

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

IN RE: GENENTECH, INC.,	)	
HERCEPTIN (TRASTUZUMAB)	)	Case No. 16-MD-02700-GKF-JFJ
MARKETING AND SALES	)	FILED UNDER SEAL
PRACTICES LITIGATION	)	
	)	Document Relates to:
	)	
	)	Case No. 15-CV-0157-GKF-JFJ

OPINION AND ORDER

This matter comes before the court on the Motion for Class Certification [Doc. 733; Doc. 739 (redacted)]¹ of plaintiffs Texas Oncology, P.A. and Tulsa Cancer Institute, PLLC, now known as Oklahoma Cancer Specialists Management Company, LLC.² For the reasons set forth below, the motion is granted in part and denied in part.

Background/Procedural History

This matter currently includes thirteen separate cases, which have been consolidated for pretrial proceedings in this multidistrict litigation. Plaintiffs are healthcare providers who purchased Herceptin, a biologic cancer-treating drug manufactured and distributed by defendant Genentech, Inc.

From 1998 to 2017, Genentech distributed Herceptin in multi-dose vials, packaged as follows:

¹ The parties have filed both sealed and unsealed, redacted versions of their briefs. The references contained in this Order are to the sealed, unredacted versions, and this Order contains, in part, information that has been filed under seal. Accordingly, the court files this Order under seal, attorneys' eyes only. As set forth below, the court will enter an unsealed Order after consideration of the parties' proposed redactions, if any.

² The motion was also filed by then-plaintiff State of Oklahoma *ex rel.* Board of Regents for the University of Oklahoma. However, as discussed herein, the University and Genentech entered into a settlement agreement and, on July 6, 2026, the University and Genentech filed a Joint Stipulation of Voluntary Dismissal, dismissing the University's claims against Genentech with prejudice. The Joint Stipulation of Voluntary Dismissal is inapplicable to the claims of other plaintiffs, either in their individual capacity or on behalf of the putative class. [Doc. 873].



[Doc. 733-8].³ The labeling required that each vial contain at least 440 mg of trastuzumab. *See* 21 C.F.R. § 201.51(g); *In re: MDL 2700 Genentech Herceptin (Trastuzumab) Mktg. & Sales Prac. Litig.*, 960 F.3d 1210, 1234-35 (10th Cir. 2020).

Each vial contained a freeze-dried, or lyophilized, “cake” of trastuzumab. A separate vial of liquid diluent was provided. [Doc. 733-7, pp. 2, 5; Doc. 733-8, p. 3]. To administer the drug to patients, the healthcare provider was required “reconstitute” the trastuzumab cake. *See* [Doc. 733-7]. With respect to reconstitution, the Herceptin Full Prescribing Information stated as follows:

Reconstitute each 440 mg vial of Herceptin with 20 mL of Bacteriostatic Water for Injection (BWFI), USP, containing 1.1% benzyl alcohol as a preservative to yield a multi-dose solution containing 21 mg/mL trastuzumab. In patients with known

³ Genentech used the same label, regardless of the site of care. [Doc. 733-6, p. 17; Doc. 736-4, pp. 7-8].

hypersensitivity to benzyl alcohol, reconstitute with 20 mL of Sterile Water for Injection (SWFI) without preservative to yield a single use solution.

[Doc. 733-7, p. 5, § 2.3].

Plaintiffs allege that “the vast majority” of Herceptin vials sold in the United States were underfilled and contained less than 440 mg of trastuzumab. As a result, plaintiffs assert they were unable to yield 21 mg/mL of fluid Herceptin solution. The Amended Master Complaint, the operative pleading, includes the following claims: (1) fraud; (2) breach of express warranty; (3) breach of implied warranty; (4) California False Advertising and Unfair Competition Violations, Cal Bus. & Pro. §§ 17200, 17500, *et. seq.*; and (5) unjust enrichment. *See* [Doc. 705].

One of the constituent cases, *Tulsa Cancer Institute, PLLC et al. v. Genentech, Inc.*, N.D. Okla. Case No. 15-CV-0157-GKF-JFJ, includes class action allegations. [Doc. 718]. Plaintiffs now move for class certification pursuant to Fed. R. Civ. P. 23 and define the proposed class as follows:

All persons and entities (including their successors in interest) who purchased and administered Herceptin 440 mg multi-dose vials in the United States (including any territory or possession of the United States) at any time from July 6, 1998 through March 30, 2017 (the “Class Members”). The Class Members do not include: (1) Genentech affiliates, employees, directors, and officers, and members of their immediate families; (2) the United States or any agencies of the United States; (3) judges before whom this case is pending and persons within the fourth degree of consanguinity or affinity to them; or (4) persons or entities whom Plaintiffs’ counsel is precluded from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct.⁴

[Doc. 733, p. 13; Doc. 779, p. 37]. Plaintiffs submit evidence that the putative Class includes up to 5,200 members, and that at least one putative member is located in each of the fifty states. *See* [Doc. 736-13; Doc. 736-4, p. 6].

⁴ In the motion, plaintiffs inadvertently omitted the phrase “and administered” from the proposed Class Definition of “all person and entities . . . who purchased and administered Herceptin 440 mg multi-dose vials in the United States” [Doc. 733, p. 13]. Plaintiffs clarified the definition in the Reply. [Doc. 779, p. 37].

Genentech filed a response in opposition to class certification [Doc. 758; Doc. 762], and plaintiffs filed a reply. [Doc. 779; Doc. 791]. The court held a class certification hearing on January 30, 2025. [Doc. 811]. With the court's leave, on June 23, 2025, Genentech submitted a supplemental response brief regarding the effect of it having reached individual resolutions with two plaintiffs in this matter: plaintiff Oncology-Hematology Associates of Central Illinois, P.C. and proposed Class representative State of Oklahoma *ex rel.* Board of Regents of the University of Oklahoma. [Doc. 834]. Plaintiffs submitted a supplemental reply on July 10, 2025. [Doc. 843].

Standard

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). “In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010) (quoting *Shook v. El Paso Cnty.*, 386 F.3d 963, 971 (10th Cir. 2004)). This court “must undertake a ‘rigorous analysis’ to satisfy itself that a putative class meets the applicable Rule 23 requirements.” *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 913 (10th Cir. 2018) (citing *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1086 (10th Cir. 2014)). This is because “Rule 23 does not set forth a mere pleading standard. A party seeking class certification 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.*, 564 U.S. at 350.

Rule 23(a) sets forth four threshold requirements:

- (1) the class is so *numerous* that joinder of all members is impracticable
[**numerosity**];

- (2) there are questions of law or fact *common to the class* [**commonality**];
- (3) the claims or defenses of the representative parties are *typical* of the claims or defenses of the class [**typicality**]; and
- (4) the representative parties will fairly and *adequately protect* the interests of the class [**adequacy**].

CGC Holding Co., 773 F.3d at 1086 (quoting Fed. R. Civ. P. 23(a)). “A party seeking class certification must show ‘under a strict burden of proof’ that all four requirements are clearly met.” *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006) (quoting *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988)).

In addition to the four threshold requirements of Rule 23(a), “[t]he party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).” *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)). Plaintiffs seek certification pursuant to Rule 23(b)(3), which requires the court to find “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”⁵ Fed. R. Civ. P. 23(b)(3); *see also Wallace B. Roderick Revocable Living Tr.*, 725 F.3d at 1217 (internal quotations omitted) (emphasis added) (“Rule 23(b)(3) . . . requires the court to find that: (1) questions of law or fact common to class members predominate over any questions affecting only individual members, (*predominance*); and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (*superiority*).”); *Brayman v. KeyPoint Gov’t*

⁵ Plaintiffs also seek class certification pursuant to Fed. R. Civ. P. 23(c)(4), which is discussed separately.

Sols., Inc., 83 F.4th 823, 837 (10th Cir. 2023) (“Thus, Rule 23(b)(3) requires a showing of predominance and superiority.”). Matters pertinent to these findings include:

- (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Rule 23(a) and Rule 23(b)(3) Analysis

Plaintiffs seek class certification as to all of the claims asserted in the Amended Master Complaint. Genentech argues plaintiffs fail to satisfy Rule 23(a)’s requirements of commonality, typicality, and adequacy, as well as Rule 23(b)’s requirements for predominance and superiority.⁶ For ease of analysis, the court first jointly considers commonality and predominance.

A. Commonality and Predominance

“A plaintiff seeking class certification satisfies Rule 23(a)(2)’s commonality requirement by demonstrating that ‘there are questions of law or fact common to the class.’” *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 788 (10th Cir. 2019) (quoting Fed. R. Civ. P. 23(a)(2)). “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” but “[t]his does not mean merely that they have all suffered a violation

⁶ Genentech does not contest the numerosity requirement. *See generally* [Doc. 758; Doc. 815]. Further, as previously stated, plaintiffs submit evidence that the Class includes up to 5,200 members. *See* [Doc. 736-13]. Courts have concluded that significantly smaller classes satisfy the numerosity requirement. *See Decoteau v. Raemisch*, 304 F.R.D. 683, 687 (D. Colo. 2014) (collecting cases). Under the circumstances, the court concludes that the proposed Class is sufficiently numerous that joinder of all members is impracticable and the numerosity requirement is satisfied.

of the same provision of law.” *Wal-Mart Stores, Inc.*, 564 U.S. at 349-50 (citations omitted). Rather, “[t]he claims must depend upon a common contention . . . that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at 350. “What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.REV. 97, 131-132 (2009)).

“Rule 23(b)(3)’s predominance requirement is related to, albeit ‘more demanding than,’ Rule 23(a)(2)’s commonality requirement.” *Naylor Farms, Inc.*, 923 F.3d at 789 (quoting *Comcast Corp.*, 569 U.S. at 34). It mandates that “the questions of law or fact common to class members *predominate over* any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3) (emphasis added). The predominance determination “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” *CGC Holding Co.*, 773 F.3d at 1087 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-23 (1997)), and “asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.” *CGC Holding Co.*, 773 F.3d at 1087 (quoting 2 William B. Rubenstein et al., Newberg on Class Actions § 4:49 (5th ed. 2012)). To do so, “[c]ourts conduct a two-step analysis. First, for every issue related to the claim, the court must characterize it as common or individual.” *Brayman*, 83 F.4th at 838. “The court must then weigh the issues to determine whether the common issues predominate.” *Id.*; *see also Naylor Farms, Inc.*, 923 F.3d at 789 (quoting 2 Newberg on Class Actions, § 4:50) (the court “must first ‘characterize the issues in the case as common or not, and then *weigh* which issues predominate’”).

Because “Rule 23(a)(2)’s ‘commonality’ requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class ‘predominate over’ other questions,” *Brayman*, 83 F.4th at 838 (quoting *Amchem Prod., Inc.*, 521 U.S. at 609), the court focuses its analysis on predominance. *Id.*

1. Choice-of-Law

“In a proposed multi-state class action, choice of law analysis is interwoven with the certifying court’s Rule 23(b)(3) predominance determination.” *Porcell v. Lincoln Woods Prods., Inc.*, 713 F. Supp. 2d 1305, 1311 (D.N.M. 2010) (quoting 7AA WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE § 1780.1 (3rd ed. 2005)). This is because “[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance. Therefore, the Court must conduct a choice-of-law analysis at the class certification stage.” *In re HomeAdvisor, Inc. Litig.*, 345 F.R.D. 209, 227 (D. Colo. 2024) (internal quotations and citation omitted) (collecting cases); *see also* 7AA WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE § 1780.1 (3rd ed. April 2026 update) (“The predominance requirement may not be met when the questions of law in the case are not common to the entire class.”).

“In an MDL such as this, the Court applies the choice of law rules of the state in which the particular action was originally filed.” *In re Syngenta AG MIR 162 Corn Litig.*, 668 F. Supp. 3d 1196, 1202 (D. Kan. 2023); *see also Johnson v. Cont’l Airlines Corp.*, 964 F.2d 1059, 1063 n.5 (10th Cir. 1992). Thus, the court applies Oklahoma choice-of-law principles.⁷

⁷ The parties do not dispute that Oklahoma choice-of-law principles apply. *See* [Doc. 733; Doc. 758].

a. Fraud

Oklahoma courts apply the Restatement (Second) of Conflict of Laws § 148 (A.L.I. 1971) and the comments thereto to fraud claims. *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla. 2003) (internal footnote omitted) (“Section 148 of the *Restatement* applies to actions to recover pecuniary damages for false representations whether fraudulent, negligent, or innocent.”). Where a plaintiff’s actions in reliance take place “in whole or in part in a state other than that where the false representations were made”—as in this case—the court considers the following contacts, among others, to determine which state “has the most significant relationship to the occurrence and the parties”:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant’s representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicil, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Ysbrand, 81 P.3d at 626 (quoting Restatement (Second) of Conflict of Laws § 148(2) (A.L.I. 1971)). The relative importance of each factor “in a given case should be determined in the light

of the choice-of-law principles stated in § 6.”⁸ Restatement (Second) of Conflict of Laws § 148 cmt. e (A.L.I 1971).

Citing *Weber v. Mobil Oil Corp.*, 243 P.3d 1 (Okla. 2010), plaintiffs argue that factors (a) and (b) weigh in favor of California law because, during the period from 2011 to 2017, “more Herceptin 440 mg vials were sold to healthcare providers in California than in any other state—by far.” [Doc. 733, p. 51 (citing Doc. 736-16)]. However, unlike in *Weber*, plaintiffs have not shown that “the majority” of the Class Members are residents of a single state—*i.e.*, California.⁹ Rather, the evidence demonstrates only that, for six of the almost nineteen-year proposed Class period, more units were sold in California than in any other state. However, plaintiffs have not shown that units sold equates to number of Class Members—the focus of *Weber*’s reasoning.¹⁰ Further, assuming that the number of units sold in each state corresponded to the number of Class Members therein, plaintiffs have not shown that the majority of Herceptin units were sold in California. By way of example, in 2011, Genentech indirectly sold a total of 322,664 Herceptin units. *See* [Doc. 736-16, pp. 3-4]. The total units sold in California—26,060—constitute approximately only 8%

⁸ Restatement (Second) of Conflict of Laws § 6 identifies the following factors as relevant to the choice-of-law determination: “(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.”

⁹ In reply, plaintiffs suggest that “majority” may mean that more Class Members resided in Oklahoma than in any other single state, rather than in all other states combined. However, the common meaning of majority is “[a] number that is more than half of a total; a group of more than 50 percent.” *Majority*, BLACK’S LAW DICTIONARY (12th ed. 2024); *Majority*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/majority> (last visited Sept. 24, 2026) (“[A] number or percentage equaling more than half of a total.”); *Majority*, OED.com, https://www.oed.com/dictionary/majority_n1?tab=meaning_and_use#38199019 (last accessed Sept. 8, 2026) (“The greater number or part; a number which is more than half the total number.”).

¹⁰ For example, based on the data cited by plaintiffs, it is possible that a single hospital (and Class Member) purchased all of the units in California, whereas another state could have multiple Class Members who collectively purchased fewer units.

of the total units sold, with New York (7%), Texas (6%), and Florida (6%) closely following. Thus, *Weber* is distinguishable with respect to factors (a) and (b). *Cf. Weber*, 243 P.3d at 7 (“Here . . . the majority of the members of the class appear to be Oklahoma residents. . . . Where, as in the instant cause, the reliance takes place in one state and a lesser part in another, the first state (Oklahoma) has a more weighty contact with the occurrence than does the latter.”).

Nor is *Weber* otherwise persuasive.¹¹ As in *Weber*, plaintiffs submit evidence that Genentech made the relevant representations in California. However, unlike *Weber*, the majority of plaintiffs and Genentech are not domiciled in the same state. Rather, putative Class Members reside in all fifty states. *See* [Doc. 736-4, p. 6]; *see also* Restatement (Second) of Conflict of Laws § 148 cmt. i (A.L.I 1971) (“The domicil, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant.”). Further, and of some significance to the court, in *Weber*, the representations related to oil and gas products pumped entirely from within Oklahoma and, as a result, factors (e) and (f) also weighed in favor of application of Oklahoma law to all of the putative Class Members’ claims. *Weber*, 243 P.3d at 7. Plaintiffs concede that factor (e) and (f) “are of less significance here.” [Doc. 733, p. 52].

Rather, this matter is analogous to the Oklahoma Supreme Court’s decision in *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla. 2003). In *Ysbrand*, the Oklahoma Supreme Court characterized comment j. to the Restatement as articulating “the general approach” of § 148:

If any two of the above-mentioned contacts, apart from the defendant’s . . . place of business, are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues. So when the plaintiff acted in reliance upon the defendant’s representations in a single state, this state will usually be the state of the applicable law, with respect to most issues, if (a) the defendant’s

¹¹ Further, although not determinative, the court notes that the Tenth Circuit has tied *Weber* to “fraud claims challenging underpayment of royalties and the like on production of oil and gas from Oklahoma wells.” *Speed v. JMA Energy Co.*, 872 F.3d 1122, 1132 (10th Cir. 2017). This is not such a case and plaintiffs have identified no cases applying *Weber* outside of fraud claims related to production of oil and gas from Oklahoma wells.

representations were received by the plaintiff in this state, or (b) this state is the state of plaintiff's domicil. . . .

Applying the comment to a putative class that included members from all fifty states, the court recognized that, there, "each class member presumably received the representation [DaimlerChrysler advertising] in their home state, their place of domicile." *Ysbrand*, 81 P.3d at 627. Thus, the court concluded that "the contacts point to each class member's home state for the applicable law." *Id.*

Here, as in *Ysbrand*, factors (a) and (b) point to application of the law of each Class Members' home state, rather than uniform application of California law. Likewise, factor (d) weighs in favor of application of the law of the putative Class Members respective domiciles. And, as conceded by plaintiffs, factors (e) and (f) are of little significance. Thus, the § 148 factors weigh in favor of application of the law of each Class Members' state of residence, not uniform application of California law.

Nevertheless, plaintiffs urge the court to consider the factors in light of the principles articulated in § 6—specifically, factor (f) which seeks "certainty, predictability and uniformity of result." But plaintiffs' proposed approach is foreclosed by *Ysbrand*. There, Michigan constituted "the only state where conduct relevant to all class members occurred" and, as a result, Michigan law uniformly applied with respect to plaintiffs' breach of warranty claim. *Ysbrand*, 81 P.3d at 626. Nevertheless, with respect to plaintiffs' fraud claim, the Oklahoma Supreme Court weighed more heavily those factors related to plaintiffs' contact with, and "where each class member acted in reliance on," the representations. *Id.* at 626. Such approach is consistent with the Restatement. *See* Restatement (Second) of Conflict of Laws § 148 cmt. i (A.L.I 1971) ("[A] financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest

relationship.”). Thus, the respective laws of the putative Class Members’ state of domicile shall apply to the fraud claim, and the court will not uniformly apply California law.

b. Breach of Warranty

Plaintiffs next bring claims for breach of express and implied warranties. Oklahoma courts apply the “most significant relationship” test to determine the applicable law to breach of warranty claims. *See Ysbrand*, 81 P.3d at 625-26. The “most significant relationship test” requires consideration of the following factors in applying the principles of § 6 to determine the applicable law: “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.” *Id.* at 625 (quoting Restatement (Second) Conflict of Laws § 188(2) (A.L.I. 1971) (formatting altered from original). “These contacts are to be evaluated according to their relative importance with respect to the particular issue.” Restatement (Second) Conflict of Laws § 188(2) (A.L.I. 1971).

In *Ysbrand*, the Oklahoma Supreme Court acknowledged that, generally, “in a contract for the sale of goods the most significant contact is the place of delivery unless another state has a more significant relationship.” *Ysbrand*, 81 P.3d at 625. However, “[o]n occasion, a state which is not the place of delivery will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction, the parties and the chattel and hence the state of the applicable law.” *Id.* Because warranties “are not something which is negotiated in the purchase,” the “[t]he Restatement’s section 188(2) contacts of the place of contracting, the place of negotiation and performance, and the location of the subject matter are of diminished significance to the sales” and “the relative interest of each buyer’s home state in applying its [law] is more or less equal.” *Id.* Instead, in claims against a manufacturer, the manufacturer’s principal

place of business “where the decisions concerning the design, manufacture, and distribution” of the product were made “is the most important contact,” as the manufacturer’s home state has an “interest in the conduct of its manufacturer.” *Id.* at 626; *see also Cuesta v. Ford Motor Co.*, 209 P.3d 278, 285 (Okla. 2009) (characterizing it as “the law in Oklahoma” that the state of the manufacturer’s principal place of business that “controlled the specifications, requirements and testing” applies to breach of warranty claims against manufacturers); *Hess v. Volkswagen of Am., Inc.*, 221 P.3d 132, 137 (Okla. Civ. App. 2009); *Kinzer v. Remington Arms Co.*, No. CIV-09-1242-R, 2010 WL 11451121, at *2 (W.D. Okla. Sept. 1, 2010); *A. Abunayyan Trading Co. v. Wood Grp. ESP, Inc.*, No. CIV-09-637-C, 2010 WL 11508856, at *2 (W.D. Okla. Feb. 4, 2010).

Genentech is a California corporation with its principal place of business in California. *In re: MDL 2700 Genentech Herceptin (Trastuzumab) Mktg. & Sales Prac. Litig.*, 960 F.3d at 1214. Genentech submitted the original Biologic Licensing Application (BLA), including the original labeling, from its California headquarters, and California-based executives signed a subsequent BLA submitted in connection with Herceptin labeling. [Doc. 736-6; Doc. 736-7; Doc. 736-8]. The BLA contains, among other things, “a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug,” as well as “specimens of the labeling proposed to be used for such drug.” 21 U.S.C. §§ 355(b)(1)(A)(iv), (vi). Further, the majority of the decision-making employees responsible for labeling and manufacturing were located in California, and all decision-making personnel regarding marketing were in California. [Doc. 736-24]. Thus, California is where decisions regarding the design, manufacture, and labeling of Herceptin were made. *Ysbrand*, 81 P.3d at 626. Moreover, California “is the only state where conduct relevant to all class members occurred.” *Id.* Thus, California law uniformly applies to the breach of warranty claims.

Although not explicitly raised in briefing, during the hearing on the motion for class certification, Genentech argued that uniform application of California law would violate the Rules Enabling Act, 28 U.S.C. § 2072. “In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules ‘shall not abridge, enlarge or modify any substantive right,’ § 2072(b).” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-07 (2010) (plurality opinion). But uniform application of one state’s law does not “exceed constitutional limits” or abridge a substantive right where the state has “a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of [state] law is not arbitrary or unfair.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985). As set forth above, California, as Genentech’s principal place of business and the location where decisions regarding the design, manufacture, and labeling of Herceptin were made, has a significant aggregation of contacts to plaintiffs’ breach of warranty claims, resulting in a state-interest in application of California law. Because sufficient contacts exist, application of California law in this matter “is not arbitrary or unfair.” *Id.* Thus, California law applies to plaintiffs’ breach of warranty claims.¹²

c. California Statutory Claims

As previously stated, plaintiffs bring claims pursuant to the California False Advertising statute, CAL. BUS. & PRO. CODE § 17200 *et seq.* (UCL)¹³, and the California Unfair Competition

¹² Genentech asks that, if the court is inclined to apply California law to the warranty class, the court certify the choice-of-law question to the Oklahoma Supreme Court. [Doc. 758, p. 69]. Genentech’s request is improper pursuant to Local Civil Rule 7-1(b), which states, “[i]t is not acceptable to file any combination of motion, response, reply or supplemental brief.”

¹³ To establish a UCL claim, a plaintiff must show an “unlawful, unfair, or fraudulent business act or practice.” *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003) (quoting CAL. BUS. & PROF. CODE § 17200).

statute, CAL. BUS. & PRO. CODE § 17500 *et seq.* (FAL).¹⁴ With respect to these claims, the court first considers whether plaintiffs have standing to assert a claim under California law, then whether California law would uniformly apply pursuant to Oklahoma choice-of-law principles.¹⁵

“California laws are generally presumed not to apply outside of California absent language that clearly expresses, or allows for a reasonable inference, otherwise.” *Short v. Hyundai Motor Co.*, No. C19-0318JLR, 2020 WL 6132214, at *5 (W.D. Wash. Oct. 19, 2020) (citing *Precht v. Kia Motors Am., Inc.*, No. CV-14-1148-DOC, 2014 WL 10988343, at *4 (C.D. Cal. Dec. 29, 2014)). However, “for the UCL [and] FAL . . . , courts have recognized that state statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California.” *Short*, 2020 WL 6132214, at *5 (internal quotations omitted) (collecting cases); *see also Schertzer v. Bank of Am., N.A.*, 489 F. Supp. 3d 1061, 1084 (S.D. Cal. 2020); *Bryan v. Del Monte Foods, Inc.*, No. 23-CV-00865-MMC, 2023 WL 4758452, at *8 (N.D. Cal. July 25, 2023) (internal quotations omitted) (“Where a defendant is located in California, and a non-resident plaintiff’s claim is based on alleged misrepresentations that were disseminated from California, courts have allowed the application of California law.”); *Precht*, 2014 WL 10988343, at *4; *In re iPhone 4S Consumer Litig.*, No. C-12-1127-CW, 2013 WL 3829653, at *3 (N.D. Ca. July 23, 2013) (quoting *Norwest Mortg., Inc. v. Superior Ct.*, 72 Cal. App. 4th 214, 224-25 (Cal. Ct. App. 1999)) (“California courts have concluded that ‘state statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California.’”). Thus, California courts have recognized that “a non-California resident may have standing under

¹⁴ The FAL, “[t]he false advertising law[,] prohibits any ‘unfair, deceptive, untrue, or misleading advertising.’” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quoting CAL. BUS. & PROF. CODE § 17500).

¹⁵ Plaintiffs’ briefing is framed in terms of standing, whereas Genentech focuses on choice-of-law. *Cf.* [Doc. 733, pp. 45-47] *with* [Doc. 758, pp. 64-67].

the UCL or the FAL if either (1) the injury occurred in California, or (2) defendants' conduct occurred in California." *Wisdom v. Easton Diamond Sports, LLC*, No. CV-18-0478-DSF, 2018 WL 6264994, at *4 (C.D. Cal. Oct. 9, 2018). "In determining whether wrongful conduct occurred in California, courts consider factors such as where the defendant does business, whether the defendant's principal offices are located in California, where the plaintiffs are located, and where the alleged actionable conduct took place." *Precht*, 2014 WL 10988343, at *4; *see also Wisdom*, 2018 WL 6264994, at *5.

As discussed above, plaintiffs submit evidence that Genentech's relevant, actionable conduct occurred in California. Specifically, California is Genentech's state of incorporation and principal place of business, as well as the primary location where decisions regarding the design, manufacture, and labeling of Herceptin were made. Thus, plaintiffs have standing to assert the California statutory claims.

"[C]ourts typically treat statutory claims as claims sounding in tort in choice of law analyses." *Huddleston v. John Christner Trucking, LLC*, No. 17-CV-549-GKF-FHM, 2020 WL 489181, at *6 n.2 (N.D. Okla. Jan. 30, 2020), *reconsidered on other grounds*, 2020 WL 6375163 (N.D. Okla. Oct. 26, 2020); *see also Tu My Tong v. Rone*, No. B210280, 2010 WL 2584755, at *12 (Cal. Ct. App. June 29, 2010) (statutory UCL claim sounds in tort). "For tort claims, Oklahoma follows the 'most significant relationship' test outlined in the Restatement (Second) of Conflict of Laws." *Huddleston*, 2020 WL 489181, at *6 n.2 (quoting *Patten Air, LLC v. Howard*,

No. CIV-18-0004-F, 2018 WL 9837822, at *3 (W.D. Okla. Oct. 15, 2018)).¹⁶ To determine the state with the most significant relationship to the conduct and parties, Oklahoma courts consider the following factors: “(1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties occurred.” *Martin v. Gray*, 385 P.3d 64, 67 (Okla. 2016) (quoting *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974)).¹⁷

As to the first factor, the injury occurred in each of plaintiffs’ respective states of residence—*i.e.*, in all fifty states. *See Martin*, 385 P.3d at 67. As recognized by the Restatement comments:

When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort. . . .

Choice of the applicable law becomes more difficult in situations where the defendant’s conduct and the resulting injury occurred in different states. When the injury occurred in two or more states, or when the place of injury cannot be ascertained or is fortuitous and, with respect to the particular issue, bears little relation to the occurrence and the parties, the place where the defendant’s conduct occurred will usually be given particular weight in determining the state of the applicable law.

¹⁶ For this reason, the cases cited by Genentech in its response are distinguishable, as, in those cases, the courts applied California choice-of-law principles, rather than the most significant relationship test as applied by Oklahoma courts. *See* [Doc. 758, p. 65 (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012); *Darisse v. Nest Labs, Inc.*, No. 14-CV-01363-BLF, 2016 WL 4385849 (N.D. Cal. Aug. 15, 2016); *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096 (C.D. Cal. 2012))]. Further, as recognized by some California courts, “*Mazza* did not ‘explicitly foreclose[] any argument that California’s consumer protection statutes . . . can be applied to a nationwide class.’” *In re iPhone 4S Consumer Litig.*, 2013 WL 3829653, at *9. Insofar as Genentech relies on the Oklahoma Supreme Court’s decision in *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028 (Okla. 2006), that decision appears to hinge on standing under an Ohio statute, as opposed to a choice-of-law analysis. *See Harvell*, 164 P.3d at 1037.

¹⁷ Plaintiffs asserted during the hearing that application of the most significant relationship test required uniform application of California law. *See* [Doc. 815, p. 108-10].

Restatement (Second) of Conflict of Laws § 145 cmt. e (A.L.I 1971). Further, the Restatement comments recognize that “the place of injury does not play so important a role for choice-of-law purposes in the case of false advertising and the misappropriation of trade values as in the case of other kinds of torts. Instead, the principal location of the defendant’s conduct is the contact that will usually be given the greatest weight.” Restatement (Second) of Conflict of Laws § 145 cmt. f (A.L.I 1971); *see also* Restatement (Second) of Conflict of Laws § 145 cmt. e (A.L.I 1971) (“[T]he place where the [defendant’s] conduct occurred is given particular weight in the case of torts involving . . . unfair competition.”). Thus, the court affords this factor little weight and, instead, focuses on the place where the conduct causing the injury occurred.

As previously stated, decisions regarding Herceptin’s design, manufacture, and labeling were made in California. Moreover, plaintiffs submit evidence that key communications regarding Herceptin marketing were approved in, and distributed from, California, including the Field Direction Memo of January 12, 2015. *See* [Doc. 735-9; Doc. 736-11; Doc. 736-12]. Thus, plaintiffs submit sufficient evidence that the conduct causing the injury occurred in California and this factor weighs heavily in favor of uniform application of California law.

Turning next to the domicile, residence, nationality, place of incorporation, and place of business of the parties, as previously stated, plaintiffs submit evidence that putative Class Members are residents of all fifty states. And Genentech is a California corporation with its principal place of business in California. Thus, this factor is neutral, as is the final factor—the place where the relationship between the parties existed.

Based on the foregoing, on balance, the § 145 Restatement factors weigh in favor of uniform application of California law. Further, application of California law furthers the principles underlying § 6, as the statutory torts are not directed to making the plaintiff “whole.” *See Sharpe*

v. Puritan's Pride, 466 F. Supp. 3d 1066, 1070 (N.D. Cal. 2020) (quoting *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 331 (2011)) (“The statutes are a type of market regulation and are ‘intended to preserve fair competition and protect consumers from market distortions.’”). Thus, the court concludes that California law applies to plaintiffs’ statutory claims.

d. Unjust Enrichment

Under Oklahoma choice-of-law principles, the “the law of each state where the services were rendered governs any claim for unjust enrichment.” *Harvell*, 164 P.3d at 1036; *see also I.P.I.C., GSP, S.L. v. Ruhrpumpen, Inc.*, No. 08-CV-510-CVE-PJC, 2009 WL 5101761, at *4 (N.D. Okla. Dec. 17, 2009) (“In an unjust enrichment action, Oklahoma looks to the law of the state where services were rendered.”); *Sallee v. Dollar Thrifty Auto. Grp., Inc.*, No. 14-CV-250-GKF-PJC, 2015 WL 1281518, at *5 (N.D. Okla. Mar. 20, 2015) (same); *Lonestar Geophysical Surveys, L.L.C. v. TAQA N. Ltd.*, No. CIV-12-0761-F, 2012 WL 12861139, at *12 n.9 (W.D. Okla. Sept. 25, 2012) (same). Here, plaintiffs seek to recover monies received by Genentech as payment for 440 mg of Herceptin, where less than 440 mg of Herceptin was provided. [Doc. 705, pp. 32-33]. Because any enrichment occurred in the place of performance, the law of each state where plaintiffs received vials containing less than 440 mg of Herceptin applies. *See Harvell*, 164 P.3d at 1035-36.

Plaintiffs urge the court to apply Restatement (Second) Conflicts of Law § 221, which according to the Restatement comments, applies to unjust enrichment claims “which are based neither on contract nor on tort.” Restatement (Second) of Conflict of Laws § 221 cmt. a (A.L.I 1971). However, plaintiffs identify no Oklahoma cases applying § 221 to unjust enrichment claims. Rather, as previously stated, the Oklahoma Supreme Court has held “the law of each state where the services were rendered governs any claim for unjust enrichment.” *Harvell*, 164 P.3d at

1035. When applying Oklahoma law, the court is bound to “follow the most recent decisions of the state’s highest court.” *Patterson v. PowderMonarch, LLC*, 926 F.3d 633, 637 (10th Cir. 2019) (quoting *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665-66 (10th Cir. 2007)). Thus, the court is bound to apply *Harvell*, and the law of each state where putative Class Members received underfilled Herceptin vials applies.

e. Effect of Choice-of-Law on Commonality and Predominance

Based on the foregoing, California law will apply to the breach of warranty and California statutory claims. However, the laws of each state where the putative Class Members received underfilled Herceptin vials will apply as to the fraud and unjust enrichment claims—that is, the law of all fifty states. Thus, the court must consider whether the variations in the states’ laws as to the fraud and unjust enrichment claims will “swamp any common issues and defeat predominance.” *In re HomeAdvisor, Inc. Litig.*, 345 F.R.D. at 227.

Looking first to the fraud claim, plaintiffs argue that, even if multiple states’ laws apply, common issues nevertheless predominate and variations in the applicable state law may be addressed through the creation of subclasses or special verdict forms. [Doc. 733, pp. 58-59]. Specifically, plaintiffs propose four “possible subclasses based on the scienter and reliance factors”: (1) Fraud Subclass One (states that require scienter of actual knowledge/reckless ignorance and where reliance is presumed); (2) Fraud Subclass Two (states that require scienter of actual knowledge/reckless ignorance but where reliance is not presumed); (3) Fraud Subclass Three (states that require scienter of ignorance of truth and where reliance is presumed); and (4) Fraud Subclass Four (states that require scienter of ignorance of truth and but where reliance is not presumed). [*Id.* at p. 59]. However, plaintiffs’ proposed classes fail to demonstrate that “variations can be effectively managed through creation of a small number of subclasses grouping the states

that have similar legal doctrines.” *In re HomeAdvisor, Inc. Litig.*, 345 F.R.D. at 231 (quoting *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010)); *cf. Rodriguez v. It’s Just Lunch, Int’l*, 300 F.R.D. 125, 141 (S.D.N.Y. 2014) (“A claim . . . can implicate common issues and be litigated collectively, despite the existence of state law variations, so long as the elements of the claim . . . are substantially similar and any differences fall into a limited number of predictable patterns which can be readily handled by special interrogatories or special verdict forms.”).

First, the named plaintiffs are members of Fraud Subclass One and plaintiffs identify no class representative for the remaining subclasses. “[W]here plaintiffs propose subclasses, plaintiffs must show that each subclass independently meets the standards of Rule 23 class certification.” *Robinson v. Gillespie*, 219 F.R.D. 179, 183 (D. Kan. 2003); *see also Soseeah v. Sentry Ins.*, No. CIV-12-01091-RB-KK, 2016 WL 7435792, at *3 (D.N.M. Sept. 6, 2016) (same). It is axiomatic that “a class representative must be part of the class.” *Wal-Mart Stores, Inc.*, 564 U.S. at 348 (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)); *see also Pueblo of Zuni v. United States*, 243 F.R.D. 436, 443 (D.N.M. 2007) (collecting cases); *Tennille v. W. Union Co.*, 785 F.3d 422, 430-31 (10th Cir. 2015) (“If there is a conflict preventing named class representatives from protecting the interest of the entire class adequately, the district court has discretion to order subclasses, *each with their own named representative.*”). Plaintiffs neither identify a class representative for Fraud Subclasses Two through Four nor address the need for same. Because plaintiffs do not identify an adequate class representative for Fraud Subclass Two, Fraud Subclass Three, or Fraud Subclass Four, plaintiffs fail to satisfy a threshold Rule 23 requirement as to those subclasses and they are not certifiable. *See White v. Just Born, Inc.*, No. 17-CV-04025-NKL, 2018 WL 3748405, at *2 (W.D. Mo. Aug. 7, 2018).

Further, although plaintiffs’ proposed fraud subclasses account for differences in the law as to scienter and whether reliance may be presumed, the subclasses do not address other material differences in law. By way of example, Alabama, California, and Colorado are members of proposed Fraud Subclass One. *See* [Doc. 733, p. 59]. However, according to plaintiffs’ analysis of state law, Alabama applies a subjective inquiry to determine whether the representation was material, whereas California and Colorado apply an objective test.¹⁸ [Doc. 733-2]. Further, the three states apply three different burdens of proof, with Alabama requiring substantial evidence, California applying a preponderance standard, and Colorado requiring clear and convincing evidence. Plaintiffs’ conclusory assertion that these material differences in state law may be addressed “through special verdict forms” is insufficient to satisfy the burden of showing that the individual inquiries necessitated by application of various states’ laws will not dominate common questions or that the “variations can be effectively managed through” through creation of subclasses. *See In re HomeAdvisor, Inc. Litig.*, 345 F.R.D. at 233-34; *see also* 2 Newberg on Class Actions § 4:50 (internal footnote and quotations omitted) (“Common questions do not predominate if . . . a number of individualized legal points would need to be established after common questions were resolved. Nor do common questions predominate if, as a practical matter, the resolution of . . . [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues.”).

Turning to the unjust enrichment claim, as recognized by plaintiffs, “[t]he elements of unjust enrichment claims differ markedly from state to state.” *Harvell*, 164 P.3d at 1036. Thus, “[c]ourts in the Tenth Circuit have noted ‘that differences among state law definitions of unjust enrichment and its availability as a remedy[,] make federal courts, in general, reluctant to certify

¹⁸ In this regard, individual evidence as to each Class Members’ subjective assessment of the representation would be required for states applying a subjective inquiry.

a nationwide class on this theory.’’ *In re HomeAdvisor, Inc. Litig.*, 345 F.R.D. at 232 (quoting *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 345 F.R.D. 208, 232 (D. Kan. 2024)) (collecting cases); *see also* 1 MCLAUGHLIN ON CLASS ACTIONS § 5:60 (22nd ed. Nov. 2025 update) (“The majority view is that unjust enrichment claims usually are not amenable to class treatment because the claim requires evaluation of the individual circumstances of each claimant to determine whether a benefit was conferred on defendant and whether the circumstances surrounding each transaction would make it inequitable for the Defendant to fail to return the benefit to each claimant.”). In an effort to save certification of the claim, plaintiffs propose subclasses “based on the conduct and (in)direct benefit factors”—specifically: (1) Unjust Enrichment Subclass One (states requiring wrongful conduct, but no direct benefit); (2) Unjust Enrichment Subclass Two (states requiring direct benefit but no wrongful conduct); and (3) Unjust Enrichment Subclass Three (states requiring neither wrongful conduct nor direct benefit). [Doc. 733, pp. 64-65]. Additionally, plaintiffs propose a subclass consisting of states that permit plaintiffs to pursue unjust enrichment claims even if there is an adequate remedy at law (“Adequate Remedy Subclass”). [*Id.* at p. 65]. However, plaintiffs offer no explanation as to the relationship between the Adequate Remedy Subclass and the other three proposed subclasses.

For similar reasons as to the fraud claim, the court declines to certify subclasses related to the unjust enrichment claim. First, plaintiffs fail to offer an adequate Class Representative as to Unjust Enrichment Subclass One. Further, and of significance to the court, plaintiffs’ proposed subclasses do not meaningfully address other material differences in the laws of the states regarding unjust enrichment. For example, some states require plaintiffs to prove actual loss or detriment, whereas other states do not. The proof necessary would vary greatly depending on whether actual loss must be shown. Nor does plaintiff sufficiently address the distinction between

those states prohibiting unjust enrichment where an adequate remedy at law exists, as plaintiffs offer no explanation as to the relationship between the Adequate Remedy Subclass and the other three proposed subclasses, membership of which overlaps. *See* 2 Newberg on Class Actions § 4:50.

Based on the foregoing, plaintiffs have not demonstrated that common questions of law predominate over individual questions within the proposed fraud and unjust enrichment subclasses. Rather, material differences in state law defeat predominance, even as to the proposed subclasses. *See Foster v. Merit Energy Co.*, 282 F.R.D. 541, 560 n.17 (W.D. Okla. 2012) (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 n.9 (6th Cir. 1998)) (“[S]ubclasses are not a substitute for compliance with Rule 23.”). Thus, the court declines to certify a class or subclass as to plaintiffs’ fraud and unjust enrichment claims.¹⁹

Having declined to certify a class or subclass as to plaintiffs’ fraud and unjust enrichment claims, the court considers the remaining arguments as to predominance only with respect to plaintiffs’ breach of warranty and California statutory claims.

2. Classwide Evidentiary Issues

As recognized by the Tenth Circuit, “[c]onsidering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.” *CGC Holding Co.*, 773 F.3d at 1088 (quoting *Erica P. John Fund, Inc. v.*

¹⁹ Moreover, plaintiffs have “provided no indication as to how the jury could be charged in some coherent manner relative to the[ir] proposed grouping[s].” *In re HomeAdvisor, Inc. Litig.*, 345 F.R.D. at 237 (quoting *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 183 (3d Cir. 2014)). Thus, as to the fraud and unjust enrichment claims, a class action is not superior to other available methods due to manageability issues. *See* Fed. R. Civ. P. 23(b)(3).

Halliburton Co., 563 U.S. 804 (2011)).²⁰ Thus, in order to determine whether the elements of plaintiffs’ causes of action “are susceptible to generalized proof” and therefore properly characterized as common, it is necessary to first briefly consider the nature of the remaining claims for which certification is sought. *CGC Holding Co.*, 773 F.3d at 1087-88. For ease of analysis, the court first considers plaintiffs’ California statutory claims.

a. California Statutory Claims

As previously stated, to establish a UCL claim, a plaintiff must show an “unlawful, unfair, or fraudulent business act or practice.” *Lippitt*, 340 F.3d at 1043 (quoting CAL. BUS. & PROF. CODE § 17200). “The false advertising law prohibits any ‘unfair, deceptive, untrue, or misleading advertising.’” *Williams*, 552 F.3d at 938 (quoting CAL. BUS. & PROF. CODE § 17500). Thus, “[a]ny violation of the false advertising law . . . necessarily violates’ the UCL,” *Williams*, 552 F.3d at 938 (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (Cal. App. 2002)), and “courts generally consider claims under California’s Unfair Competition Law (‘UCL’) [and] False Advertising Law (‘FAL’) . . . together.” *In re ConAgra Foods, Inc.*, 90 F. Supp.3d 919, 982-83 (C.D. Cal. 2015).

Both the UCL and FAL claims “are governed by the ‘reasonable consumer’ test.” *Williams*, 552 F.3d at 938. Pursuant to the “reasonable consumer” test, plaintiffs “must ‘show that members of the public are likely to be deceived.’” *Id.* (quoting *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). The test “requires more than a mere possibility that [defendant’s] label ‘might conceivably be misunderstood by some few consumers viewing it in an unreasonable

²⁰ As previously stated, “[c]ommon issues are those for which ‘the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.’” *Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1175 (10th Cir. 2023) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). Individual issues, in contrast, “are those for which ‘members of [the] proposed class will need to present evidence that varies from member to member.’” *Black*, 69 F.4th at 1175 (quoting *Tyson Foods, Inc.*, 577 U.S. at 453).

manner.” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (Cal. Ct. App. 2003)). “Rather, the reasonable consumer standard requires a probability ‘that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.’” *Ebner*, 838 F.3d at 965. Accordingly, “[e]ach statute allows plaintiffs to establish materiality and reliance (i.e., causation and injury) by showing that a reasonable person would have considered the defendant’s representation material.” *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 612 (N.D. Cal. 2018) (quoting *In re ConAgra*, 90 F. Supp. 3d at 983).

Based on the foregoing, whether the representations on the Herceptin 440 mg multi-dose vials were untrue or misleading advertisements under the FAL or an “unfair” practice under the UCL, material, and likely to mislead a reasonable person constitute questions common to the proposed Class. *See Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 241 (N.D. Cal. 2014); *Martin v. Monsanto Co.*, No. CV-16-2168-JFW, 2017 WL 1115167, at *4 (C.D. Cal. Mar. 24, 2017). Further, the questions are subject to generalized proof.

First, as previously stated, plaintiffs submit evidence that Genentech used the same label, regardless of the site of care. [Doc. 733-6, p. 17; Doc. 736-4, pp. 7-8]. As a result, exposure may be proven through common evidence. [Doc. 733-6, p. 17; Doc. 736-4, pp. 7-8; Doc. 733-8].

Further, as common proof of materiality, Dr. Hosier opines that Genentech’s communications demonstrate that it considered the weight identified on the label to be material. [Doc. 733-6, pp. 20-22]; *see Fitzhenry-Russell*, 326 F.R.D. at 614 (materiality may be demonstrated through defendant’s internal documents) (collecting cases). Regardless, because materiality is evaluated using the objective “reasonable consumer” standard, “[t]here is no risk whatever that a failure of proof on the common question[s] of . . . materiality will result in

individual questions predominating.” *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1115-16 (N.D. Cal. 2018) (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013)); *Miller v. Travel Guard Grp., Inc.*, No. 21-CV-09751-TLT, 2023 WL 7106479, at **12-13 (N.D. Cal. Sept. 15, 2023), *appeal filed*, No. 25-275 (9th Cir. Jan. 15, 2025); *see also Fitzhenry-Russell*, 326 F.R.D. at 612 (cleaned up) (“As a general rule, materiality may be established by common proof because materiality is judged according to an objective standard, and so [t]he alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all [consumers] composing the class.”).²¹ Thus, common issues predominate with respect to plaintiffs’ California statutory claims.

b. Breach of Express Warranty

“To prevail on a breach of express warranty claim under California law, a plaintiff must prove that ‘(1) the seller’s statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached.’” *In re ConAgra Foods*, 90 F. Supp. 3d at 984; *see also* CAL. COM. CODE § 2313(1)(a) (“Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.”). “Proof of reliance on specific promises or

²¹ The court previously reserved its ruling as to the admissibility of Mr. Hosier’s opinions that the Class Members considered the weight identified on the label to be material. Given that the court applies California’s objective, reasonable consumer standard, Mr. Hosier’s opinions the Class Members considered the weight to be material are irrelevant. *See Miller*, 2023 WL 7106479, at *12 (describing whether the misrepresentation was material to class members as “not the correct standard,” and stating “[i]nstead, under the UCL, plaintiff must only show that members of the public are likely to be deceived”). Accordingly, the court will not consider them. *See In re: EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2020 WL 1164869, at *26 (D. Kan. Mar. 10, 2020). Genentech’s motion is granted insofar as it seeks exclusion of Mr. Hosier’s opinions that Class Members considered the weight to be material.

representations is not required.” *In re Congra Foods*, 90 F. Supp. 3d at 984.²² However, California courts have concluded that “class treatment of breach of express warranty claims is only appropriate if plaintiffs can demonstrate that the alleged misrepresentation would have been material to a reasonable consumer.” *Id.* at 985.

Here, whether the Herceptin 4440 mg vial label misrepresented the content and whether that misrepresentation breached warranties are issues common to putative Class Members. *See In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 985. Further, the issues are susceptible to common, generalized proof because, like the California statutory claims, materiality is judged objectively, based on a reasonable consumer. *Id.* at 985-86. Thus, common issues predominate with respect to plaintiffs’ breach of express warranty claim. *Id.* at 986.

c. Breach of Implied Warranty

Turning next to plaintiffs’ breach of implied warranty claim, by operation of California law, “a contract for the sale of goods ‘implies a warranty of merchantability that goods are fit for ordinary purposes for which such goods are used.’” *James v. Chocmod USA Inc.*, 773 F. Supp. 3d 945, 961 (E.D. Cal. 2025) (quoting *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009)). “However, the California Commercial Code also requires merchantable goods to meet five other

²² The court acknowledges some California courts have characterized “whether reliance is considered as part of ‘the basis of the bargain’” as “an unsettled issue.” *Valentine v. Crocs, Inc.*, No. 22-CV-07463-TLT, 2023 WL 12015530, at *3 (N.D. Cal. Apr. 28, 2023). Further, some courts maintain the reliance requirement where the parties are not in privity. *Watkins v. MGA Ent., Inc.*, 574 F. Supp. 3d 747, 757 (N.D. Cal. 2021) (summarizing positions of various courts). However, at this stage, Genentech offers no substantive argument with respect to the issue. Further, having reviewed the relevant cases, the court is persuaded by those courts concluding that proof of reliance is not required. *See In re ConAgra Foods*, 90 F. Supp. 3d at 984; *see also* CAL. COM. CODE § 2313, editor’s notes (internal citation and quotations omitted) (“In former Civil Code § 1732 reliance by the buyer was an essential requirement for the creation of an express warranty. Under Subdivision (1) of this section no particular reliance on [affirmations of fact] need be shown in order to weave them into the fabric of agreement.”). “In any event, ‘the . . . court may revisit its decision and choose to decertify the class should [Genentech]’” persuade the undersigned that proof of reliance is required under California law. *See generally Menocal*, 882 F.3d at 921.

criteria, one of which is to “[c]onform to the promises or affirmations of fact made on the container or label if any.” *James*, 773 F. Supp. 3d at 961 (quoting CAL. COM. CODE § 2314(2)(f)). Further, the Code requires “a plaintiff asserting breach of warranty claims must stand in vertical contractual privity with the defendant.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008). However, authority exists for exceptions to the vertical privity requirement where a plaintiff relies on the manufacturer’s written labels or advertisements, *Roper v. Big Heart Pet Brands, Inc.*, 510 F. Supp. 3d 903, 924 (E.D. Cal. 2020), or for food and drug products. *Corbett v. PharmaCare U.S., Inc.*, 567 F. Supp. 3d 1172, 1197-98 (S.D. Cal. 2021).

Plaintiffs assert that exceptions to vertical privity apply and Genentech offers no substantive argument to the contrary. Assuming that the exceptions to vertical privity apply, common questions predominate as to the breach of implied warranty claim, including whether the Herceptin 440 mg multi-dose vials conformed to the label. Further, as previously discussed, the common questions are subject to general proof. Accordingly, the claim is provisionally appropriate for class certification, contingent upon the applicability of an exception to the vertical privity requirement.

However, if it is later determined that no exception to vertical privity applies, the court will decertify the class with respect to this claim, as individual issues regarding vertical privity would predominate. *See In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1261 (10th Cir. 2004) (“[A] trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment.”); *see also Shin v. Sanyo Foods Corp. of Am.*, 348 F.R.D. 477, 488-89 (C.D. Cal. 2025) (collecting cases for the proposition that predominance requirement is not satisfied as to breach of

implied warranty claim where class members would need to show that each was in vertical privity with defendant).

d. Classwide Evidence of Underfill and Damages

Genentech next contends that individualized issues predominate as to injury and damages. However, as previously stated, under California law, plaintiffs need not prove reliance on specific statements (*i.e.*, *injury*), and “[c]lass treatment is appropriate if plaintiffs can demonstrate the materiality of the alleged misrepresentation.” *In re Dial Complete Mktg. & Sales Pracs. Litig.*, 312 F.R.D. 36, 61 (D.N.H. 2015) (breach of warranty); *see also In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 984; *Fitzhenry-Russell*, 326 F.R.D. at 612 (California statutory claims). Even if that were not the case, “[i]t is not necessary that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive.” *CGC Holding Co.*, 773 F.3d at 1087 (quoting *Amgen Inc.*, 568 U.S. at 468); *see also Menocal*, 882 F.3d at 914-15 (“[T]he predominance prong asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.”).

Plaintiffs submit evidence that Genentech utilized the same label on its 440 mg multi-dose vials and therefore uniformly represented that the vial contained 440 mg of trastuzumab, when the vials did not. Genentech’s single, common label “mak[es] class-wide proof possible.” *Menocal*, 882 F.3d at 920; *see also CGC Holding*, 773 F.3d at 1091-92. That is, Genentech’s common labeling scheme is “the ‘glue’ that holds together” the Class’s breach of warranty and California statutory claims. *Menocal*, 882 F.3d at 920. Genentech’s alleged misrepresentation as to fill is the predominant issue and individual inquiries as to injury do not predominate.

Nor does the potential for uninjured plaintiffs destroy predominance. As recognized by the Tenth Circuit, “the question at class certification is whether the method by which plaintiffs propose to prove class-wide impact could prove such impact, not whether plaintiffs in fact can prove class-wide impact.” *Black*, 69 F.4th at 1184 (internal quotations omitted). Thus, “[t]he presence of class members who experienced varying degrees of injury, including some who were altogether uninjured, does not bar class certification.” *Id.* at 1185 “[A] class may still be properly certified even if it ‘consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm.’” *Id.* The court therefore turns to damages.

Looking to the breach of warranty claims (both express and implied), the measure of damages under California law is “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” CAL. COM. CODE § 2714(2). Likewise, “in calculating [the equitable remedy of] restitution under the UCL and FAL, the focus is on the difference between what was paid and what a reasonable consumer would have paid *at the time of purchase without* the fraudulent or omitted information.” *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (emphasis added). This is because the defect itself is the injury. *See Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 822 (9th Cir. 2019); *Martin*, 2017 WL 1115167, at *9; *In re 5-Hour Energy Mktg. & Sales Pracs. Litig.*, No. ML-13-2438-PSG, 2017 WL 2559615, at *11 (C.D. Cal. June 7, 2017) (“In contrast, when the issue is only how much of the product the consumer received, few would contest that the consumer

received no value from the product that they did not get.”). Thus, plaintiffs were injured each time they received an underfilled—*i.e.*, defective—vial.²³

Plaintiffs offer two alternative models for assessing damages: (1) the Minimum Contents Model, and (2) the Percentage Underfill Model. [Doc. 733, p. 66]. Pursuant to the Percentage Underfill Model, plaintiffs’ expert, Dr. William Huber, conducted a statistical analysis to determine the probabilities that Class Members received underfilled Herceptin vials. [*Id.*]. Dr. Huber’s opinions in this regard were set forth in the 2024 Declaration of William A. Huber, Ph.D., dated July 15, 2024; however, in an Order of July 21, 2025, the court excluded Dr. Huber’s 2024 Declaration. *See* [Doc. 846]. Thus, plaintiffs cannot demonstrate common injury through the Percentage Underfill Model.

Turning to the Minimum Contents Model, plaintiffs describe the model as follows:

Every purchaser parted with the value of a vial with a minimum content of 440 mg trastuzumab. In return, they received a vial with a minimum content that was substantially less. (The jury will determine the minimum contents Genentech provided.) Under this approach, every Class Member suffered injury on every vial purchased.

[Doc. 733, p. 66]. Insofar as plaintiffs ask the court to presume that “every Class Member suffered injury on every vial purchased,” the court cannot do so given the undisputed evidence of vial samples above 440 mg throughout the proposed Class Period. *See* [Doc. 733-15, fig. 1]. “Such a result would fly in the face of the core principle that class actions are the aggregation of individual claims” and recognition that Rule 23 is “fundamentally a procedural device.” *In re Asacol*

²³ Because Genentech was required to “ensure that the amount of trastuzumab contained in *each vial* is equal to or greater than the amount listed on the label,” the court does not consider Genentech’s argument that *aggregate* underfill cannot be demonstrated utilizing common evidence. *See In re: MDL 2700 Genentech Herceptin (Trastuzumab) Mktg. & Sales Prac. Litig.*, 960 F.3d 1210, 1235 (10th Cir. 2020) (emphasis added). Proof of aggregate underfill amongst the vials purchased by Class Members is unnecessary.

Antitrust Litig., 907 F.3d 42, 56 (1st Cir. 2018) (quoting 1 William B. Rubenstein et al., Newberg on Class Actions § 1:1 (5th ed. 2012)).

Further, “at the class-certification stage (as at trial), any model supporting a ‘plaintiff’s damages case must be consistent with its liability case.’” *Comcast Corp.*, 569 U.S. at 35. In the Minimum Contents Model, plaintiffs assert that “every Class Member suffered injury on every vial purchased.” [Doc. 733, p. 66]. However, plaintiffs have premised their claims on *underfill*. *See generally* [Doc. 705]. Specifically, in the Amended Complaint, plaintiffs allege that, as a result of underfill, they were “damaged due to the additional vials of Herceptin they were required to purchase” and are entitled to recover “amounts paid by Plaintiffs for 440 mg Herceptin vials that *did not contain at least 440 mg of trastuzumab*.” [Doc. 705, pp. 28-29, 31 (emphasis added)]. But, in the motion, plaintiffs propose a damages model that would award damages based on inability to *guarantee* a 440 mg fill—not actual underfill. As result, the Minimum Contents Model fails to “translat[e] the *legal theory of the harmful event* [underfill] into an analysis of the economic impact of *that event* [payment for trastuzumab not actually received].” *Comcast Corp.*, 569 U.S. at 38 (quoting FEDERAL JUDICIAL CENTER, REFERENCE MANUAL OF SCIENTIFIC EVIDENCE 432 (3d ed. 2011)).

Regardless, it is clear that the model would require individualized inquiries. First, plaintiffs must establish how many vials each Class Member purchased and, of those, the vials that were underfilled. Further, although plaintiffs submit evidence Herceptin’s wholesale acquisition cost was priced per milligram, *see* [Doc. 736-1, p. 4], Genentech presents undisputed evidence that putative Class Members did not always purchase Herceptin directly from Genentech (and pay the wholesale acquisition cost). Rather, putative Class Members paid different prices for Herceptin. *See* [Doc. 758-14, pp. 43-46]. Accordingly, the damages calculation would require individualized

inquiry into the prices paid by each putative Class Member. In sum, plaintiffs have not demonstrated that any component of the Minimum Contents Model may be proven through classwide evidence and therefore the “model falls far short of establishing that damages are capable of measurement on a classwide basis.”²⁴ *Comcast Corp.*, 569 U.S. at 34.

However, as recognized by the Tenth Circuit, “even if damages can only be calculated on an individual basis, a class action may still properly proceed.” *Brayman v. KeyPoint Gov’t Sols., Inc.*, 83 F.4th 823, 839 (10th Cir. 2023); *see also Naylor Farms*, 923 F.3d at 798 (“[T]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification.”). “[T]he black letter rule is that individual damage calculations generally do not defeat a finding that common issues predominate, and courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determination.” 2 William B. Rubenstein et al., Newberg on Class Actions § 4:54. Here, the fact that damages will be “ascertained on an individual basis” does not defeat predominance. Rather, common questions regarding Genentech’s label, vial fill, and its liability regarding same are not overwhelmed by, and, in fact, outweigh any individualized inquiries regarding damages. *Naylor Farms, Inc.*, 923 F.3d at 789, 798. Accordingly, the court turns to Rule 23’s remaining requirements.

B. Typicality

Rule 23’s typicality requirement mandates that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “Typicality requires only that ‘the claims of the class representative and class members are based on the same

²⁴ In concluding that that individualized issues predominate as to damages, the court does not consider the opinions of James W. Hughes. Accordingly, the reserved portions of Plaintiffs’ Motion to Exclude Testimony and Expert Opinion of James W. Hughes [Doc. 741; Doc. 752] are irrelevant and therefore denied without prejudice to their reassertion.

legal or remedial theory.” *Menocal*, 882 F.3d at 924 (quoting *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014)). “[D]iffering fact situations of class members do not defeat typicality . . . so long as the claims of the class representative and class members are based on the same legal or remedial theory.” *Menocal*, 882 F.3d at 914; *see also DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010) (internal quotations omitted) (“[E]very member of the class need not be in a situation identical to that of the named plaintiff to meet Rule 23(a)’s commonality or typicality requirements” and “[f]actual differences between class members’ claims do not defeat certification where common questions of law exist.”).

Genentech asserts that Texas Oncology’s and Oklahoma Cancer Specialists’ knowledge of the alleged underfill undermines the putative class representatives’ typicality. However, the alleged knowledge does not render plaintiffs atypical, as Texas Oncology, Oklahoma Cancer Specialists, and putative Class Members received Herceptin 440 mg multi-dose vials bearing the same labels, and their claims are based on the same legal theory—that Genentech materially misrepresented the Herceptin vial contents by labeling the vials as containing 440 mg of trastuzumab when they did not.²⁵ *DG ex rel. Stricklin*, 594 F.3d at 1198-99. Factual differences mean that Texas Oncology’s and Oklahoma Cancer Specialists’ claims are not identical to putative Class Members’ claims, not atypical. *See Roberts v. C.R. England, Inc.*, 318 F.R.D. 457, 511 (D. Utah 2017) (recognizing putative class representatives’ receipt of “different versions of the core

²⁵ Citing the deposition testimony of Dr. Daron Street, Oklahoma Cancer Specialists’ Rule 30(b)(6) corporate representative, Genentech asserts that Oklahoma Cancer Specialists purports to proceed under a different legal theory than the Class. [Doc. 758, pp. 72-73 (citing Ex. 6 at p. 179)]. However, Dr. Street subsequently clarified that Oklahoma Cancer Specialists’ theory of economic loss is that it was “universally . . . overbilled for 20 units of Herceptin that [it] couldn’t recover.” [Doc. 758-7, p. 212]; *see also* [Doc. 733-13, p. 3]. Further, Oklahoma Cancer Specialists and Texas Oncology pleaded identical legal theories. *See* [Doc. 718].

messages” and other “minor” factual differences did not defeat typicality); *In re Motor Fuel Temp. Sales Pracs. Litig.*, 271 F.R.D. 221, 229 (D. Kan. 2010); *see also Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239, 255 (S.D. Ill. 2015) (“[W]hen it comes to consumer fraud class actions, individual differences are to be expected.”) (collecting secondary sources). Thus, Texas Oncology and Oklahoma Cancer Specialists’ claims are typical of the Class claims and Rule 23’s “typicality” requirement is satisfied.

C. Adequacy

Rule 23 next requires that plaintiffs demonstrate that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between the named parties and the class they seek to represent.” Fed. R. Civ. P. 23, Rules and Commentary. “The representative does not need to be in perfect alignment and agreement with all class members. However, class certification is inappropriate if there are substantial or ‘fundamental’ conflicts.” *Id.* The Tenth Circuit has articulated a two-prong test to determine whether adequacy is satisfied: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002).

Here, Genentech does not dispute the adequacy of Class Counsel. *See* [Doc. 758, pp. 69-73]. Further, the two prongs of the *Rutter* test are satisfied with respect to Class Counsel. First, Class Counsel states, under oath, that no conflicts of interest exist among counsel and the named plaintiffs or proposed Class. [Doc. 736-15, p. 3]. Second, given the lengthy procedural history of this matter (including an appeal to the United States Court of Appeals for the Tenth Circuit), the

court is satisfied that Class Counsel has vigorously prosecuted the action and will continue to do so. *See [id.]*. Thus, Class Counsel will “fairly and adequately protect the interests of the class.”

Turning to the proposed Class Representatives, as previously stated, Genentech contends that Oklahoma Cancer Specialists pursues a “distinct legal theory” from Class Members. However, Oklahoma Cancer Specialists shares a common interest with Class Members in recovering the monies that it overpaid for Herceptin 440 mg multi-dose vials and seeks to recover those funds. [Doc. 733-13, p. 3; Doc. 758-7, p. 212]; *see also* [Doc. 733-12, p. 3 (Texas Oncology shares same interest)]. Genentech asserts that Texas Oncology is also inadequate based on email, dated June 11, 2025, from Barry Brooks, M.D., to Becky Hedberg, Genentech’s Vice President, National Supply & Care Delivery. *See* [Doc. 834-3]. However, Dr. Brooks is not a decisionmaker with respect to the claims asserted in this litigation, including whether to settle same. [Doc. 843-1, p. 3]. Thus, *Dr. Brooks’s* opinions do not render *Texas Oncology* conflicted or otherwise inadequate.

Nor do factual differences with respect to knowledge, reliance, or materiality render Class Representatives inadequate as “not every potential distinction between the proposed representative and other class members will render the representative inadequate.” 1 William B. Rubenstein et al., Newberg on Class Actions § 3:58. Rather, “[o]nly conflicts that are *fundamental to the suit* and that *go to the heart of the litigation* prevent a proposed class representative from meeting the Rule 23(a)(4) adequacy requirement.” 1 William B. Rubenstein et al., Newberg on Class Actions § 3:58 (emphasis added). Like putative Class Members, Texas Oncology and Oklahoma Cancer Specialists purchased 440 mg of Herceptin multi-dose 440 mg vials. Further, Texas Oncology and Oklahoma Cancer Specialists assert that the label’s representation that the vial contained 440 mg of trastuzumab was false and, as a result, they paid for more trastuzumab than received. [Doc.

733-12; Doc. 733-13]. Fundamentally, Texas Oncology and Oklahoma Cancer Specialists' claims are aligned with those of the Class. Any factual distinctions are insufficient to render Texas Oncology or Oklahoma Cancer Specialists inadequate. No conflicts of interest therefore exist amongst the Class Representatives and Class Members and the first prong of the *Rutter* test is satisfied.²⁶ *Rutter*, 314 F.3d at 1187-88.

The second prong of the *Rutter* test is also met, as the court is satisfied that Texas Oncology and Oklahoma Cancer Specialists will prosecute the action vigorously on behalf of the Class. *Rutter & Wilbanks Corp.*, 314 F.3d at 1187-88. Texas Oncology and Oklahoma Cancer Specialists are familiar with the claims asserted in this case and have stayed informed as to its status over its decade-long life. Further, both understand the responsibilities of serving as a Class Representative. [Doc. 733-12; Doc. 733-13]. For all of these reasons, Texas Oncology and Oklahoma Cancer Specialists, the remaining Class Representatives, will "fairly and adequately protect the interests of the Class" and Rule 23(a)'s "adequacy" requirement is satisfied.

D. Superiority

As previously stated, Rule 23 also requires that plaintiffs demonstrate that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Relevant factors include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

²⁶ In its Supplemental Brief, Genentech argues that its resolution with Oncology-Hematology Associates of Central Illinois "highlights an intractable conflict within the proposed class." [Doc. 834, pp. 3-7]. However, Genentech's argument in this regard is entirely speculative and based on Genentech's presumptions as to why some settlement offers were accepted, while others were rejected, and Genentech's view of what other putative class members "would likely choose . . . if given the option." [*Id.* at p. 5]. Genentech's suppositions as to plaintiffs' motivations do not create a conflict. Nor does Genentech cite any authority for the proposition that seeking to obtain the highest possible settlement value renders a class representative inadequate. Regardless, should other Class Members wish to independently settle, as suggested by Genentech, Rule 23 permits those Class Members to request exclusion. *See* Fed. R. Civ. P. 23(c)(2)(B)(v).

- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). “In setting out these factors, the Advisory Committee for the 1966 reform anticipated that in each case, courts would ‘consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit.’” *Amchem Prods., Inc.*, 521 U.S. at 616 (quoting Advisory Committee notes).

Looking first to Class Members’ interests in individually controlling the prosecution, as recognized by the U.S. Supreme Court:

The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, *or* the amounts at stake for individuals may be so small that separate suits would be impracticable.

Amchem Prods., Inc., 521 U.S. at 616 (emphasis added). Because the inquiry is framed in the disjunctive, “the potential for greater recovery in individual suits . . . does not mean a class action is inferior to individual actions because potential plaintiffs may be unaware of their right[s], or otherwise uninclined, to bring such an action.” *Pruess v. Presbyterian Health Plan, Inc.*, 745 F. Supp. 3d 1218, 1244 (D.N.M. 2024) (quoting *Lawrence v. First Fin. Inv. Fund V, LLC*, 336 F.R.D. 366, 385 (D. Utah 2020)); *see also Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 313 (D.D.C. 2007) (high individual damages do not preclude class certification). Although the MDL exists, it appears no additional suits have been filed relative to Genentech’s Herceptin marketing, suggesting that potential plaintiffs are “otherwise uninclined[] to bring such an action.” *Pruess*, 745 F. Supp. 3d at 1244. Further, as previously stated, common issues with

respect to Genentech's liability predominate. Under the circumstances, "[t]he interest of the class as a whole to litigate the predominant common questions substantially outweighs any interest of individual members to bring and prosecute separate actions." *Pruess*, 745 F. Supp. 3d at 1244.

Genentech suggests that the manner in which the plaintiffs have litigated this matter suggests an individual interest in controlling the prosecution, as two plaintiffs, including one proposed Class Representative, have opted to settle their individual claims. *See* [Doc. 826; Doc. 827; Doc. 828; Doc. 873]. However, as previously stated, Rule 23 provides Class Members the option to request exclusion and independently pursue a claim. *See* Fed. R. Civ. P. 23(c)(2)(B)(v); *Pruess*, 745 F. Supp. 3d at 1244. Thus, that putative Class Members may seek to independently pursue their claims or settlement does not significantly cut against superiority. On balance, this first factor weighs in favor of superiority.

Turning to the second factor, the extent and nature of any litigation concerning the controversy already begun, fourteen other cases were filed with respect to this matter, which have already been consolidated into this multidistrict litigation. However, those cases represent less than five percent (5%) of potential Class Members. *See CGC Holding Co.*, 773 F.3d at 1096 ("[T]he mere existence of individual actions brought by putative class members does not necessarily defeat a claim for superiority."). Further, this litigation remains in its relatively early stages, as the court has set no pre-trial hearings, bellweather trials, or trial dates. *Cf. Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90, 107 (10th Cir. 1971) (class action was not superior where other pending litigation "is far advanced"). Accordingly, this second factor weighs in favor of a finding of superiority.

Genentech does not dispute that the third factor, desirability and undesirability of concentrating the litigation in this forum, weighs in favor of superiority. Further, the court

acknowledges that this matter has been litigated in this court for more than a decade. Thus, this factor weighs in favor of a finding of superiority.

Finally, as to the fourth factor—manageability—this factor “encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). Courts in this Circuit have characterized this factor as “the most important.” *Anderson Living Tr. v. ConocoPhillips Co.*, 349 F.R.D. 365, 414 (D.N.M. 2025).

Prior to analyzing manageability, the court notes that, since briefing closed in this matter, the Tenth Circuit has “recognized ‘ascertainability’ is not in the text of Rule 23 but is an ‘implied prerequisite to class certification.’” *Dunn v. Santa Fe Nat. Tobacco Co.*, 185 F.4th 999, 1019 (10th Cir. 2026) (citing *Cline v. Sunoco, Inc.*, 159 F.4th 1171 (10th Cir. 2025)). “Ascertainability refers to whether ‘the putative class members can be readily identified based on the class definition.’” *Dunn*, 185 F.4th at 1018 (quoting *Tarrify Props., LLC v. Cuyahoga Cnty.*, 37 F.4th 1101, 11016 (6th Cir. 2022)). “For class members to be ascertainable, the class definition must (1) be defined clearly and cannot be defined too vaguely, and (2) be defined objectively and cannot be based on subjective criteria.” *Cline*, 159 F.4th at 1196. Here, the Class Definition is clearly defined and not based on subjective criteria. Thus, the Class is ascertainable.

Related to ascertainability, the Tenth Circuit has recognized “administrative feasibility.” *Cline*, 159 F.4th at 1194. “Administrative feasibility” concerns whether “identifying class members is a manageable process that does not require much, if any, individual factual inquiry.” *Dunn*, 185 F.4th at 1018 (quoting 1 William B. Rubenstein et al., Newberg on Class Actions § 3:3 (6th ed. 2025)). Unlike ascertainability, administrative feasibility is not “a required element,” but,

instead, “one of many considerations attendant to manageability under rule 23(b)(3)(D).” *Dunn*, 185 F.4th at 1019.

Citing the opinions of Mr. Hosier, plaintiffs assert that Class Members are readily identifiable through various sources, including Genentech’s own records, Herceptin distributors, Group Purchasing Organizations, and IQVIA and Symphony Health (third parties who specialize in tracking pharmaceutical drug sales). *See* [Doc. 733, p. 32; Doc. 733-6, pp. 8-14]. Genentech asks the court to exclude the opinions as unreliable. *See* [Doc. 744, p. 26]. Having reviewed Mr. Hosier’s expert disclosures, curriculum vitae, and his November 22, 2024 Declaration, the court finds by a preponderance of the evidence that, based on his nearly thirty-years’ experience in the pharmaceutical industry and familiarity with product distribution, Mr. Hosier is qualified to opined that Class Members can be readily identified and notified. Further, a sufficient link exists between Mr. Hosier’s personal experience and his opinions regarding identification of, and notice to, the Class. *See* Fed. R. Evid. 702, advisory committee notes to 2023 amends.; *United States v. Fredette*, 315 F.3d 1235, 1240 (10th Cir. 2003)). Thus, it is more likely than not that Mr. Hosier’s opinions regarding identification and notice have a sufficient foundation and reflect a reliable application of Mr. Hosier’s experience to the facts of this case. Genentech’s criticisms go to the weight of Mr. Hosier’s opinions, not admissibility. *See* Fed. R. Evid. 702, advisory committee notes to 2023 amends. Genentech’s request to exclude Mr. Hosier’s opinions is denied.

Here, plaintiffs propose an administratively feasible method to identify Class Members. *See* [Doc. 733-6, pp. 8-16]. Further, the Class definition is sufficiently straightforward that a potential Class Member could read the definition and readily identify themselves as a member of the Class. *See* 1 William B. Rubenstein et al., Newberg on Class Actions § 3:3. Finally, if necessary, the court may appoint a notice and/or claims administrator. *See* 1 William B.

Rubenstein et al., Newberg on Class Actions §§ 8:27, 12:20. Thus, the Class may be identified through a manageable process and this factor weighs in favor of superiority.

Genentech also contends that the “proposed Class definition is fatally overbroad.” [Doc. 758, p. 73]. Genentech first criticizes the definition as including “entities that are even further removed from any claim to injury.” [*Id.* at p. 75]. However, as previously stated, plaintiffs clarify in reply that the proposed Class Definition is limited to those persons and entities “who purchased *and administered* Herceptin 440 mg multi-dose vials.” [Doc. 779, p. 37]. Accordingly, Genentech’s argument in this regard is moot.

Genentech also contends that the proposed Class impermissibly includes state-government entities. “The ability of private parties to bind States as absent class members in a Rule 23(b)(3) opt-out class is an open question of law.” *In re Flonase Antitrust Litig.*, No. 08-3301, 2015 WL 9273274, at *5 n.7 (E.D. Pa. Dec. 21, 2015). However, having reviewed the relevant authorities, the undersigned concurs with those courts holding that “[t]he Eleventh Amendment, with some limited exceptions, generally bars federal court jurisdiction over the States or their agencies, without their consent,” *Walker v. Liggett Grp., Inc.*, 982 F. Supp. 1208, 1210 (S.D. W. Va. 1997), and that Rule 23’s opt-out provision does not satisfy sovereign immunity concerns. *In re Auto. Parts Antitrust Litig.*, No. 14-CV-00106, 2015 WL 14047405, at **4-5 (E.D. Mich. Apr. 30, 2015). Accordingly, the court declines to certify the Class insofar as it includes any State or its agencies.

However, the inclusion of the States and state-agencies is not fatal to plaintiffs’ request for certification. Rather, “district courts have broad discretion to modify class definitions.” *Powers v. Hamilton Cnty. Pub. Defender Comm’n*, 501 F.3d 592, 619 (6th Cir. 2007); *Rider v. OXY USA, Inc.*, 175 F.4th 1214, 1227 (10th Cir. 2026) (“District courts have authority to modify the class definition.”). Accordingly, the court modifies the Class definition to exclude States and state

agencies.²⁷ For all of these reasons, the fourth factor—manageability—weighs in favor of superiority.

Having considered the relevant factors, the court concludes that a class action is superior to other available methods of fairly and efficiently adjudicating the controversy and the “superiority” requirement is satisfied.

Conclusion

WHEREFORE, the Motion for Class Certification [Doc. 733; Doc. 739] of plaintiffs Texas Oncology, P.A. and Tulsa Cancer Institute, PLLC, now known as Oklahoma Cancer Specialists Management Company, LLC, is granted in part and denied in part.

IT IS FURTHER ORDERED that the court certifies the following Class pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) as to the California breach of express warranty and California False Advertising and Unfair Competition Violations, CAL BUS. & PRO. §§ 17200, 17500, *et. seq.*, claims and provisionally certifies as to the California breach of implied warranty:

All persons and entities (including their successors in interest) who purchased and administered Herceptin 440 mg multi-dose vials in the United States (including any territory or possession of the United States) at any time from July 6, 1998 through March 30, 2017 (the “Class Members”). The Class Members do not include: (1) Genentech affiliates, employees, directors, and officers, and members of their immediate families; (2) the United States or any agencies of the United States; (3) the States and any agencies of the States; (4) judges before whom this case is pending and persons within the fourth degree of consanguinity or affinity to them; or (5) persons or entities whom Plaintiffs’ counsel is precluded from representing under Rule 1.7 of the Oklahoma Rules of Professional Conduct.

IT IS FURTHER ORDERED that Tulsa Cancer Institute, PLLC, now known as Oklahoma Cancer Specialists Management Company, LLC, and Texas Oncology, P.A. are appointed as Class Representatives.

²⁷ Because the court certifies a class under Rules 23(a) and 23(b)(3), it does not consider plaintiffs’ alternative request for certification pursuant to Rule 23(c)(4).

IT IS FURTHER ORDERED that the law firm of GABLEGOWALS, including Craig A. Fitzgeald, Steven J. Adams, Amelia A. Fogleman, Amy M. Stipe, Adam C. Doverspike, and Barrett L. Powers, is appointed as Class Counsel.

IT IS FURTHER ORDERED that the remaining portions of the Motion to Exclude Testimony and Expert Opinions of James W. Hughes, Ph.D. [Doc. 741; Doc. 752] are denied without prejudice to reassertion.

IT IS FURTHER ORDERED that the remaining portions of the Motion to Exclude Testimony of John Hosier [Doc. 744; Doc. 757] are granted in part and denied in part. The motion is granted as to Mr. Hosier's opinions that Class Members considered the weight on the label to be material, but is otherwise denied.

IT IS FURTHER ORDERED that the parties may filed proposed redactions, or state their non-objection to public filing of this Order, no later than October 14, 2026.

IT IS FURTHER ORDERED that this matter is set for Status Conference on October 27, 2026 at 2:00 p.m. The parties shall submit a proposed agenda for the Status Conference, including a proposed schedule for submission of a plan to provide notice to Class Members, on or before October 20, 2026.

IT IS SO ORDERED this 30th day of September, 2026.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE