UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY LAMBERT, on behalf of himself and others similarly situated,

Plaintiff,

v.

NUTRACEUTICAL CORP., a Delaware Corporation,

Defendant.

Case No. CV 13-05942-AB (Ex)

ORDER RESCINDING CLASS DECERTIFICATION ORDER AND REINSTATING CLASS CERTIFICATION ORDER

I. INTRODUCTION

Before the Court is Plaintiff Troy Lambert's Supplemental Brief Regarding Class Certification Following Appeal. (Pls. Suppl. Br., Dkt. No. 255). Defendant filed an opposition ("Ds. Opp'n," Dkt. No. 259), and Plaintiff replied ("Pls. Reply," Dkt. No. 260). Defendant filed an *Ex Parte* Motion for Leave to File Sur-Reply (Dkt. No. 261) and a Sur-Reply ("Sur-Reply," Dkt. No. 161-1), which Plaintiff opposed ("Opp'n to Sur-Reply," Dkt. No. 262).[1] For the reasons stated below, the Court

[1] The Court **GRANTS** Defendant's Motion for Sur-Reply and considers its corresponding three-page Sur-Reply, which addresses arguments regarding the statute

RESCINDS the Court's February 20, 2015 Class Decertification Order (Dkt. No. 175) and **REINSTATES** the Court's June 19, 2014 Class Certification Order (Dkt. No. 80) and thereby **GRANTS** Plaintiff's Class Certification Motion. (Dkt. No. 65).

II. BACKGROUND

This case arises from Defendant's purported violations of California consumer protection law for its marketing of a dietary supplement, Cobra Sexual Energy ("Cobra"). On August 14, 2013, Plaintiff filed his complaint (Dkt. No. 1), which was subsequently amended. (*See* Second Amended Complaint ("SAC"), Dkt. No. 56). On April 7, 2014, Plaintiff filed a Motion for Class Certification ("Motion," Dkt. No. 35).[2] On June 19, 2014, the Court (Collins, J.) granted Plaintiff's Motion, and permitted Plaintiff to litigate on behalf of a class of similarly situated consumers. Defendant subsequently filed a Motion for Class Decertification on November 17, 2014. (Dkt. No. 111).[3]

On February 20, 2015, the Court (Birotte, J.) granted Defendant's motion and decertified the class, concluding that "because Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages, the Court cannot find that common issues predominate under Rule 23(b)(3)." ("Decertification Order," Dkt. No. 175 at 11). On March 12, 2015, Plaintiff filed a Motion for Reconsideration on the Decertification Order (Dkt. No. 183), which the Court denied on June 24, 2015. (Dkt No. 195).

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of limitations raised in Plaintiff's Reply. While Defendant's *ex parte* motion violates the procedural requirements of L.R. 7–19, the Court allows it in this instance because the Court had expected Plaintiff's opening brief to address the statute of limitations issues discussed at the parties' status conference on October 4, 2019. (*See* Status Conference Transcript, Dkt. No. 257). The Court also considers Plaintiff's Opposition to the Sur-Reply. (Dkt. No. 262-1).

[2] Defendant filed an opposition to Plaintiff's Motion for Class Certification (Dkt. No. 72) and Plaintiff replied. (Dkt. No. 75).

[3] Plaintiff filed an opposition to Defendant's Motion for Class Decertification (Dkt. No. 141) and Plaintiff replied. (Dkt. No. 144).

On July 8, 2015 Plaintiff subsequently filed a Rule 23(f) Petition to the Ninth Circuit, requesting permission to appeal the Decertification Order. (*See* Plaintiff's Status Report Re Rule 23(f) Petition, Dkt. No. 206). On August 3, 2015, the Court ordered the action stayed pending the Ninth Circuit's ruling on the Petition. (Dkt. No. 205). On September 16, 2015, the Ninth Circuit granted the Petition (*see* Dkt. No. 220), and ruled just under two years later on September 15, 2017 that: (1) as a procedural matter, a motion for reconsideration filed within the 14-day deadline to file a 23(f) Petition tolls that deadline, and (2) as a substantive matter, this Court abused its discretion in decertifying the class on the basis that consumers would be unable to prove restitution damages through their full refund model. *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (9th Cir. 2019), *rev'd on other grounds*, 139 S.Ct. 710 (2019).

On February 2, 2018, Defendant filed a petition to the Supreme Court for a writ of certiorari, challenging only the timeliness of the 23(f) Petition. The Supreme Court reversed the Ninth Circuit's timeliness ruling, holding that the 14-day deadline for filing a 23(f) Petition is not subject to equitable tolling. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). Based on this decision, on August 27, 2019 the Ninth Circuit dismissed the 23(f) Petition as untimely. *Lambert v. Nutraceutical Corp.*, No. 15-56423, 2019 WL 4039564 (9th Cir. Aug. 27, 2019) (unpublished).

The Court lifted the stay in this action on September 10, 2019 (Dkt. No. 243) and ordered supplemental briefing on class certification that is now before the Court.

III. DISCUSSION

1. The Court follows the Ninth Circuit's decision reversing the grounds for decertification and rescinds the Decertification Order.

As a threshold matter, Defendant argues that "even though the Ninth Circuit's now-vacated opinion reversed this Court's decertification decision, that does not matter" for class certification purposes here. (Ds. Opp'n at 5). Defendant reasons that, because the Ninth Circuit dismissed Plaintiff's Rule 23(f) Petition as untimely, "Plaintiff's appeal should have never been filed and has zero legal effect," so the

Decertification Order governs. (*Id.*). Plaintiff counters that the Court should vacate its Decertification Order and follow the Ninth Circuit's ruling reversing the order on substantive grounds because (1) "it remains binding and published precedent of the Circuit"; (2) "the portion of the decision not addressed by the Supreme Court is the law of the case," and (3) "in a subsequent published decision, the Ninth Circuit recognized the viability of the substantive portion of its decision, quoting and relying on it while describing it as reversed on other grounds." (Dkt. No. 246 at 2–3). The Court agrees with Plaintiff.

A "decision reversed on other grounds is not merely persuasive, but also binding.'" *Blum v. 1st Auto & Cas. Ins. Co.*, 326 Wis. 2d 729, 765 (2010) (citation omitted). The Ninth Circuit's substantive decision in *Lambert* is unquestionably good and controlling law. This very Court has cited it as binding authority. *See Hamilton v. Wal-Mart Stores, Inc.*, No. 5:17-cv-01415-AB (KKx), 2019 WL 1949457, at *13 (C.D. Cal. Mar. 4, 2019). So have other district courts. *See Di Donato v. Insys Therapeutics*, No. CV-16-00302-PHX-NVW, 2019 WL 4573443, at *15 (D. Ariz. Sep. 20, 2019) (citing *Lambert* and certifying class); *Grace v. Apple, Inc.*, No. 17-CV-00551-LHK, 2019 WL 3944988 (N.D. Cal. Aug. 21, 2019) (citing *Lambert* and denying defendant's motion for summary judgment in certified class action). And so has the Ninth Circuit itself. *See Huu Nguyen v. Nissan N. Am., Inc.*, 932 F.3d. 811, 817 (9th Cir. 2019) ("In short, '[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages.' *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017), *rev'd on other grounds*, 139 S. Ct. 710 (2019).") (citing *Lambert* and reversing certification denial).

Further, consistent with the "law of the case" doctrine, "when a court decides upon a rule of law," as the Ninth Circuit did here in ruling that this Court decertified on improper grounds, "that decision should continue to govern the same issues in

subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 1391 (1983).

Despite the untimeliness of Plaintiff's 23(f) Petition, the Court has the authority to rescind its Decertification Order based on new, binding Ninth Circuit law in *Lambert* following decertification,[4] establishing that "[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages." *Lambert*, 870 F.3d at 1182. "As long as a district court has jurisdiction over the case," as it does here, "it possesses the inherent procedural power to reconsider, *rescind*, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (internal quotation omitted) (emphasis in original); *see also Howell v. Advantage RN, LLC*, 401 F. Supp. 3d 1078, 1084–85 (S.D. Cal. Aug. 16, 2019) (explaining that a "district court's order respecting class certification is inherently tentative prior to final judgment on the merits" and that "courts retain discretion to revisit class certification throughout the legal proceedings and may rescind, modify, or amend" their certification orders).

Here, the Court finds that the Ninth Circuit's reversal of the grounds for its prior decertification decision in *Lambert* constitutes sufficient cause for the Court to rescind its prior Decertification Order. The Court cannot ignore controlling, published Ninth Circuit precedent finding that its articulated basis for decertification decision—that individualized damages defeated certification—was incorrect. As the Ninth Circuit made clear, "this class should not have been decertified." *Lambert*, 870 F.3d at 1184.

Accordingly, the Court rescinds its Decertification Order and reconsiders class certification, because that prior order only considered the damages issue, and did not

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[4] At oral argument on December 13, 2019, Defendant agreed with Plaintiff that the Court has discretion to reconsider its Decertification Order.

address any other requirements for class certification under Federal Rule of Civil Procedure 23(f). Fed. R. Civ. P. 23(f).

2. The statute of limitations does not preclude class certification here.

Defendant argues that the statute of limitations bars class certification. (Ds. Opp'n at 2–5). Specifically, Defendant contends that the four-year statute of limitations on the putative class members' claims began running on February 20, 2015—the date this Court issued its Decertification Order—and thus expired (at the latest) on February 20, 2019. (*Id.* at 3). According to Defendant, because the absent class members did nothing to preserve their claims post-decertification during the pendency of Plaintiff's appeal, their claims have expired. The Court disagrees, and is not persuaded that the statute of limitations precludes certification here.

To support its argument that time has run out on putative class members' claims, Defendant relies primarily on the Supreme Court's decisions in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Company v. Parker* 462 U.S. 345 (1983); the Second Circuit's decision in *Giovanniello v. ALM Media, LLC*, 726 F.3d 106 (2d Cir. 2013); and the Southern District of California's decision in *Stiller v. Costco Wholesale Corporation*, No. 3:09-cv-2437-GPC-BGS (S.D. Cal. Oct. 1. 2014). But as Plaintiff points out, none of these cases hold that the statute of limitations "elapsed during the pendency of *the same case*," as here. (Pls. Reply at 8) (emphasis in original). Further, these cases in no way indicate that putative class members' *same case* class claims—and not *individual claims*—are time-barred where the Circuit Court reverses the District Court's decertification decision, thereby reviving the same class claims. The Court has not located any cases showing that, where a district court decertified a class and then the circuit court reversed that decertification, the statute of limitations clock began running from the date of the decertification of class members' same class claims that were up on appeal.

Absent further guidance from the Ninth Circuit, the Court determines that, while the clock on the individual claims may have run out on February 20, 2019—four years after the issuance of the Decertification Order—the putative class members' same class claims have been preserved throughout the pendency of this action while Plaintiff has represented the putative class on appeal. Indeed, "'[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims.'" *Abrantes v. Fitness 19 LLC*, No. 1:16–cv–00903–LJO–SKO, 2017 WL 4075576, at *5 (E.D. Cal. Sept. 14, 2017) (quoting *Crown, Cork*, 462 U.S. at 352–53). The Court agrees with Plaintiff that it is not "even strictly accurate to speak of 'tolling' within a single case," as here (Pls. Reply at 10), because "[t]he filing of the complaint suspends the statute during the pendency of the action," including where class certification is litigated on appeal. *ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.*, 5 Cal. App 5th 69, 84 (2016). Moreover, where the Ninth Circuit rules that "this class should not have been decertified," no clock ever ran from the issuance of the Decertification Order, because the triggering event—the decertification—was improper. *Lambert*, 870 F.3d at 1184. And again, critically, none of the cases Defendant relies on involve class claims within the same action, as is the case here.

a. *American Pipe* Tolling

California has adopted the *American Pipe* tolling doctrine for members of a putative class action. *See Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1119 (1988); *see also Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 530 (9th Cir. 2011) ("A federal court sitting in diversity applies the substantive law of the state."). In *American Pipe*, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S.

at 554. That suspension, however, lasts "only during the pendency of the motion to strip the suit of its class action character." *Id.* at 561.

Crown, Cork & Seal Co. v. Parker extended *American Pipe* tolling to apply not only to situations "where plaintiffs sought to intervene in a continuing action, but also" to situations "where they sought to file an entirely new action." *Catholic Social Servs., Inc. v. INS*, 232 F.3d 1139, 1147 (9th Cir. 2000) (citing *Crown, Cork*, 462 U.S. 345, 350 (1983)). There, the Supreme Court held that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Crown, Cork*, 462 U.S. at 354. As Plaintiff states, neither *American Pipe* nor *Crown, Cork* stated that the statute of limitations on same class claims runs when the Plaintiff of a decertified class challenges decertification on appeal.

Although the Court in *Walker v. Life Insurance Company of the Southwest* considered a dismissal reversed by the Ninth Circuit, and not a decertification, as here, the Court finds its approach persuasive and adopts its reasoning in finding that same class claims are not time-barred under *American Pipe*. No. CV 10-09198-JVS (RNBx), 2018 WL 3816716 (C.D. Cal. July 31, 2018). "While [Defendant] claims that tolling stops upon denial of class certification . . . , notwithstanding the possibility of appeal, the cases [it] cites," including *American Pipe*, "are inapposite because none of them involve the assertion of revived claims in the *same action* in which they were originally brought," as here, where the Ninth Circuit revived Plaintiff's same class claims. *Id.* at *5 (emphasis added). "Any attempt by absent class members to assert the [same class] claims post-[decertification] would have been an exercise in futility" because after issuing the Decertification Order, the only "way for the [same class] claims to proceed would be after a successful appeal." *Id.* Thus, while the absent class members here may be time-barred from bringing their own *individual* claims—if

the four-year statute of limitations has run on those claims—they are not time-barred from bringing the *same class* claims that Plaintiff previously asserted on their behalf where the Ninth Circuit has held that decertification was improper and has revived those same class claims.

b. *Giovanniello*

Defendant points to *Giovanniello*, a Second Circuit decision that is not binding on this Court, for the proposition that "[i]ndividual class members were required" at the time of decertification "to take action to preserve their rights or face the possibility that their action could become time barred." 726 F.3d at 117. Because the class members took no action, Defendant concludes they're out of luck. Again, the Court disagrees.

The Ninth Circuit has not yet determined whether *American Pipe* tolling ends upon denial of class certification, but Ninth Circuit Judge J. Clifford Wallace analyzed the issue while sitting by designation on the Second Circuit in *Giovanniello*. There, the *Giovanniello* Court stated that the Second Circuit "join[ed] [its] sister circuits and [held] that *American Pipe* tolling does not extend beyond the denial of class status." *Id.* at 116. Defendant maintains that this rule stands "regardless of whether an interlocutory appeal is filed pursuant to Rule 23(f)" (Ds. Opp'n at 4) because Judge Wallace and the Second Circuit determined that "Rule 23(f) does not alter [the] analysis" regarding tolling. 726 F.3d at 117. But the circumstances in *Giovanniello* are fundamentally different than those before this Court, rendering any discussion of tolling improper here.

In *Giovanniello*, the plaintiff filed a putative class action in federal district court. 726 F.3d at 108. The court denied class certification and dismissed the case, and the plaintiff appealed. *Id.* The appeal was stayed pending a related appeal, and after the related appeal was decided, the plaintiff failed to respond to an order to show cause, so his appeal was dismissed. *Id.* Six months after the dismissal, the plaintiff

again filed a putative class action under the same statute. *Id.* The district court ruled that the statute of limitations had run on the plaintiff's cause of action and dismissed the case. *Id.* at 108–09. Then the plaintiff appealed the district court's ruling that his filing was untimely. *Id.* On appeal, the plaintiff asserted, for the first time, that his initial appeal was an interlocutory appeal under Federal Rule of Civil Procedure 23(f). *Id.* at 118.

Following review of this procedural history, the *Giovanniello* Court held that "once [the plaintiff's] attempt to secure class status failed, the statute of limitations began to run again." *Id.* at 117. The Second Circuit reasoned that once a district court disallows class status, "'the named plaintiffs no longer have a duty to advance the interests of the excluded putative class members,'" so former putative class members could no longer reasonably rely on the putative class action to protect their rights. *Id.* at 117 (quoting *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir. 1998) (en banc)).[5] Even in cases where the plaintiff seeks "reconsideration or appeal, ostensibly representing the rights of non-named plaintiffs," the Second Circuit observed that reliance on the former putative class action "is not objectively reasonable." *Id.*

Relevant here, the plaintiff in *Giovanniello* argued that the existence of his alleged interlocutory appeal under Rule 23(f) changed the *American Pipe* tolling analysis, but the Second Circuit disagreed, explaining that "there is no reason why Rule 23(f) compels a conclusion that we must depart from our sister circuits." *Id.* The *Giovanniello* Court emphasized that there was no evidence that "circuit courts freely grant petitions for interlocutory review of class status decisions nor that where

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[5] Notably, *Armstrong* "was decided prior to the enactment of Rule 23(f)," but "a number of post-Rule 23(f) cases have held that tolling does not extend beyond a district court decision denying class status even after the promulgations of Rule 23(f). [(citing cases).]" *Giovanniello,* 726 F.3d at 118.

such petitions are granted, interlocutory appeal is more likely to be successful because of Rule 23(f)." *Id.* Even when a plaintiff files a Rule 23(f) petition, the Second Circuit reasoned, a former putative class member's reliance on the possibility of a reversal of a class certification denial "is not *ordinarily* reasonable." *Id.* (quoting *Armstrong*, 138 F.3d at 1381) (emphasis added). The Second Circuit also noted that *American Pipe* tolling requires a bright-line rule to prevent abuse and reduce uncertainty. *Id.* at 119.

Critically, the procedural posture before the *Giovanniello* Court differs in several fundamental respects from the posture now before this Court, making its rule inapplicable here. First, the plaintiff in *Giovanniello* sought to toll the statute of limitations based on claims asserted *in other, different class actions* which were previously dismissed. 726 F.3d at 108 ("This case is the fourth attempt by Giovanniello to commence and prosecute a putative class action . . . for an unsolicited fax advertisement that he allegedly received on January 28, 2004."). And the appeal at issue in *Giovanniello* was taken "from the Southern District of New York's dismissal," which "was not an interlocutory appeal under Rule 23(f)." *Id.* at 118. But here, Plaintiff's 23(f) Petition was an interlocutory appeal of the *same case* under 23(f). Second, in *Giovanniello*, the Second Circuit had not determined the merits of the appeal before it, unlike here, where the Ninth Circuit granted Plaintiff's 23(f) Petition and reversed this Court's denial of class status, reviving the same class claims.

In determining that *American Pipe* tolling "does not extend beyond the denial of class status," *id.* at 116, the Second Circuit relied heavily on the likelihood of success of a 23(f) Petition, which bears on the analysis here. Judge Wallace explained that "even after Rule 23(f), 'reliance on the possibility of a reversal of the [district] court's [class status] decision is *ordinarily* not reasonable.'" *Id.* (quoting *Armstrong*, 138 F.3d at 1381) (emphasis added). But Plaintiff's 23(f) Petition here was granted

relatively quickly (it was filed on July 8, 2015, and it was granted on September 16, 2015) and this Court's decertification decision was reversed. While reliance on reversal may not *ordinarily* be reasonable, here the Court finds it was and that the facts of this case justify departure from *Giovanniello*.

c. *Stiller*

In response to Plaintiff's argument that Defendant "cites zero cases involving 'same case' class action tolling," (Pls. Reply at 8) (capitalization altered), Defendant points to one case—*Stiller v. Costco Wholesale Corporation*, No. 3:09-cv-2473-GPC-BGS, 2014 WL 4955695 (S.D. Cal. Oct. 1, 2014)—which it claims has "a nearly identical procedural posture" to that of this case. (Sur-Reply at 2). There, as Defendant describes, "the court granted class certification, a different judge decertified the class, the plaintiff filed a 23(f) appeal, and the court stayed the entire action," after which Plaintiff filed a motion to clarify whether the statute of limitations was running or had been stayed. (*Id.*). The *Stiller* Court determined that "*American Pipe* tolling ended when this Court rendered the Decertification Order." *Stiller*, 2014 WL 4955695, at *3.

Here, the Court agrees with Plaintiff that *Stiller* addressed "tolling non-class individual claims that would be filed at a later date," not same class claims. (Pls. Reply at 9). The *Stiller* Court denied a "motion to clarify," not a certification motion, about whether individual members of a decertified class could enjoy tolling for later-filed non-class suits during the pendency of a 23(f) Petition, which was ultimately denied. *Stiller*, 2014 WL 4955695, at *1; *see generally* Plaintiff's Motion to Clarify, *Stiller v. Costco Wholesale Corp.*, No. 09-2473, Dkt. No. 232-1 (S.D. Cal. July 10, 2014) (arguing that "clarification" of tolling was needed to prevent "a potential flood of individual actions" during appeal, and also to allow "sufficient time" if appeal is denied for "members to assert their rights by filing individual claims."). As Plaintiff states, the plaintiff's motion in *Stiller* makes clear that the *Stiller* Court rejected tolling

on individual claims, but did not "address 'tolling' within the same case on a subsequent certification motion." (Pls. Opp'n to Ds. Sur-Reply, Dkt. No. 262 at 4).

Defendant fails to recognize the distinction between *individual* and *same class* claims. This is evident from Defendant's emphasis that Plaintiff "explicitly admitted" that the statute of limitations on the putative class members' claims started running again on February 20, 2015 when Plaintiff argued that the class needed notice of the Decertification Order because "the statute of limitations on their *individual* claims has begun to run again." (Dkt No. 183 at 20:6 (emphasis added). At no time did Plaintiff concede that the statute began to run on the *same class* claims from the point of decertification.

d. Time-barring putative class members' claims during the pendency of an appeal regarding certification would create unfair results and defy the purpose of appeals.

According to Defendant's theory, if a Court decertifies a class and the plaintiff prevails in appealing decertification, depending on how long the appeal takes, that plaintiff may be left with a small or even no class because each day the same class claims are up on appeal would be an "un-tolled" day. Further, if a case is litigated on appeal for longer than the relevant statute of limitations for the claims at-issue, reversal of the grounds for certification would be utterly ineffective, because the statute of limitations would have elapsed during the pendency of appeal, so all class claims would have expired. Such a result would dramatically shrink the authority of the appellate courts to determine class certification issues.

Time-barring the claims of putative class members would produce an especially perverse result here, where (1) the Ninth Circuit determined that this Court improperly decertified a class, and (2) this case has been up on appeal for more than four years. After Plaintiff filed his 23(f) Petition on July 8, 2015, this matter traveled to the Ninth Circuit (from Plaintiff's appeal), and all the way to the Supreme Court (from Defendant's appeal). The matter was finally re-opened in this Court on September 10,

2019. If the four-year appeals process triggered by this Court's Decertification Order ran out the clock on putative class members' claims, those class members would be penalized for a district court's error in decertifying a "class [that] should not have been decertified." *Lambert*, 870 F.3d at 1184. Ultimately, here, all individual claims may have expired, but not the class claims. If they did, what would be the purpose of appealing a decertification order?

For the foregoing reasons, and absent Ninth Circuit guidance, the Court finds that the four-year statute of limitations here does not preclude class certification on Plaintiff's same class claims, where the District Court decertified the class and that decertification was reversed by the Ninth Circuit, because this reversal revived the putative class members' claims. Finding that none of the class claims expired, the Court proceeds to the class certification analysis.

IV. LEGAL STANDARD

To certify a class, Plaintiffs bear the burden of showing they meet each of the four requirements of Federal Rule of Civil Procedure ("Rule") 23(a), together with at least one of the requirements of Rule 23(b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011). Rule 23(a) requires that:

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

Fed. R. Civ. P. 23(a)(1–4); *Ellis*, 657 F.3d at 980. The party seeking to certify a class bears the burden of demonstrating that each element of Rule 23 is satisfied and must "affirmatively demonstrate [its] compliance with the Rule—that is, [it] must be

prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original). The district court then must engage in a "rigorous analysis" to ensure that the prerequisites of Rule 23(a) have been satisfied. *Id.* Evaluating whether the plaintiff has satisfied the Rule 23 requirements "is intimately involved with the merits of the claims." *Ellis*, 657 F.3d at 980. "Frequently th[e] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes*, 564 U.S. at 351.

As for Rule 23(b), Plaintiff moves to certify the proposed class under the third prong, which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).[6]

Plaintiff Troy Lambert seeks to certify one class and to have him appointed as class representative. Plaintiff defines the class as follows, pursuant to this Court's previous Order Granting Class Certification:

> All persons (excluding officers, directors, and employees of Defendant[] . . . Nutraceutical Corp. . . . who purchased, on or after August 14, 2009, Defendants' Cobra Products (in all packaging sizes and iterations) in California for their own use rather than resale or distribution.

(Dkt. No. 83 ¶ 1).[7]

Having reviewed the Parties' briefing regarding class certification, the Court reinstates the June 19, 2014 Order Granting Plaintiffs' Motion for Class Certification

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[6] Plaintiff also argues that his claim satisfies Rule 23(b)(2), but because the Court finds that this action satisfies Rule 23(b)(3), the Court does not reach Rule 23(b)(2).

[7] The original order listed Defendants Natural Balance, Inc. and Nutraceutical International Corporation, but both of these defendants have been dismissed, leaving only Defendant Nutraceutical Corporation.

(Dkt. No. 80),[8] and finds no reason to depart from it based on the parties' supplemental briefing. First, the Court discusses the parties' supplemental briefing regarding materiality and typicality, and determines that, as the Court previously found, Plaintiff has satisfied his burden as to both. Then the Court concludes that, based on the Ninth Circuit's decision in *Lambert*, individualized damages do not defeat certification here.

1. The Court's First Certification Order Correctly Decided the Issue of Materiality.

"[U]nder the UCL, FAL, and CLRA, a plaintiff can trigger a rebuttable presumption of reliance and causation as to absent class members if the defendant's alleged statements were material and made to the entire class." *Ortega v. Natural Balance Inc.*, 300 F.R.D. 422, 429 (C.D. Cal. June 19, 2014).

Here, materiality is an objective standard measured by whether

> 'a reasonable man would attach importance to [a claim's] existence or nonexistence in determining his choice of action in the transaction in question' [citations], and as such materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.'

Id. (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009)). After previously considering the issue of materiality, the Court correctly found that Plaintiff's theory of commonality—namely that the challenged claims appear on every Cobra product label—was "more than sufficient that such materiality can and should be determined by a jury." *Ortega,* 300 F.RD. at 429. As the Court previously explained, the claims here encompass

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[8] The Court notes that this order refers to Plaintiffs, plural, because Frank Ortega and Troy Lambert were formerly both lead plaintiffs and class representatives in this action. On November 11, 2014, however, the Court issued an Order Granting an *Ex Parte* Application to Dismiss Frank Ortega With Prejudice, and as such, he is no longer a plaintiff in this case. (Dkt. No. 121).

> nearly all of the statements on Cobra's packaging. It strains credulity to think that a merchant would select exclusively immaterial statements to print on its product's packaging. It therefore also appears that if Plaintiff[] can demonstrate that Defendant's claims were misleading, they would also be able to demonstrate materiality.

Id. The Court properly determined that "[t]he evidence relevant to this inquiry is also common to all claims: it is the packaging itself, which Plaintiff[] assert[s] was uniform in California throughout the class period." *Id.* at 428.

Defendant argues that Plaintiff has provided no evidence to prove materiality (Ds. Opp'n at 5–11), explaining that the only objective evidence of materiality comes from the consumer survey of its expert, Dr. Eli Seggev, which demonstrates that consumers' interpretations of Cobra's label "varied considerably." (*See* Dr. Seggev Report, Dkt. No. 111-5 at 5; *see id.* at 19 (finding that "48 percent of respondents either did not believe that the Cobra product packaging communicated a specific benefit or benefits or had no opinion.")). The Court rejects this argument for several reasons. First, "California courts have explicitly 'reject[ed] [the] view that a plaintiff must produce' extrinsic evidence 'such as expert testimony or consumer surveys' in order 'to prevail on a claim that the public is likely to be misled by a representation' under the FAL, CLRA, or UCL." *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 115 (N.D. Cal. 2018) (quoting *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 681–82, 38 Cal.Rptr.3d 36 (2006)). Thus, the absence of a consumer survey does not alone defeat materiality. Second, Plaintiff's expert Dr. Belch has stated that he does "not agree with the conclusions made by Dr. Seggev" (Dr. Belch Report, Dkt. No. 141-1, Ex. 1 at 9–11, 16) and explained that the survey shows there is "a large percentage of responses that center on a specific theme such as sexual performance enhancement," thereby demonstrating it is not "established" that consumer expectations vary. (*Id.* at 9). The Court also agrees with Plaintiff that "Dr. Belch's expert testimony, based on consumer surveys, provides strong evidence that Cobra's claims are material and misleading to the reasonable customer." (Pls. Suppl. Br. At

6). Therefore, the

> Court need not assess the merits of Dr. Seggev's report because the report does not purport to show that materiality cannot be proven or disproven through common evidence. On the contrary, the study purports to show the opposite—that common evidence such as an experimental study can shed light on the question of materiality.

Price v. L'Oreal USA, Inc., No. 17 Civ. 614 (LGS), 2018 WL 3869896, at *9 (S.D.N.Y. Aug. 15, 2018).

Defendant points to *Alargin v. Maybelline*, 300 F.R.D. 44 (S.D. Cal. 2014) for the proposition that Plaintiff has "failed to demonstrate the elements of materiality and reliance are subject to common proof," but that case is inapposite. *Id.* at 457. There, the court refused to certify a class action alleging that Maybelline's "24HR" line of products did not actually last 24 hours because a consumer survey conducted by Dr. Seggev showed that consumers "had a variety of duration expectations." *Id.* Defendant fails to acknowledge that there, however, "only 9%" of the total sample surveyed by Dr. Seggev shared Plaintiffs' expectations "and thus were 'injured' in the manner alleged by Plaintiffs." *Id.* at 454. But here, Plaintiff has evidence showing that Cobra's "virility-enhancing" claims were important to class members, who were purportedly injured because Cobra provided no such benefits. (*See* Belch Report at 10 (finding that "112 of the 151 respondents (74%) who indicated that the Cobra packaging communicated a specific benefit described at least one benefit related to sex, sexual enhancement or sexual performance")).

Thus, the Court rejects Defendant's argument against materiality based on Dr. Seggev's report and finds that Plaintiff has met his burden in proving materiality.

2. The Court's First Certification Order Correctly Decided the Issue of Typicality.

The typicality requirement for class certification is satisfied if Plaintiff, as the named party and class representative, shows that his claims are typical of the class. Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members have the

same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff[], and whether other class members have been injured by the same course of conduct." *Ellis*, 657 F.3d at 984 (internal quotation marks omitted). "[T]he typicality requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of absent class members.'" *Berman v. Freedom Fin. Network, LLC*, 400 F. Supp. 3d 964, 984 (Sept. 4, 2019) (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010)). Thus, the claims of the named plaintiff and the class members need not be exactly the same.

Here, the Court finds that Plaintiff has shown: (1) the members' purported injuries from purchasing the misleading Cobra product is the same or similar as Plaintiff's injury; (2) Plaintiff's action is based on conduct not unique to him alone (as his claims are based on the theory that Defendant allegedly fraudulently marketed and sold an illegal aphrodisiac drug in violation of California's consumer protection laws; the Federal Food, Drug and Cosmetic Act; California's Sherman Law; and 21 C.F.R. section 310.528); and (3) other members have been injured by the same course of conduct, namely Defendant's purportedly deceptive advertising and illegal sale of an unapproved aphrodisiac drug.

As such, previously the Court correctly found typicality and rejected Defendant's claim that Plaintiff's "interpretations of Cobra's labels are both unreasonable and not commonly shared by other customers." (Dkt. No. 111 at 17). As the Court observed:

> Defendant goes into great detail about the exact expectations [that] Plaintiff claimed to have had about the product based on [his] understanding of the words and imagery on Cobra's packaging. But these particulars do not render Plaintiff[']s claims] atypical: even if . . . Plaintiff and [each] class member had somewhat varying conceptions of the results he could expect from a product marketed as virility-enhancing, each had the same marketing-induced expectation that the product would be virility-enhancing.

Ortega, 300 F.R.D. at 427. Thus, even if class members had somewhat

different experiences with and expectations for Cobra, those differences do not defeat typicality because "[t]ypicality does not turn on the specific facts from which [the claim] arose." *Alvarez v. NBTY, Inc.*, 331 F.R.D. 416, 422 (S.D. Cal. 2019) (internal quotations omitted).

Defendant asserts that "Plaintiff's claims are atypical because no reasonable consumer reading Cobra's label would share Plaintiff's belief that it enables one to maintain an erection for an hour," so the "purported misrepresentation that Plaintiff relied on is different" from the alleged misrepresentations relied upon by other class members. (Ds. Opp'n at 11). While the parties dispute (1) whether Plaintiff actually had this expectation for his sexual performance from Cobra and (2) whether Defendant's characterization of Plaintiff's deposition testimony is accurate, the Court agrees with Plaintiff that "[e]ven if this assertion were true, it wouldn't matter." (Pls. Reply at 15). A class representative's "'individual experience with the product is irrelevant where, as here, the injury under the UCL, [FAL,] and CLRA is established by an objective test,'" under which "'injury is shown where the consumer has purchased a product that is marketed with a material misrepresentation, that is, in a manner such that members of the public are likely to be deceived.'" *Holt v. Noble House Hotels & Resort, Ltd.*, No. 17cv2246-MMA (BLM), 2018 WL 5004996, at *6 (S.D. Cal. Oct. 16, 2018) (quoting *Bruno v. Quten Research Instit., LLC*, 280 F.R.D. 524, 534 (C.D. Cal. 2011); *see also Martin v. Monsanto, Inc.*, No. ED CV 16–2168–JFW (SPx), 2017 WL 1115167, at *4 (C.D. Cal. May 17, 2018). Here, the purported economic injury allegedly occurred at the time of purchase and falls under the objective test, which is the same for every class member.

Ultimately, Plaintiff has persuasively argued that he suffered from the same or similar injury as all putative class members who purchased Cobra: that he was "misled by Cobra's packaging to believe that it would provide health benefits and act as an aphrodisiac, and that it was scientifically formulated to improve virility" when in

actuality, as he alleges, it was "ineffective and posed health risks." *Ortega*, 300 F.R.D. at 427.

The Court accordingly concludes that Plaintiffs have met the typicality requirement of Rule 23(a)(3).

3. Individualized damages calculations do not defeat certification.

As the Ninth Circuit held in *Lambert*, and has recently affirmed, "'[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages.'" *Huu Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2019) (quoting *Lambert*, 870 F.3d at 1182). The Ninth Circuit found such a valid model here. As the *Lambert* Court stated

> Lambert proposed measuring class wide damages under the full refund model. The full refund model measures damages by presuming a full refund for each customer, on the basis that the product has no or only a de minimis value. [(Citation omitted).] Here, Lambert presented evidence that the product at issue was valueless and therefore amenable to full refund treatment. We agree with the district court that the full refund model is consistent with Lambert's theory of liability. Accordingly, Lambert was required only to show that the full price amount of retail sales of the product could be approximated over the relevant time period, even if that figure or the data supporting it—in this case the average retail price multiplied by the number of units sold—was uncertain. [(Footnote and citation omitted).]
>
> Although Lambert did not present evidence of the actual average retail price, he did present evidence of both unit sales and the suggested retail price over the relevant time period. [(Footnote omitted].) There may well be additional evidence that Lambert could present at trial to support an average retail price. For example, the record contains evidence that Lambert paid $16–$18 per 30-count bottle of the product and that Nutraceutical, through its website, sold 30-count bottles for $14.39 during this time frame. The suggested retail price in conjunction with Lambert's other evidence suggests that a trier of fact could calculate or sufficiently approximate the average retail price for the product.

> We recognize that a suggested retail price does not "automatically configure an average," but such a precise average is unnecessary for class certification. At this stage, the question is only whether Lambert has presented a workable method. We conclude that he has.

Lambert, 870 F.3d at 1183–84. Because Plaintiff's "damages model matched his theory of liability, and because [he] has shown that his damages model was supportable on evidence that could be introduced at trial," individualized damages does not defeat the predominance of common issues here. *Id.* at 1184.

V. CONCLUSION

For the reasons stated above, the Court **RESCINDS** the Court's February 20, 2015 Decertification Order (Dkt. No. 175) and **REINSTATES** the Court's June 19, 2014 Certification Order (Dkt. No. 80) and thereby **GRANTS** Plaintiff's Class Certification Motion. The Court **FURTHER ORDERS** Plaintiff to submit a Proposed Order within fourteen days of the issuance of this Order.

Dated: January 8, 2020

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE