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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TATIANA KOROLSHTEYN, on behalf
12 of herself and all others similarly situated,
13 Plaintiff,

14 v.

15 COSTCO WHOLESALE
16 CORPORATION and NBTY, INC.,
17 Defendants.

Case No.: 3:15-cv-709-CAB-RBB

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

[Doc. Nos. 172, 173, 176, 177, 178, 183,
184, 187, 191]

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20 This matter is before the Court on Defendants’ motion for summary judgment. The
21 motion has been fully briefed, and the Court held a hearing on August 8, 2017. As
22 discussed below, the motion is granted.

23 **I. Background**

24 This case arises out of alleged false statements on the labels of TruNature Gingko
25 Biloba with Vinpocetine (“TruNature Gingko”), which is manufactured by Defendant
26 NBTY, Inc. (“NBTY”) and sold at the stores of Defendant Costco Wholesale Corporation
27 (“Costco”). The labels of TruNature Gingko represent that the product “supports alertness
28 & memory,” that “Gingko biloba can help with mental clarity and memory,” and that “[i]t

1 also helps maintain healthy blood flow to the brain to assist mental clarity and memory,
2 especially occasional mild memory problems associated with aging” (collectively, the
3 “Label Claims”). [Doc. No. 100 at ¶ 1.] According to the third amended complaint (the
4 “TAC”), these representations are false because studies show that Gingko biloba and
5 vinpocetine do not provide any mental clarity, memory or mental alertness benefits. [*Id.*
6 at ¶ 2.]

7 Lead Plaintiff Tatiana Korolshteyn alleges she bought a bottle of TruNature Gingko
8 based on the allegedly false representations on the product label and filed this lawsuit on
9 behalf of herself and a class of consumers who purchased TruNature Gingko in California.
10 The TAC asserts two claims: (1) violation of California’s unfair competition law (the
11 “UCL”), California Business & Professions Code § 17200 *et seq.*; and (2) violation of
12 California’s Consumer Legal Remedies Act (“CLRA”), California Civil Code § 1750 *et*
13 *seq.* The prayer for relief asks for restitution and disgorgement of Defendants’ revenues,
14 actual, statutory and punitive damages, and attorneys’ fees and costs. [*Id.* at 15.]

15 On March 16, 2017, the Court granted Plaintiff’s motion to certify a class consisting
16 of “all California consumers who, within the applicable statute of limitations, purchased
17 TruNature Gingko Biloba with Vinpocetine until the date notice is disseminated.” [Doc.
18 No. 158 at 14.] Defendants now move for summary judgment. Also pending before the
19 Court are motions by both sides to exclude evidence and testimony from the other side’s
20 experts, a motion from Plaintiff to strike Defendants’ citation to certain evidence in
21 connection with their summary judgment motion, and a motion by The Council for
22 Responsible Nutrition (“CRN”) for leave to file an amicus brief. This opinion addresses
23 each motion in turn.

24 **II. Motion for Leave to File a Brief Amicus Curiae [Doc. No. 187]**

25 CRN has filed a motion for leave to file an amicus curiae brief, along with the
26 proposed brief itself. “The district court has broad discretion to appoint amici curiae.”
27 *Safari Club Int’l v. Harris*, No. 2:14-CV-01856-GEB-AC, 2015 WL 1255491, at *1 (E.D.
28 Cal. Jan. 14, 2015) (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)). “An

1 amicus brief should normally be allowed when, among other considerations, the amicus
2 has unique information or perspective that can help the court beyond the help that the
3 lawyers for the parties are able to provide.” *Missouri v. Harris*, No. 2:14-CV-00341-KJM,
4 2014 WL 2987284, at *2 (E.D. Cal. July 1, 2014) (internal quotation marks and citation
5 omitted). “While historically, amicus curiae is an impartial individual who suggests the
6 interpretation and status of the law, gives information concerning it, and advises the Court
7 in order that justice may be done, rather than to advocate a point of view so that a cause
8 may be won by one party or another, the Ninth Circuit has said there is no rule that amici
9 must be totally disinterested.” *Id.* (internal quotation marks and citations omitted).

10 Here, Plaintiff’s primary argument for denying CRN’s motion is that CRN’s brief
11 “is highly partisan and heavily influenced by its own self-interest in Defendants’ position.”
12 [Doc. No. 206 at 2.]¹ The Court disagrees. Nature’s Bounty (presumably an affiliate of
13 Defendant NBTY) is one of CRN’s 116 members, and there is little doubt that CRN has an
14 interest in the outcome of this case, but it is unlikely any amicus would be totally
15 disinterested in the outcome of a case because otherwise one would not bother to incur the
16 expense of filing a brief. Moreover, notwithstanding its interest, CRN’s brief focuses
17 entirely on the law applicable to Plaintiff’s false advertising claims and does not argue
18 expressly that Defendants should win summary judgment (although Plaintiff appears to
19 concede that CRN’s interpretation of the law would yield that result). In other words, CRN
20 is not impartial, but its brief simply “suggests the interpretation and status of the law, gives
21 information concerning it, and advises the Court in order that justice may be done, rather
22 than to advocate a point of view so that a cause may be won by one party or another.”
23 *Harris*, 2014 WL 2987284, at *2. Accordingly, CRN’s motion to file an amicus brief is
24 granted.

28 ¹ Pinpoint page citations to documents in the record are to the ECF page number at the top of the page.

1 **III. Legal Standard for Summary Judgment**

2 A party is entitled to summary judgment “if the pleadings, depositions, answers to
3 interrogatories, and admissions on file, together with the affidavits, if any, show that there
4 is no genuine issue as to any material fact and that the moving party is entitled to a judgment
5 as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To avoid summary
6 judgment, disputes must be both 1) material, meaning concerning facts that are relevant
7 and necessary and that might affect the outcome of the action under governing law, and 2)
8 genuine, meaning the evidence must be such that a reasonable jury could return a verdict
9 for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Cline*
10 *v. Indus. Maint. Eng’g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000).

11 The initial burden of establishing the absence of a genuine issue of material fact falls
12 on the moving party. *See Celotex Corp.*, 477 U.S. at 323. If the moving party can
13 demonstrate that its opponent has not made a sufficient showing on an essential element of
14 his case, the burden shifts to the opposing party to set forth facts showing that a genuine
15 issue of disputed fact remains. *Id.* at 324. When ruling on a summary judgment motion,
16 the court must view all inferences drawn from the underlying facts in the light most
17 favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
18 U.S. 574, 587 (1986). However, “[t]he district court need not examine the entire file for
19 evidence establishing a genuine issue of fact, where the evidence is not set forth in the
20 opposing papers with adequate references so that it could conveniently be found.” *Carmen*
21 *v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001).

22 **IV. Legal Standards for UCL and CLRA Claims Based on Allegedly False**
23 **Efficacy Claims on Product Labels**

24 The majority of the parties’ arguments on summary judgment, as well as their
25 arguments for exclusion of expert testimony, involve what Plaintiff must prove to succeed
26 on her false advertising claims under the UCL and CLRA. Plaintiff appears to concede
27 that her claim does not survive under the standards advocated by Defendants. For their
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1 part, Defendants argue that summary judgment is appropriate even under the standards
2 argued by Plaintiff.

3 The UCL prohibits any “unlawful, unfair or fraudulent business act or practice [in
4 addition to any] unfair, deceptive, untrue or misleading advertising” Cal. Bus. & Prof.
5 Code §§ 17200, 17500. The CLRA prohibits “unfair methods of competition and unfair
6 or deceptive acts or practices.” Cal. Civ. Code § 1770. Claims under either the UCL or
7 CLRA are governed by the “reasonable consumer” test, which requires plaintiffs to prove
8 that “members of the public are likely to be deceived.” *Williams v. Gerber Prods. Co.*, 552
9 F.3d 934, 938 (9th Cir. 2008) (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir.
10 1995)). The UCL and CLRA prohibit “not only advertising which is false, but also
11 advertising which although true, is either actually misleading or which has the capacity,
12 likelihood or tendency to deceive or confuse the public.” *Kasky v. Nike, Inc.*, 27 Cal. 4th
13 939, 951 (2002). Thus, “[a] perfectly true statement couched in such a manner that it is
14 likely to mislead or deceive the consumer, such as by failure to disclose other relevant
15 information, is actionable” under the UCL. *Day v. AT & T Corp.*, 63 Cal. App. 4th 325,
16 332–33 (1998).

17 In a false advertising case under the UCL and CLRA, the plaintiff “bears the burden
18 of proving that the defendant’s advertising claim is false or misleading.” *Nat’l Council*
19 *Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336, 1341, 1344
20 (Cal. Ct. App. 2003); *see also Kwan v. SanMedica Int’l*, 854 F.3d 1088, 1096 (9th Cir.
21 2017) (“King Bio’s holding is firmly established law in California.”). “Private plaintiffs
22 are not authorized to demand substantiation for advertising claims.” *King Bio.*, 107 Cal.
23 App. 4th at 1345. Only prosecuting authorities “have the administrative power to request
24 advertisers to substantiate advertising claims. . . .” *Id.* at 1344. “The rationale behind the
25 legislation regarding substantiation claims is to provide prosecuting authorities a means of
26 protecting consumers while limiting ‘undue harassment of advertisers and is the least
27 burdensome method of obtaining substantiation for advertising claims.’” *Kwan*, 854 F.3d
28 at 1097-98 (quoting *King Bio.*, 107 Cal. App. at 1345).

1 In *King Bio*, the California Court of Appeals held that “falsity of the advertising
2 claims may be established by testing, scientific literature, or anecdotal evidence,” *King*
3 *Bio.*, 107 Cal. App. 4th at 1348. However, this standard leaves open the question of how
4 or whether a plaintiff can prove falsity when a defendant offers scientific evidence and
5 admissible expert testimony supporting an advertising claim about the efficacy of the
6 product in question. There is no controlling Ninth Circuit authority on this issue, and other
7 courts’ interpretation and application of the proscription on lack of substantiation claims
8 by private plaintiffs have varied.

9 In *In re GNC Corp.*, 789 F.3d 505, 510 (4th Cir. 2015), a Fourth Circuit case that
10 included claims under the UCL and CLRA, the plaintiffs alleged in their complaint that
11 health representations made on the products’ packaging were false because “the vast
12 weight of competent and reliable scientific evidence” showed that the ingredients in the
13 product did not provide the promised health benefits. The complaint also cited a number
14 of peer-reviewed published studies that supported this argument. *In re GNC Corp.*, 789
15 F.3d at 510. The court, however, held that “to state a false advertising claim on a theory
16 that representations have been proven to be false, plaintiffs must allege that all reasonable
17 experts in the field agree that the representations are false. If plaintiffs cannot do so
18 because the scientific evidence is equivocal, they have failed to plead that the
19 representations based on this disputed scientific evidence are false.” *Id.* at 516. Notably,
20 Plaintiff does not argue that she can satisfy this standard, asserting only that this case is not
21 the law in the Ninth Circuit. [Doc. No. 189 at 23-24.] Plaintiff, however, does not cite to
22 any Ninth Circuit or California state court cases that have rejected *In re GNC*.²

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25 ² Plaintiff cites one district court case that found *In re GNC* insufficient to cause it to reconsider a prior
26 decision denying a motion to dismiss. *Zakaria v. Gerber Prods Co.*, Case No. LA CV15-00200 JAK(Ex),
27 2015 WL 4379743 (C.D. Cal. Jul. 14, 2015). The holding in *Zakaria*, a non-binding opinion on California
28 state law, that *In re GNC* does not constitute an “intervening change in controlling law” as required to
reconsider a decision (*Smith v. Clark Cty Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013)), does not mean *In*
re GNC is not persuasive as to California’s law on UCL and CLRA claims like the one before the Court
here. Regardless, the undersigned respectfully disagrees with *Zakaria*’s disregard of *In re GNC* and

1 Several California district courts have addressed a plaintiff’s burden of proving
2 falsity in the face of scientific evidence from a defendant that supports the advertised
3 efficacy claims. In the case on which Plaintiff primarily relies, and which Defendants and
4 CRN ask the Court to reject, the district court held that a plaintiff who had alleged that
5 advertising claims were false and misleading had “two lines of attack.” *Mullins v. Premier*
6 *Nutrition Corp.*, 178 F.Supp. 3d 867, 894 (N.D. Cal. 2016). She could prove that the
7 advertising claims are “literally false if a reasonable jury concludes that all *reasonable*
8 scientists agree,” or that the claims are “*misleading* by showing that the vast weight of the
9 competent evidence establishes that those health claims are false.” *Id.* at 894-95 (*emphasis*
10 in original). The *Mullins* opinion then notes that under this second line of attack, a plaintiff
11 “can concede the existence of scientific studies substantiating a representation, but argue
12 that those studies are poorly designed, incredible, or represent the view of a minority of
13 scientists.” *Id.* at 895.

14 The *Mullins* court ultimately denied summary judgment for two reasons. First, the
15 court held that “because [the plaintiff] and her experts have offered principled, supported
16 critiques of the studies [the defendant’s expert] used to form his opinions, and a jury may
17 reasonably adopt those same views, she may be able to convince a jury that [the
18 defendant’s] claims are literally false.” *Id.* at 896. Second, the court held that a jury could
19 conclude that the efficacy claims were misleading if “the totality of the evidence” supports
20 the conclusion that the product does not work as advertised. *Id.* at 894. Thus, according
21 to the *Mullins* court, summary judgment was not appropriate because a jury could believe,
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24 general analysis of the burdens of a plaintiff alleging false advertising based on alleged misrepresentations
25 about a products’ efficacy. In particular, as discussed herein, the Court disagrees with *Zakaria*’s holding
26 that “[i]f some reasonable experts incorrectly had opined that [the product] had [the advertised health
27 benefit], this would not necessarily bar the claim. A fact issue could remain as to what Defendant knew
28 as to this scientific issue, including any contrary scientific opinions.” 2015 WL 4379743, at *3. To the
contrary, if the evidence as to an advertising claim is equivocal, as would be the case if reasonable experts
offer contradictory opinions on the truth or falsity of statements, a plaintiff cannot prove the falsity of the
statements. Whether the defendant was aware that contrary scientific opinions exist is irrelevant to
whether the plaintiff can maintain a false advertising claim.

1 based on the critiques by the plaintiff's experts, that "those studies finding positive results
2 pale in comparison to those going the other way," rendering the efficacy claims misleading.
3 *Id.* at 897.

4 Other district courts, however, have granted summary judgment when the defendants
5 offer scientific evidence supporting their claims, notwithstanding arguments and critiques
6 of the quality of the studies cited by the defendant. As one court noted, "[d]isputes over
7 the quality and credibility of the substantiation for the claims on Defendants' products are
8 not properly brought before the Court in a suit by private plaintiffs." *Reed v. NBTY, Inc.*,
9 No. EDCV 13-0142 JGB (OPx), 2014 WL 12284044, at *14 (C.D. Cal. Nov. 18, 2014).
10 Moreover, the *Reed* court held that even the existence of studies that find none of the
11 advertised benefits in the product do not save a private plaintiff's false advertising claim
12 because "[i]nconclusive findings and unsettled science are insufficient to meet Plaintiffs'
13 burden of raising a question of fact on the issue of falsity," and "mixed evidence
14 demonstrates at most that the science on [the product's] effectiveness is inconclusive." *Id.*
15 at *14-15. Thus, "where there are studies demonstrating both the effectiveness and
16 ineffectiveness of the Products, a reasonable jury could not find that the advertising claims
17 are false." *Id.*; *cf. In re GNC*, 789 F.3d at 515 ("By characterizing this dispute as a battle
18 of the experts, Plaintiffs highlight the [complaint's] concession that a reasonable difference
19 of scientific opinion exists as to whether [the products] can provide the advertised [] health
20 benefits.").

21 In another case involving similar claims of false advertisements about a Ginkgo
22 biloba product, and in which the parties relied on some of the same studies they cite here,
23 the court noted that "[t]aking issue with the strength or significance of the studies . . . is not
24 enough to prove their falsity." *Sonner v. Schwabe N. Am., Inc.*, 2017 WL 474106, at *7,
25 __ F.Supp. 3d __ (C.D. Cal. Feb. 2, 2017). The court granted summary judgment for the
26 defendant, notwithstanding *Mullins*, holding that "Plaintiff's expert, if believed by a
27 reasonable jury, demonstrates that Defendants' scientific substantiation for its product
28 claims is not strongly substantiated. However, this does not establish a triable issue of fact

1 that Defendants’ advertising claims are false or misleading.” *Id.* at *8 (internal brackets,
2 ellipses and citation omitted).

3 Although the outcomes in these cases differ, a common thread in all of them is that
4 when a defendant presents scientific studies supporting its advertising claim, a plaintiff
5 must do more than present its own studies that do not support the advertising claim, thereby
6 demonstrating that evidence is equivocal. Where *Mullins* is the outlier is in its apparent
7 determination that the question of whether the evidence is equivocal is for the jury,
8 precluding summary judgment even where there are scientific studies on both sides of the
9 issue.³ In other words, the *Mullins* court appeared to hold that if a plaintiff offers
10 “principled, supported critiques” of the defendant’s studies, a jury can find that the
11 defendant’s studies are not in fact reasonable or scientific such that they effectively do not
12 constitute evidence at all, making the advertised claim literally false. Alternatively,
13 according to *Mullins*, a jury could find that because the plaintiff’s studies are more
14 persuasive, the advertising claims are misleading. *Id.* at 895. This rationale is difficult to
15 reconcile with *King Bio*.

16 Under California law, to survive summary judgment on a false or misleading
17 advertising claim, a plaintiff must present evidence sufficient to allow a jury to find: (1)
18 that a statement is literally false; or (2) that the statement is literally true, but that it is
19 misleading to a reasonable consumer. *See Kasky*, 27 Cal. 4th at 951; *cf. In re GNC*, 789
20 F.3d at 514 (“Courts uniformly interpret ‘false or misleading’ as creating two different
21 theories of recovery in a false advertising claim: A plaintiff must allege either (i) that the
22 challenged representation is literally false or (ii) that it is literally true but nevertheless
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25 ³ The *Mullins* opinion even contradicts itself on this point. At one point, the court states that “if the
26 scientific record is equivocal, then summary judgment is appropriate because no reasonable jury could
27 conclude that the representations are false or misleading.” *Mullins*, 178 F.Supp. 3d at 893. Later on in
28 the opinion, however, the court states: “Of course, a jury may also conclude that these studies muddy the
waters enough to believe the scientific literature on the subject is equivocal, in which case it must side
with [the defendant].” *Id.* at 897. If the existence of equivocal evidence makes summary judgment
appropriate, then a jury cannot be the arbiter of whether the evidence is equivocal.

1 misleading.”). Here, notwithstanding Plaintiff’s arguments otherwise, Plaintiff is only
2 alleging the former—that the Label Claims are literally false. Although the TAC alleges
3 and Plaintiff argues on summary judgment that the Label Claims are “false and
4 misleading,” she is really alleging and arguing that the Label Claims are misleading
5 *because they are false*. See generally *In re GNC*, 789 F.3d at 514 (“[S]tatements that are
6 literally false are necessarily misleading . . .”); *Day*, 63 Cal. App. 4th at 332 (noting
7 distinction between “those advertisements which have deceived or misled because they are
8 untrue, [and] those which may be accurate on some level, but will nonetheless tend to
9 mislead or deceive”). Plaintiff is not arguing that the Label Claims are literally true but
10 misleading for some other reason. Doing so would undercut her literal falsity argument.

11 Whether the Label Claims are true or false is a binary choice—they are true, or they
12 are false. When the scientific evidence is equivocal, it is impossible to prove that an
13 advertised claim is either literally true or literally false. Thus, what Plaintiff is arguing,
14 and what *Mullins* appears to support, is that the Label Claims are misleading or deceptive
15 because there is insufficient evidence supporting them or because the contradictory
16 evidence is stronger. A similar argument was rejected by Judge Battaglia in *Johns v. Bayer*
17 *Corp.*, No. 09CV1935 AJB DHB, 2013 WL 1498965 (S.D. Cal. Apr. 10, 2013), a case
18 involving claims concerning advertisements about a product’s benefits to prostate health:

19 Plaintiffs’ arguments that the Prostate Claims are deceptive and/or misleading
20 are confusing at best and rely on circular reasoning. For example, although
21 Plaintiffs fervently argue that they do not have to prove that Bayer’s
22 representations are in fact false to proceed under the UCL and CLRA,
23 Plaintiffs simultaneously argue that their “evidence is not limited to criticisms
24 about the amount of substantiation Bayer had, but that the advertisements are
25 not true.” Thus, in an attempt to plead around the “lack of substantiation” bar
26 to recovery, it appears Plaintiffs are alleging that Bayer’s representations are
27 deceptive because they are unsubstantiated. However, as stated above,
28 Bayer’s representations are not provably false, and private plaintiffs under the
UCL and CLRA are prohibited from bring a “lack of substantiation” claim.

27 *Johns*, 2013 WL 1498965, at *48 (internal citations omitted). Judge Battaglia’s reasoning
28 is equally applicable here. Essentially, Plaintiff is arguing that the Label Claims could be

1 misleading because a jury could find that Defendants have not proven them to be literally
2 true, which is little more than a “lack of substantiation” claim. Accordingly, Plaintiff
3 cannot survive summary judgment by arguing that a jury could find that the Label Claims
4 are false or misleading despite scientific evidence supporting those claims. *See generally*
5 *In re GNC*, 789 F.3d at 509 (“[M]arketing statements that accurately describe the findings
6 of duly qualified and reasonable scientific experts are not literally false.”). To the extent
7 *Mullins* holds otherwise, the Court declines to follow it.

8 In sum, when a plaintiff presents admissible expert testimony that scientific studies
9 do not support an advertised claim, and a defendant presents admissible expert testimony
10 that scientific studies support the advertised claim, the evidence is equivocal and all
11 reasonable scientists do not agree. No jury conclusion would change either of these facts.
12 The existence of studies supporting the advertisements would mean that a jury finding for
13 the plaintiff has simply found that the evidence supporting one of two permissible
14 judgments (namely, that the products do not work as advertised, or that they do) is more
15 persuasive, but not that the advertisements themselves are literally false. *Cf. In re Rigel*
16 *Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 877 (9th Cir. 2012) (“In order to allege falsity, a
17 plaintiff must set forth facts explaining why the difference between two statements is not
18 merely the difference between two permissible judgments, but rather the result of a
19 falsehood.”). In such a circumstance summary judgment is appropriate. To hold otherwise
20 would require a defendant to affirmatively prove the truth of, i.e., to substantiate,⁴ its
21 advertising claims to avoid liability for false advertising, which a private plaintiff is not
22 allowed to require. As a result, regardless of whether a plaintiff’s burden of proof is
23 characterized as (1) all reasonable experts in the field agree that the representations are
24 false, or (2) the evidence is unequivocal that the representations are false, a plaintiff cannot
25 survive summary judgment when a defendant presents admissible expert testimony that
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28 ⁴ One definition of substantiate is “to establish by proof or competent evidence.” Webster’s Ninth New
Collegiate Dictionary (1983).

1 there is scientific support for the alleged misrepresentations. This is because the mere
2 existence of such evidence makes it impossible for a jury to find that all reasonable experts
3 agree or that the evidence is unequivocal that the advertising claims are false.

4 Having arrived at this determination, the Court must determine whether Defendants
5 have offered any admissible evidence of scientific studies supporting the Label Claims. To
6 do so, the Court must address Plaintiff's motions to exclude defense experts.

7 **V. Motions to Exclude Experts**

8 **A. Legal Standards For Admissibility of Expert Testimony**

9 Under Federal Rule of Evidence 702,

10 A witness who is qualified as an expert by knowledge, skill, experience,
11 training, or education may testify in the form of an opinion or otherwise if: (a)
12 the expert's scientific, technical, or other specialized knowledge will help the
13 trier of fact to understand the evidence or to determine a fact in issue; (b) the
14 testimony is based on sufficient facts or data; (c) the testimony is the product
of reliable principles and methods; and (d) the expert has reliably applied the
principles and methods to the facts of the case.

15 In determining the admissibility of expert testimony, "the Rules of Evidence—especially
16 Rule 702—[] assign to the trial judge the task of ensuring that an expert's testimony both
17 rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow*
18 *Pharm., Inc.*, 509 U.S. 579, 597 (1993). In other words, the Court must undertake a two-
19 step assessment of whether: "(1) the reasoning or methodology underlying the testimony
20 is scientifically valid (the reliability prong); and (2) whether the reasoning or methodology
21 properly can be applied to the facts in issue (the relevancy prong)." *Johns*, 2013 WL
22 1498965, at *6.

23 "Expert testimony which does not relate to any issue in the case is not relevant and,
24 ergo, non-helpful." *Daubert*, 509 U.S. at 591 (citation omitted). "District courts must
25 strike the appropriate balance between admitting reliable, helpful expert testimony and
26 excluding misleading or confusing testimony to achieve the flexible approach outlined in
27 *Daubert*." *United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir. 1997) (citation omitted).
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1 The “test of reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither necessarily
2 nor exclusively applies to all experts or in every case.” *Kumho Tire Co. v. Carmichael*, 526
3 U.S. 137, 141 (1999). “Shaky but admissible evidence is to be attacked by cross
4 examination, contrary evidence, and attention to the burden of proof, not exclusion.”
5 *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). “Under *Daubert*, the district judge
6 is ‘a gatekeeper, not a fact finder.’ When an expert meets the threshold established by Rule
7 702 as explained in *Daubert*, the expert may testify and the jury decides how much weight
8 to give that testimony.” *Id.* at 564-65 (quoting *United States v. Sandoval-Mendoza*, 472
9 F.3d 645, 654 (9th Cir. 2006)). Put differently, “[t]he judge is supposed to screen the jury
10 from unreliable nonsense opinions, but not exclude opinions merely because they are
11 impeachable.” *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014)
12 (internal quotation marks omitted).

13 **B. Defense Expert Susan Mitmesser [Doc. Nos. 177, 183]**

14 In her expert report, Dr. Susan Mitmesser provides the following summary of her
15 opinions:

16 I have thoroughly reviewed the scientific literature (including the references
17 stated below) pertaining to ginkgo biloba and brain function. It is my
18 professional opinion that the scientific evidence supports the claims stated on
19 the product label (i.e., healthy brain function and circulation). Furthermore,
20 the clinical evidence has been repeated in a variety of populations with
numerous clinical endpoints which further adds to the conclusion that ginkgo
biloba supports healthy brain function.

21 [Doc. No. 181-2 at 15.] Plaintiffs move to exclude the testimony of Dr. Mitmesser on the
22 grounds that: (1) she is unqualified; (2) her opinions are unreliable; and (3) her opinions
23 are not relevant.

24 **1. Qualifications**

25 Dr. Susan Mitmesser has a Masters of Science and a Ph.D. in Human Nutrition from
26 the University of Nebraska. She was a clinical professor in the Department of Family
27 Medicine at Stony Brook University from 2014 to 2016. She has also worked for The
28 Nature’s Bounty Co. as Director, Nutrition research, and then Senior Director, Nutrition &

1 Scientific Affairs, since 2012. Previously, she was Manager, Medical Communications,
2 and then Manager, Global Medical Communications, at Mead Johnson Nutrition from 2005
3 to 2012. Her job responsibilities at Nature’s Bounty and Mead Johnson included authoring
4 and coordinating publication of peer-reviewed manuscripts based on clinical research and
5 managing clinical study report development and nutrition research activities. Her resume
6 lists dozens of peer-reviewed articles, book chapters, abstracts, and presentations where
7 she was an author or presenter. [*Id.* at 29-35.] She is or has been on the editorial boards
8 or committees of nine journals or organizations.

9 Notwithstanding the foregoing, Plaintiff argues that Dr. Mitmesser is unqualified to
10 offer her opinions because she “has *no pre-litigation experience*, training or education
11 related to studies of substances on brain health (other than a very limited role in a study on
12 smoking and brain function), and, most important, no experience with [Gingko biloba] in
13 general or its effect/non-effect on brain health in particular.” [Doc. No. 183-1 at 20
14 (*emphasis* in original).] This argument reflects a misunderstanding of Dr. Mitmesser’s
15 testimony and of the standards applicable to Plaintiff’s false advertising claims. Dr.
16 Mitmesser is not opining that Gingko biloba in fact provides the benefits advertised on the
17 label; she is opining that scientific evidence exists to support the Label Claims. Thus, to
18 offer an opinion on whether there is scientific support for the Label Claims, Dr. Mitmesser
19 need not already have experience with Gingko biloba or brain health studies. Rather, she
20 needs to be qualified to review the available scientific evidence and offer an opinion on
21 what that evidence reveals. As a doctor of nutrition with extensive experience reviewing
22 studies on the effects of nutritional products based on clinical studies and research, she is
23 qualified to offer an opinion, based on her assessment of the clinical studies and research
24 on Gingko biloba, as to whether such studies support the Label Claims.

25 **2. Reliability**

26 Plaintiff next argues that “Dr. Mitmesser’s opinions are unreliable because they
27 contravene not just one – but numerous material, well-established scientific principles and
28 methodologies and employed by experts in the field.” [Doc. No. 183-1 at 21.] Once again,

1 however, this argument is premised on a mischaracterization of Dr. Mitmesser’s opinions.
2 Plaintiff argues that Dr. Mitmesser does not base her opinions on a “totality of the
3 evidence” analysis, but Dr. Mitmesser is not offering an opinion as to whether *Gingko*
4 *biloba* actually works as advertised or even whether the “totality of the evidence” supports
5 the Label Claims. Rather, Dr. Mitmesser is simply opining that there is scientific evidence
6 that supports those claims. That there may be other scientific evidence that casts doubt on
7 the Label Claims does not render her opinion unreliable or inadmissible.

8 Plaintiff’s argument that Dr. Mitmesser’s opinions are unreliable because “[s]he
9 ignores the limits on extrapolating from studies of diseased patients to healthy populations
10 observed by experts in the field – and as set forth in FDA guidelines to dietary supplement
11 manufactures,” [Doc. No. 183-1 at 23] is misplaced for the same reason. Dr. Mitmesser
12 opines that scientific evidence supports the Label Claims. Neither the Label Claims nor
13 the class definition are limited to healthy people not suffering from any disease. Plaintiff’s
14 position in this case, as reflected in her motion for class certification, is that *Gingko biloba*
15 provides no benefit to anyone, regardless of whether they are diseased or healthy, old or
16 young. The existence of studies on diseased patients would therefore support Dr.
17 Mitmesser’s opinion and the Label Claims, and contradict Plaintiff’s argument that *Gingko*
18 *biloba* provides no benefit to anyone. That the Label Claims are not false for some
19 purchasers precludes a finding of liability on a classwide basis and entitles Defendants to
20 summary judgment. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 520 (6th Cir.
21 2015), cert. denied, 136 S. Ct. 1493, 194 L. Ed. 2d 597 (2016) (holding that evidence that
22 a product has been proven to work for some individuals is not fatal to a predominance
23 determination on class certification in case where the plaintiff’s theory of liability was that
24 the product was worthless, but noting that “the more straightforward impact of this
25 evidence is simply that it may prevent Plaintiffs from succeeding on the merits,” because
26
27
28

1 “if [the product] is shown to work, even for only certain individuals, then presumably
2 Plaintiffs lose.”).⁵

3 It is particularly notable that Plaintiff does not (and cannot) argue that the studies on
4 which Dr. Mitmesser relies were not studies on *Gingko biloba*, or that the studies did not
5 conclude that *Gingko biloba* provided some positive effect. Dr. Mitmesser’s expert report
6 lists numerous studies on which she relied for her opinion, along with her brief summary
7 of each study and its results and how the study provides evidence for the benefits of *Gingko*
8 *biloba*. The publications of these studies include statements such as:

- 9
- 10 • “The results show that *Ginkgo biloba* extract gave sustained and protracted
11 improvements of all the tested symptoms of cerebral insufficiency [which
12 included vertigo, headache, tinnitus, short-term memory, vigilance, and
13 mood]. These good therapeutic results may possibly be explained by an
14 improvement in global and regional blood-flow in the brain, with an increase
15 in oxygen and glucose utilization.” G. Vorberg, *Ginkgo Biloba Extract*
16 *(GBE*): A Long-Term Study of Chronic Cerebral Insufficiency in Geriatric*
17 *Patients*, *Clinical Trials Journal* Vol. 22, No. 2 (1985) [Doc. No. 172-4 at 9.]
 - 18 • “The results show that chronic [*Gingko biloba*] medication has a positive
19 effect in geriatric subjects with deterioration of mental performance and

20

21 ⁵ Plaintiff’s new position on summary judgment that the issue in this case is “whether [*Gingko biloba*]
22 provides brain health benefits to healthy persons,” [Doc. No. 199 at 6] is contradicted by the Labels
23 themselves, which do not limit the brain health claims to “healthy persons,” and by the class definition
24 sought by Plaintiff, and certified by the Court, which includes all purchasers of TruNature *Gingko*, not
25 just healthy purchasers. Plaintiff’s new argument also cannot be reconciled with her argument in support
26 of class certification that Plaintiff intended to prove that “the TruNature products do not provide any brain
27 health benefits making them worthless to anyone who takes them,” [Doc. No. 116 at 8.] and that “because
28 the TruNature Product is worthless, Plaintiff and the Class members are entitled to receive the total retail
price they paid.” [Doc. No. 107 at 32.] It was this argument that caused the Court to hold that class
certification was warranted because “[t]he answer to these questions will be the same for the entire class.
Likewise, the determination of whether the statements on the label are material and likely to deceive a
reasonable consumer will be the same for the entire class.” [Doc. No. 158 at 10.] Studies showing that
Gingko biloba provides benefits to diseased persons directly undermine the “theory of the case” Plaintiff
advocated on class certification.

1 vigilance, and this effect is reflected at the behavioural level.” B. Gebner et
2 al., *Study of the Long-term Action of a Gingko biloba Extract on Vigilance*
3 *and Mental Performance as Determined by Means of Quantitative*
4 *Pharmac-EEG and Psychometric Measurements*, *Arzneim-Forsch/Drug*
5 *Res.* 35 (II), Nr. 9 (1985) [Doc. No. 181-2 at 3.]

- 6 • “[Gingko biloba] was safe and appears capable of stabilizing and, in a
7 substantial number of cases, improving the cognitive performance and the
8 social functioning of demented patients for 6 months to 1 year.” P. LeBars
9 et al., *A Placebo-Controlled, Double-blind, Randomized Trial of an Extract*
10 *of Gingko biloba for Dementia*, *JAMA*, October 22/29, 1997—Vol 278, No.
11 16 [Doc. No. 172-9 at 2.]
- 12 • “Overall, [Gingko biloba] appears to have improved cognitive performance
13 and social functioning when the treatment group included a majority of
14 patients with very mild to mild cognitive impairment.” P. LeBars et al.,
15 *Influence of the Severity of Cognitive Impairment on the Effect of the Gingko*
16 *biloba Extract EGb 761 in Alzheimer’s Disease*, *Neuropsychobiology* 2002;
17 45:19-26 [Doc. No. 181-4 at 7.]
- 18 • “[Gingko biloba tablet] can improve the therapeutic efficacy as well as
19 improve cognitive ability and cerebral blood flow supply of patients with
20 [vascular cognitive impairment of none dementia].” S. Zhang et al., *Effect*
21 *of Western Medicine Therapy Assisted by Gingko biloba Tablet on Vascular*
22 *Cognitive Impairment of None Dementia*, *Asian Pacific Journal of Tropical*
23 *Medicine* (2012), 661-664 [Doc. No. 172-12 at 2.]
- 24 • “Statistical analysis of the data as compared to baseline suggests that Gingko
25 biloba extract had a beneficial effect on cognitive function in this group of
26 patients.” G.S. Rai et al., *A Double-blind, Placebo-controlled study of*
27 *Gingko biloba Extract (‘Tanakan’) in Elderly Out-patients with Mild to*
28

1 *Moderate Memory Impairment*, Current Medical Research and Opinion, Vol.
2 12, No. 6 (1991) [Doc. No. 181-5 at 2.]

- 3 • “The findings of the present study are that Tanakan [Gingko biloba]
4 produced favourable effects on the mental efficiency of elderly non-
5 institutionalized patients.” K. Wesnes et al., *A Double-blind Placebo-*
6 *controlled Trial of Tanakan in the Treatment of Idiopathic Cognitive*
7 *Impairment in the Elderly*, Human Psychopharmacology, Vol. 2, 159-169
8 (1987) [Doc. No. 181-9 at 10.]

9 In other words, Dr. Mitmesser’s opinion that there is scientific support for the Label
10 Claims about the benefits of Gingko biloba is based on published scientific studies where
11 the authors conclude that Gingko biloba had positive effects in ways that support the Label
12 Claims. Moreover, Dr. Mitmesser’s testimony “is based directly on legitimate, preexisting
13 research unrelated to the litigation.” *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311,
14 1317 (9th Cir. 1995) (noting that testimony based on preexisting research “provides the
15 most persuasive basis for concluding that the opinions he expresses were ‘derived by the
16 scientific method’”). That other contradictory research may exist or that the research on
17 which Dr. Mitmesser relies has methodological flaws that make it less persuasive (in
18 Plaintiff’s view) of the efficacy of Gingko biloba goes to the weight of Dr. Mitmesser’s
19 opinion, not its admissibility. *See Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th
20 Cir. 1998) (“Disputes as to the strength of an expert’s credentials, faults in his use of a
21 particular methodology, or lack of textual authority for his opinion, go to the weight, not
22 the admissibility, of his testimony.”) (internal brackets and citation omitted). Accordingly,
23 Dr. Mitmesser’s testimony is sufficiently reliable.

24 **3. Relevance**

25 Finally, Plaintiff argues that Dr. Mitmesser’s opinions are irrelevant “because they
26 are based on her incorrect belief that Defendants’ TruNature GB brain health claims need
27 not be scientifically proven.” [Doc. No. 183-1 at 25.] Once again, Plaintiff’s premise is
28 flawed. Indeed, this argument undermines Plaintiff’s entire opposition to summary

1 judgment because it effectively serves as an acknowledgement that Plaintiff's claims are
2 based on Defendants' alleged inability to scientifically prove (i.e., "substantiate") the Label
3 Claims. If, as Plaintiff argues, Dr. Mitmesser's opinion is irrelevant to Plaintiff's claims
4 because the issue for a jury is whether the Label Claims are scientifically proven, then this
5 case is nothing more than a lack of substantiation case.⁶ Plaintiff even relies on FDA
6 guidelines for substantiation of product benefit claims by supplement manufactures in
7 making this argument. [Doc. No. 183-1 at 9-10.] Yet, as discussed above, California does
8 not allow private actions based on a lack of substantiation. Accordingly, Plaintiff's entire
9 line of reasoning for why Dr. Mitmesser's opinions are irrelevant is misplaced and
10 demonstrates why Defendants are entitled to summary judgment.

11 Ultimately, Dr. Mitmesser's opinions relate to the question of whether Plaintiff can
12 prove that the Label Claims are false. Plaintiff cannot prove the Label Claims are false if
13 scientific evidence supporting the claims exists. Dr. Mitmesser is qualified to review the
14 research on the efficacy of Gingko biloba and offer an opinion as to what that research
15 concludes, including whether the research supports the Label Claims. Her reasoning is
16 valid and her opinions are relevant to the issues in this case. Therefore, Plaintiff's motion
17 to exclude Dr. Mitmesser's opinions and testimony is denied.

18 **C. Defense Expert Edward Rosick [Doc. Nos. 178, 184]**

19 Dr. Rosick's opinion is similar to Dr. Mitmesser's: "what the research and science
20 shows is that there is reasonable evidence that ginkgo biloba is a very safe herbal
21 supplement that can promote healthy brain function, improve memory and attention, and
22 help promote healthy circulation." [Doc. No. 182-1 at 13.] He bases this opinion on some
23 of the same studies and research cited by Dr. Mitmesser as well as other studies. Dr. Rosick
24 also critiques the studies on which Plaintiff's experts rely.

25
26
27 ⁶ In her reply, Plaintiff implies that the burden shifts to Defendants because Plaintiff offered expert
28 testimony based on studies that do not support the Label Claims. [Doc. No. 199 at 2.] Plaintiff does not
cite to any authority for a burden shifting scheme, and such a scheme would render California's bar on
lack of substantiation claims effectively meaningless.

1 Plaintiff's motion for exclusion of Dr. Rosick's opinion testimony makes many of
2 the same arguments as the motion to exclude Dr. Mitmesser: (1) that he is not qualified;
3 (2) that his opinions are not reliable; and (3) that his opinions are irrelevant because he
4 does not use the totality of the evidence standard that Plaintiff incorrectly argues applies to
5 her claims. For many of the same reasons discussed above with respect to Dr. Mitmesser,
6 the Court disagrees and finds Dr. Rosick's opinions to be admissible.

7 As for his qualifications, Dr. Rosick is a physician with a degree from the Michigan
8 State University College of Osteopathic Medicine. Since graduating in 1993 he has held
9 numerous roles at Michigan State, including Clinical Assistant Professor of Medicine,
10 Associate Professor in the College of Osteopathic Medicine, and Medical Director of the
11 Family and Community Medicine Clinic in the College of Osteopathic Medicine. He is
12 Board Certified in Preventive Medicine, Public Health and Integrative Medicine, and has
13 been on the medical staff of various medical centers continually since at least 1998. Based
14 on his education and experience as a practicing physician and teaching at a medical school,
15 Dr. Rosick is qualified to offer his opinions about the existence of research and scientific
16 evidence supporting the Label Claims.

17 Dr. Rosick's opinions are also sufficiently reliable and relevant for the same reasons
18 as discussed above with respect to Dr. Mitmesser's opinions. Plaintiff's arguments about
19 the quality of the studies on which Dr. Rosick relies goes to the weight of his testimony,
20 not its admissibility. Likewise, his opinions about the existence of scientific research
21 supporting the Label Claims are relevant to an issue in this case—whether Plaintiff can
22 prove that the Label Claims are false. Further, Plaintiff's argument that Dr. Rosick does
23 not provide the bases for his opinion about what the scientific research and evidence shows
24 is puzzling in light of the fact that he cites to the scientific articles and research on which
25 he relies in his report and attached copies of the studies not also referenced by Dr.
26 Mitmesser to his declaration in support of Defendants' motion for summary judgment.
27 [Doc. Nos. 172-22 – 172-30.] Once again, Plaintiff does not (and cannot) argue that the
28 studies and articles on which Dr. Rosick relies were not about the efficacy of Ginkgo

1 biloba, or that the studies and articles did not conclude that Ginkgo biloba provided some
2 positive effect. In addition to many of the same studies cited by Dr. Mitmesser, the studies
3 and reports on which Dr. Rosick relies include statements such as:

- 4 • “There is consistent evidence that chronic administration improves selective
5 attention, some executive processes and long-term memory for verbal and
6 non-verbal material.” R. Kaschel, *Ginkgo biloba: Specificity of*
7 *Neuropsychological Improvement—a Selective Review in Search of*
8 *Differential Effects*, Human Psychopharmacology (2009) [Doc. No. 172-26 at
9 2.]⁷
- 10 • “Taken together, the results from both the objective, standardized,
11 neuropsychological tests and subjective Follow-up Self-report Questionnaire
12 provided complementary evidence of the potential efficacy of relatively short-
13 term (i.e. 6 weeks) utilization of [Ginkgo biloba extract] in enhancing certain
14 neurocognitive/memory functions of cognitively intact older adults, 60 years
15

16
17 ⁷ Notably, this review acknowledges that the research has not uniformly found that Ginkgo biloba has
18 positive effects:

19 A first Cochrane meta-analysis including 33 randomized placebo-controlled trials found
20 superiority over placebo in different domains: cognition, activities of daily living as well
21 as mood and emotional functions in dementia and other cognitive disorders. There was
22 ‘promising evidence of improvement in cognition and function associated with ginkgo’
23 (Birks *et al.*, 2002; p.2). This is in line with another review which stated that its use in
24 dementia is ‘encouraging’ (Ernst and Pittler, 1999; p. 301) and the conclusion that ‘for
25 treating cognitive impairment and dementia, the evidence suggests that ginkgo is effective’
(Ernst *et al.*, 2006; p. 404). Although relating to a similar database, an updated Cochrane
review is more skeptical: ‘There is no convincing evidence that Ginkgo biloba is
efficacious for dementia and cognitive impairment . . . Evidence that Ginkgo has
predictable and clinically significant benefit for people with dementia or cognitive
impairment is inconsistent and unconvincing.

26 [Doc. No. 172-26 at 3.] In a separate article, the same author similarly acknowledges that “[b]oth positive
27 and negative findings have been reported from trials using other Ginkgo biloba leaf extracts in healthy
28 young as well as in elderly persons.” [Doc. No. 172-28 at 3.] The fact that there is a difference of opinion
among scientists and that studies have yielded varying results as to Ginkgo biloba’s efficacy means that
Plaintiff cannot prove that the Label Claims are false. *See Reed*, 2014 WL 12284044, at *15.

1 of age and over. . . . The present study’s findings appeared consistent with
2 past studies that have demonstrated the efficacy of *Gingko biloba* extract for
3 the treatment of dementia and ‘cerebral insufficiency.’ . . . The results also
4 bolster those from the few previously published, small-scaled studies that
5 have found improvements in cognitive functioning among older cognitively
6 intact adults . . . and young, healthy volunteers.” J. Mix and W. Crews, *A*
7 *Double-blind, Placebo-Controlled, Randomized Trial of Gingko biloba*
8 *Extract EGb 761® in a Sample of Cognitively Intact Older Adults:*
9 *Neuropsychological Findings*, *Human Psychopharmacology* (2002) [Doc.
10 No. 172-27 at 9-10.]

- 11 • “[Gingko biloba extract] EGb 761 (240 mg once daily) improves free recall
12 of appointments in middle-aged healthy volunteers, which requires high
13 demands on self-initiated retrieval of learned material.” R. Kaschel, *Specific*
14 *Memory Effects of Gingko biloba Extract EGb 761 in Middle-Aged Healthy*
15 *Volunteers*, *Phytomedicine* 18 (2011) 1202-1207. [Doc. No. 172-28 at 2.]

16 In other words, as with Dr. Mitmesser’s opinion, Dr. Rosick’s opinion that “research
17 and science shows [] that there is reasonable evidence that ginkgo biloba . . . can promote
18 healthy brain function, improve memory and attention, and help promote healthy
19 circulation” is based on published scientific research and review articles where the authors
20 conclude that *Gingko biloba* had such positive effects on study participants. This testimony
21 is sufficiently reliable and relevant to the issue of whether Plaintiff can prove that the Label
22 Claims are false. Accordingly, the motion to exclude Dr. Rosick is denied.

23 **D. Defense Expert Stephen Ogenstad [Doc. No. 176], and Plaintiff’s**
24 **Experts Richard Bazinet and Martin Lee [Doc. No. 173]**

25 Because the Court ultimately concludes that Defendants are entitled to summary
26 judgment regardless of the admissibility of defense expert Stephen Ogenstad and Plaintiff’s
27 experts Richard Bazinet and Martin Lee, the motions to exclude those experts are denied
28 as moot.

1 **E. Defendants’ Request for Judicial Notice [Doc. No. 172-56]**
2 **/Plaintiff’s Motion to Strike Evidence [Doc. No. 191]**

3 Because Defendants are entitled to summary judgment regardless of the
4 admissibility of the evidence of which they seek judicial notice and that Plaintiff seeks to
5 strike, the Court did not consider any of the web pages and other documents at issue in the
6 request and motion to strike. Accordingly, Defendants’ request for judicial notice [Doc.
7 No. 172-56] and Plaintiff’s motion to strike [Doc. No. 191] are both denied as moot.

8 **VI. Analysis**

9 Having determined that under California law a Plaintiff cannot maintain a false
10 advertising claim when the defendant offers admissible expert testimony and scientific
11 evidence supporting the advertisement in question, and that Dr. Mitmesser’s testimony and
12 Dr. Rosick’s testimony are both admissible, the application of the law to the facts here is
13 relatively simple. In short, the existence of admissible expert testimony that scientific
14 studies and evidence supports the Label Claims is fatal to Plaintiff’s case. To hold
15 otherwise and allow a jury to weigh the strength of Defendants’ scientific support simply
16 because Plaintiff intends to offer scientific evidence of her own would effectively mean
17 that all a Plaintiff needs to circumvent California law barring lack of substantiation claims
18 is one scientific study that does not support the alleged misrepresentations.⁸

19 Plaintiff concedes, as she must, that there are some studies demonstrating that
20 Gingko biloba might work. [Doc. No. 183-1 at 6.] “When litigants concede that some
21 reasonable and duly qualified scientific experts agree with a scientific proposition, they
22 cannot also argue that the proposition is literally false.” *In re GNC*, 789 F.3d at 515. Even
23 Plaintiff’s expert Dr. Bazinet, on whom Plaintiff relies extensively for her claims, does not
24 opine that the Label Claims are literally false based only on the existence of a handful of
25 studies that did not yield positive results, particularly in light of the dozens of studies cited
26

27
28 ⁸ Plaintiff essentially took this position at oral argument, asserting that even if 90% of the evidence supported the Label Claims, this case should go to the jury.

1 by the defense experts. Instead, when reading his report as a whole, his opinion simply
2 amounts to a conclusion that because Ginkgo biloba studies finding no positive results are
3 better studies than those finding positive results, the “totality of the evidence” does not
4 support the Label Claims. Notably, Dr. Bazinet did not consider evidence of studies on
5 diseased subjects that showed positive results of Ginkgo biloba, despite the fact that the
6 class is not limited to non-diseased individuals. [Doc. No. 173-3 at ¶ 16.] Moreover, that
7 he frames his opinion as based on the “totality of the evidence,” and acknowledges that
8 “there are some earlier positive trials,” [*Id.* at ¶ 28], means that Dr. Bazinet is not opining
9 that there is no evidence or scientific research supporting the Label Claims or that the
10 evidence is unequivocal that the Label Claims are false. Dr. Bazinet’s criticisms of the
11 methodology used in the studies on which Defendants rely does not nullify the existence
12 of those studies.⁹

13 In reality, however, whether Plaintiff concedes that there are studies supporting the
14 Label Claims is irrelevant in light of the host of studies cited by Defendants’ experts. Dr.
15 Bazinet’s opinion, and Plaintiff’s argument, that the methodological flaws in the studies on
16 which Defendants’ experts rely render those studies weaker than the studies on which
17 Plaintiff relies do not eliminate the equivocality of the evidence concerning the Label
18 Claims. There can be no genuine dispute of fact that such studies exist or that they conclude
19 that Ginkgo biloba provided health and memory benefits. The only dispute articulated by
20

21
22 ⁹ False advertising claims like Plaintiff’s that argue the active ingredient in a product provides no health
23 benefits are distinguishable from claims that advertisements about the benefits of a product are misleading
24 because the amounts of the active ingredient in the product are too small to be bioavailable, meaning that
25 the product in question cannot provide the benefit that its active ingredient might provide in larger doses.
26 Other cases have made this distinction between variations of allegedly false efficacy claims. *See, e.g.,*
27 *Racies v. Quincy Bioscience, LLC*, Case No. 15-cv-00292-HSG, 2015 WL 2398268, at *3-4 (N.D. Cal.
28 May 19, 2015) (dismissing claims that representation was false because “no competent and reliable studies
testing the Product exist,” while denying motion to dismiss claims that the product cannot work as
represented because the active ingredient “is destroyed by the human digestive system or is of such a
trivial amount that it cannot biologically affect memory or support brain function”). Plaintiff makes no
such argument here and many of the studies cited by Dr. Mitmesser and Dr. Rosick test Ginkgo biloba in
similar or identical dosages to those contained in TruNature Ginkgo.

1 Plaintiff is whose studies and whose experts are better. Yet a jury finding by a
2 preponderance of the evidence that Plaintiff's experts are more persuasive does not equal
3 a finding that the Label Claims are literally false, or that they are true but otherwise
4 misleading. Because there is no dispute of fact that there is scientific evidence both
5 supporting and contradicting the Label Claims, the evidence is equivocal and Defendants
6 are entitled to summary judgment.

7 **VII. Conclusion**

8 In light of the foregoing, it is hereby **ORDERED** as follows:

- 9 1. CRN's motion to file a brief amicus curiae [Doc. No. 187] is **GRANTED**;
- 10 2. Plaintiff's motions to exclude the testimony of Susan Mitmesser [Doc Nos.
11 177, 183] and Edward Rosick [Doc. Nos. 178, 184] are **DENIED**;
- 12 3. Plaintiff's motion to exclude the testimony of Stephen Ogenstad [Doc. No.
13 176] is **DENIED AS MOOT**;
- 14 4. Defendants' motion to exclude the testimony of Richard Bazinet and Martin
15 Lee is [Doc. No. 173] is **DENIED AS MOOT**;
- 16 5. Defendants' request for judicial notice [Doc. No. 172-56] and Plaintiff's
17 motion to strike [Doc. No. 191] are **DENIED AS MOOT**; and,
- 18 6. Defendants' motion for summary judgment [Doc. No. 172] is **GRANTED**.

19 Accordingly, the Clerk of Court is instructed to enter **JUDGMENT** for Defendants
20 and to **CLOSE** this case.

21 It is **SO ORDERED**.

22 Dated: August 23, 2017



23
24 Hon. Cathy Ann Bencivengo
25 United States District Judge
26
27
28