 based claims, Plaintiffs state that there are two common questions: **“(1) whether**  
8 **Defendants misrepresented the PSRs; and (2) whether the misrepresentation was**  
9 **likely to deceive a reasonable consumer.”** (Doc. No. 95-1 at 31.) Plaintiffs assert the first  
10 question—a binary question—predominate over any potential individualized issues  
11 because it is the single most significant aspect of the case and “can be resolved for all  
12 members of the class in a single adjudication.” (*Id.* (quoting *Hanlon*, 150 F.3d at 1022).)  
13 Plaintiffs note if each member were to try his or her own case, the evidence going to this  
14 question would be identical.

15 Plaintiffs further argue the second of the two questions raised is an objective  
16 inquiry—whether a reasonable consumer would be deceived—and is the same test for all  
17 Plaintiffs’ claims. Plaintiffs importantly note that individualized factors which went into  
18 the decision to undergo stem cell therapy is immaterial. *Forcellati v. Hyland’s, Inc.*, No.  
19 CV 12-1983-GHK (MRWx), 2014 WL 1410264, at \*11 (C.D. Cal. Apr. 9, 2014) (finding  
20 whether “a large number of factors may have gone into each consumer’s decision to  
21 purchase Defendants’ products is immaterial here given the objective materiality of the  
22 alleged misrepresentations.”).

23 Defendants rely on a California Court of Appeal case in which the court held that  
24 individualized issues predominated for failure to disclose the risks of a medical treatment  
25 because what each consumer would consider a “material risk” would vary. *In re Vioxx*  
26 *Class Cases*, 180 Cal. App. 4th 116, 129 (Cal. Ct. App. 2009). Defendants also point to a  
27 case finding that generalized proof could not be used to determine whether class members  
28 were likely to be deceived or relied on the misrepresentations because each member used



1 the medical device “in the context of a host of individualized factors.” *Lucas v. Berg, Inc.*,  
2 212 F. Supp. 3d 950, 969 (S.D. Cal. 2016). The *Lucas* Court also stated, “Although a  
3 presumption of reliance may hold in the prototypical consumer protection case where a  
4 consumer buys a product against the backdrop of a uniform, broad-based advertising  
5 campaign, in this case the common question of reliance inevitably breaks down into  
6 individualized inquiries.” *Id.* at 969–70.

7 Defendants make an interesting point. This is unlike a false advertising case where  
8 a snack manufacturer makes misrepresentations about the ingredients or consumer  
9 satisfaction. The decision to undergo stem cell therapy has a multitude of individualized  
10 factors. However, the Court reminds itself of plaintiffs’ two questions and neither, it seems,  
11 are affected by these individualized decisions. One asks a binary question and the other is  
12 an objective test: (1) whether Defendants misrepresented the PSRs; and (2) whether the  
13 misrepresentation was likely to deceive a reasonable consumer.

14 Finally, Plaintiffs assert that reliance and causation issues do not defeat the  
15 predominance of Plaintiffs’ claims under the UCL, CLRA, Negligent Misrepresentation,  
16 and Fraud claims. (Doc. No. 95-1 at 32.) This is because under these statutes, Plaintiffs  
17 only need to “show that members of the public are likely to be deceived.” *Moorer*, 2017  
18 WL 1281882, at \*8. Plaintiffs emphasize that the test is based on a “**reasonable** consumer,  
19 not the **particular** consumer.” (*Id.* at 33 (emphasis in original).)

20 Under these theories, Plaintiffs only need to show that members of the public are  
21 likely to be deceived—no proof of individualized reliance is necessary. Thus, Plaintiffs  
22 argue, for these claims, reliance and causation must only be established for lead Plaintiffs,  
23 who have testified they saw the PSR and relied on it. (Brewer Decl. ¶ 6; Gardner Decl. ¶  
24 6; Class Member Decl.) However, Defendants point out that there is confusion amongst  
25 the Plaintiffs on what the PSRs are, and that one Plaintiff testified she never saw the pie  
26 chart before.

27 Plaintiffs assert that only exposure is necessary class wide—not reliance. Further,  
28 under the CLRA, reliance is inferred for fraudulent and negligent misrepresentation claims



1 if material misrepresentations are made to an entire class. *In re Brazilian Blowout Litig.*,  
 2 No. cv 10-8452-JFW (MANx), 2011 WL 10962891, at \*8 (C.D. Cal. Apr. 12, 2011)  
 3 (recognizing presumption of reliance for and certifying common law fraud and negligent  
 4 misrepresentation claims.) Materiality, Plaintiffs assert, is an objective one and can be  
 5 perceived through evidence common to the class.

6 The Court ultimately agrees with Plaintiffs. The questions asserted are common  
 7 questions of fact and, as Plaintiffs acknowledge, the answers can apply to all class members  
 8 in one swoop.

#### 9 IV. CONCLUSION

10 Thus, the Court **DENIES** Defendants' motions to strike, albeit with caveats and  
 11 changes as noted herein. (Docs. No. 109, 110). The Court **GRANTS** Plaintiffs' motion for  
 12 class certification as set forth below and **ORDERS** the following:

13 1. The following Rule 23(b)(3) classes are **CERTIFIED**:

##### 14 *Subclass A*

15 All persons residing in the United States who purchased Stem Cell Therapy  
 16 Treatment from StemGenex for at least \$14,900 between December 8, 2013  
 17 and April 2016, after (a) visiting [www.stemgenex.com](http://www.stemgenex.com) when the website  
 18 contained Patient Satisfaction Ratings and/or (b) receiving an email from  
 StemGenex with Patient Satisfaction Ratings.

##### 19 *Subclass B*

20 All persons residing in the United States who purchased Stem Cell Therapy  
 21 Treatment from StemGenex for at least \$14,900 between April 2016 and  
 22 March 2017, or when the information was no longer on the website or being  
 23 used in emails or advertising materials, after (a) visiting [www.stemgenex.com](http://www.stemgenex.com)  
 when the website contained Patient Satisfaction Ratings and/or (b) receiving  
 an email from StemGenex with Patient Satisfaction Ratings.

24 2. Plaintiffs Jennifer Brewer and Alexandra Gardner are appointed class  
 25 representatives of Subclass A, as they both received treatment prior to April  
 26 2016.

27 3. Plaintiffs are to submit a class representative(s) for Subclass B for the Court's  
 28 approval within **three weeks** of this Order.

